

BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES
STATE OF KANSAS

SHAWNEE MISSION NEA, *
Complainant, *
vs. * CASE NOS. 72-CAE-3-1986
U.S.D. 512, SHAWNEE * 72-CAE-3a-1986
MISSION, KANSAS *
Respondent. *
*

ORDER

Comes now on this 6th day of November, 1985, the above captioned case for consideration before the Secretary of the Department of Human Resources. The case comes before the Secretary on signature of David M. Schauner, Attorney At Law, acting in behalf of Shawnee Mission National Education Association (NEA). Complainant has alleged that representatives of U.S.D. 512, hereinafter called Respondent, has engaged in prohibited practices within the meaning of K.S.A. 72-5430 (b), (5) and (7). The case came on for hearing on September 20, 1985, before Jerry Powell, a designated representative of the Secretary of the Department of Human Resources. The Hearing Examiner, having examined all evidence, within the record hereafter makes the following findings and conclusions.

APPEARANCES

Complainant, Shawnee Mission NEA, appears by and through its Chief Counsel, Mr. David M. Schauner, Kansas National Education Association (KNEA), 715 West Tenth, Topeka, Kansas, and Mr. Tom Madden, UniServ Director, NEA, Shawnee Mission, 7820 Conser Place, Shawnee Mission, Kansas.

Respondent, Shawnee Mission U.S.D. 512, appears by and through its representatives Robert F. Bennett, Attorney At Law, and Mr. P. Stephen Martin, Attorney At Law, Bennett, Lytle, Wetzler, Winn and Martin, 5100 West 95th Street, Prairie Village, Kansas.

PROCEEDINGS BEFORE THE SECRETARY

- 1) Complaint 72-CAE-3-1986 filed with the Secretary on September 5, 1985, under the signature of David M. Schauner for Shawnee Mission NEA.
- 2) Complaint hand delivered to Respondent on September 5, 1985, to its agent, P. Stephen Martin.
- 3) Amended complaint filed with the Secretary on September 6, 1985, under the signature of David M. Schauner, General Counsel, Shawnee Mission NEA.
- 4) Amended complaint filed with P. Stephen Martin, representative of U.S.D. 512, on September 9, 1985.
- 5) Hearing scheduled for September 20, 1985 in Shawnee Mission, Kansas.
- 6) Answer filed under the signature of P. Stephen Martin on September 16, 1985.
- 7) Hearing commenced on Friday, September 20, 1985.
- 8) At the outset of the hearing, Respondent made three oral motions to dismiss. These motions were also contained within the answer filed by Respondent. Respondent subsequently withdrew one motion, leaving the following two to be ruled upon: A) Respondent moves for immediate dismissal inasmuch as the complaint states no cause of action or no grounds for complaint under the prohibited practice section of the Professional Negotiations Act of the State of Kansas; B) Respondent moves for immediate dismissal on the grounds that the Secretary has no authority to grant the relief requested by the petitioner. The Hearing Examiner noted the two motions on the record and held his ruling in absence, pending a presentation of evidence and testimony.
- 9) At the conclusion of Complainant's case, Respondent moved for dismissal based upon the two previously stated motions for dismissal.
- 10) Hearing reconvened on October 10, 1985.
- 11) Upon opening the record, the Hearing Examiner denied Respondent's motions to dismiss.

- 12) Brief received from Complainant on October 17, 1985.
- 13) Brief received from Respondent on October 23, 1985.

FINDINGS OF FACT

1) That this matter is properly and timely before the Secretary.

2) That U.S.D. 512 and Shawnee Mission NEA engaged in professional negotiations pursuant to the provisions of K.S.A. 72-5413 et seq.

3) That the negotiations for school year 1985-86 commenced on or about February 1, 1985.

4) That Ms. Joan Bowman is currently serving as a member of the Board of Education for U.S.D. 512. Ms. Bowman has served on the Board for approximately four and one-half (4½) years. Ms. Bowman holds no office on the Board at this time. (T-44, 45)

5) That Ms. Bowman is aware of the fact that NEA Shawnee Mission is the exclusive bargaining representative for certified school teachers within U.S.D. 512. (T-45)

6) That Ms. Bowman is aware that an agreement was reached between the NEA Shawnee Mission and U.S.D. 512 during the 1984 negotiations to remove the subject of early retirement from the negotiated agreement. (T-46, 47)

7) That Ms. Bowman recalls being informed by the district's Chief Negotiator during the 1984 negotiations that the NEA had proposed the appointment of a committee to look at the subject of Early Retirement. The request for the appointment of a committee, however, was not made a part of the collectively bargained agreement. (T-52)

8) That Ms. Bowman also recalls that a committee was subsequently appointed to look into the subject of Early Retirement. Further, Ms. Bowman recalls that the committee made a report which was received by the Board of Education in January of 1985. (T-53)

9) That Ms. Bowman is very much aware that the subject of Early Retirement has been an issue in the bargaining during the 1985-86 negotiations. (T-53)

10) That Ms. Bowman recalls considerable discussion among the U.S.D. 512 Board members regarding Early Retirement, however, the Board's position on the subject of Early Retirement has not changed from the position that the Board held on February 1, 1985. (T-58)

11) That Ms. Bowman recalls a discussion at a late August Board meeting involving the "negotiations" which were had between the parties over the previous weekend. It was Ms. Bowman's understanding at that Monday night Board meeting that a proposal was presented to the Board, which, in fact, would constitute tentative agreement on all issues except the issue of Early Retirement. She recalls no discussion relating to who made the proposal concerning taking only the issue of Early Retirement to fact-finding. Rather, she just assumed that since the Early Retirement program was a proposal made by the NEA, they (the NEA) desired to take that subject to fact-finding since no agreement had been reached. (T-59, 60)

12) That there currently is in existence a negotiated agreement covering terms and conditions of employment for certified teachers within U.S.D. 512 effective for a period of July 1, 1984 through June 30, 1986. There is, however, a reopener clause within that agreement under which negotiations were reopened for the school year 1985-86 on certain subjects. (T-64)

13) That the current negotiated agreement between U.S.D. 512 and the NEA Shawnee Mission provides a section entitled "Early Retirement Plan". Provisions of that section are as follows:

"The Early Retirement Plan, hereinafter called the 'Plan' (previously set forth in Article X. D. of the 1982-84 Agreement, pages 40-44) is hereby abolished. The following conditions shall apply:

- 1) Professional employees who have heretofore elected to retire under said 'Plan' shall continue to receive their benefits subject to the same terms and conditions in existence at the time of his or her retirement.

- 2) Those professional employees who would have otherwise been eligible for the 'Plan' by virtue of having reached at least age 55 on or before August 31, 1985, may still exercise such option, subject to the same terms and conditions as before, if notice of retirement is given on or before April 1, 1985.
- 3) No professional employee shall be entitled to the 'Plan' who:
 - A) Would not be at least 55 years of age on or before August 31, 1985; and
 - B) Has not exercised his or her option on or before April 1, 1985; and
 - C) Fails to fulfill all other requirements of the 'Plan'.
- 4) With reference to those professional employees who remain eligible, it is understood that no non-Kansas K.P.E.R.S. credit shall be honored unless purchased prior to May 31, 1984.
- 5) The abolishment of the Early Retirement Plan shall be absolute on the dates stated herein and no professional employee may rely on the continuing contract law or any other contract document to support a claim for early retirement under the 'Plan' beyond these dates."

14) That Ms. Bowman is not aware of any proposal made by the Board negotiator concerning the subject "Early Retirement". In fact, Ms. Bowman does not recall any authorization granted by the Board to the negotiator to make a proposal on the subject "Early Retirement". (T-68, 69)

15) That Thomas Madden is currently serving as the UniServ Director for NEA Shawnee Mission. During the 1984 negotiations, Mr. Madden served as chief spokesperson at the bargaining table. During the 1985 negotiation session, Mr. Madden served as a member of the negotiations team. (T-79)

16) That Mr. Madden recalls that the 1984 agreement was entered into by Shawnee Mission NEA with the understanding that a committee would be appointed to study the subject of Early Retirement. (T-84)

17) That Mr. Madden became aware of the fact that the Board of Education, U.S.D. 512, was calling a press conference during the month of August, 1985, when a news reporter informed the Shawnee Mission NEA of the press conference. When the Shawnee Mission NEA negotiating team learned of the press conference, the chief spokesperson, Ms. Phyllis Uchtman, called the negotiator for the school district to inquire as to whether or not he knew why the conference was being called. (T-87, 88)

18) That Mr. Martin, chief spokesperson for the district, requested that Ms. Uchtman meet with him to discuss negotiations on the Friday following the press conference. (T-89)

19) That a meeting between the parties to the negotiations process was had on a Friday afternoon following the Thursday press conference. This meeting was attended by Mr. Madden, Mr. Tom Mercer, personnel superintendent for the district, Steve Martin, Chief Negotiator for the Board of Education, and Phyllis Uchtman, Chief Negotiator for the NEA. At that meeting, the Board offered one change in their position in negotiations. Basically, that movement consisted of a move to the current contract salary schedule with a request from the district to have teachers new to the district starting on Step 2 of the salary schedule, rather than Step 1. The Shawnee Mission NEA negotiating team was told at the time that this meeting was not a negotiating session. (T-88, 89, 90)

20) That on Saturday, August 24, 1985, the teacher team met in order to develop a comprehensive package of proposals which they believe would fit the mold that had been given to them on the previous Friday afternoon by the Board negotiating team. (T-90)

21) That as a result of the Saturday, August 24th meeting the NEA Shawnee Mission team developed a package which was delivered to the chief spokesperson for U.S.D. 512 on Saturday afternoon, August 24, 1985, by Mr. Rod Siegele and Ms. Uchtman. (T-95)

22) That the Shawnee Mission NEA team decided to meet again on Sunday, August 25, 1985, in order to discuss possible resolutions to the negotiations process. The NEA team requested that

the chief negotiator for the Board meet with them at this Sunday meeting. (T-96)

23) That a meeting took place on Sunday, August 25, 1985, between the entire negotiation team for the NEA, plus the president of the Association, and the chief spokesperson for the Board, Mr. Steven Martin, Mr. Tom Mercer, the personnel superintendent, U.S.D. 512, Dr. Chopra, the superintendent of schools, and Mr. Dick Spears, the President of the Board of Education. (T-96)

24) That Mr. Madden recalls a caucus of the parties taking place at the Sunday afternoon, August 25, 1985 meeting. Further, Mr. Madden recalls Mr. Martin returning to the room to meet with the NEA team. At that time, Mr. Madden recalls Mr. Martin stating that he believed that the parties could resolve all issues, except for the salary schedule and Early Retirement which would be taken to fact-finding. Mr. Madden recalls the NEA team responding, "No" to Mr. Martin, at which time, Mr. Martin asked if only the Early Retirement proposal was taken to fact-finding, could the other issues be resolved. Mr. Madden recalls his direct question to Mr. Martin, "Is that an offer?" To which, Mr. Martin replied, "Yes." As the meeting concluded, Mr. Madden recalls Mr. Martin stating, "Let's give this our best shot. If you can bottom line your positions, we have an opportunity to wrap the entire agreement up." (T-96, 97)

25) That after the August 25, 1985 meeting between the parties, the NEA team returned to their building in an attempt to arrive at proposal which they believed the U.S.D. 512 might be able to accept. The chief spokesperson for the NEA then called the school district spokesperson and informed the district of the changes that Shawnee Mission was offering. (T-97)

26) That Mr. Madden recalls that there was no immediate response to the NEA's offer to the district via the telephone on August 25, 1985. Mr. Madden does recall a statement at a later date from Mr. Martin of "If I can get the Board to agree to seven and one-half percent (7½) on the base with the other items as you suggested, would that resolve the differences?" Mr. Madden then

recalls that the NEA Shawnee Mission group informed Mr. Martin that seven and one-half percent (7½%) was not sufficient in light of the fact that the Association was currently at 7.95. Therefore, the Shawnee Mission NEA suggested that the parties split the difference between those two figures. (T-98)

27) That Mr. Madden and the president of the association decided on Monday, August 26, 1985 that they should make an attempt to get their team together in an effort to give one more shot to coming up with an entire package that the Board might accept. Ms. Uchtman and Mr. Madden called the district, then, to determine whether or not the team members would be excused from classes in order to meet to develop a package. The NEA team was excused from classes and did meet and developed a package which was subsequently delivered to the Board's negotiator by the spokesperson for the NEA group. (T-99)

28) That it was Mr. Madden's understanding that during the weekend meetings, August 24 and August 25, 1985, the NEA did not demand that Early Retirement go to fact-finding. Rather, it was his understanding that it was Mr. Martin's proposal that the subject of Early Retirement go to fact-finding. (T-99)

29) That Mr. Madden recalls that the chief spokesperson for the Board communicated with the NEA's chief spokesperson to the effect that the Board could accept the NEA package with three modifications: 1) that the Board could not agree to pay coaches extra pay if, in fact, the coach might have to work into the summer months beyond a normal spring season; 2) that the Board wanted the authority to hire new teachers on the second step of the salary schedule; 3) that the Board insisted that the NEA remove their request for Early Retirement totally from the package. (T-100)

30) That Mr. Madden believes that the offer made to the district on Monday, August 26, 1985 is similar in nature to the outline of proposals given by their Board in their August 30, 1985 "Dear Patron" letter with the exception of the last demand, which is a demand that the Early Retirement issue be taken to fact-

finding. Mr. Madden feels that the offer to take Early Retirement to fact-finding was made by the Board rather than the NEA Shawnee Mission. (T-101)

31) That during the weekend meetings between Mr. Martin as chief spokesperson for the Board, and the NEA Shawnee Mission, the only written document presented to the NEA by Mr. Martin was the salary schedule that was presented by Mr. Martin to the NEA on Friday afternoon. (T-113)

32) That Mr. Madden believes that the proposals submitted by the Shawnee Mission NEA to the chief spokesperson for the Board on Monday afternoon, August 26, 1985, were in writing. (T-113)

33) That Ms. Phyllis Uchtman is employed by the Shawnee Mission school district at Trailridge Junior High School. Ms. Uchtman is a member of NEA Shawnee Mission and is currently serving as the chief spokesperson for the negotiating team. (T-128)

34) That there were approximately nine meetings between the parties during the 1985 negotiations prior to the time the parties believed they were at impasse. (T-129)

35) That Ms. Uchtman is not aware of any public relations program undertaken by the Board for patrons' support prior to May 13, 1985. (T-142, 143)

36) That Ms. Uchtman believed that Mr. Martin as chief spokesperson for the district had in the past, indicated a willingness to modify the district's position on all issues except Early Retirement. (T-153)

37) That Ms. Uchtman heard about the August 22, 1985 press release after she had already accepted an invitation from Mr. Martin to visit with him in his office in an informal discussion. (T-153)

38) That after Ms. Uchtman heard about the August 22, 1985 press release from the district, she placed a telephone call to Mr. Martin concerning the purpose of the press release. Mr. Martin informed Ms. Uchtman that he did not know what the Board's complete intent was in issuing the press release. Mr. Martin, prior to the close of the telephone call, indicated to Ms. Uchtman

that the purpose of the meeting was to run a new salary proposal past the NEA. (T-154)

39) That Ms. Uchtman recalls Mr. Martin asking her directly during the informal meetings, had over the weekend of August 25, 1985, "Can we reach an agreement without Early Retirement". Ms. Uchtman recalls then asking for her team to caucus after which Mr. Martin returned to the room and asked the same question. Ms. Uchtman recalls that she then informed Mr. Martin that her team could not agree to drop Early Retirement. Further, Ms. Uchtman recalls relating to Mr. Martin that she believed that there were other solutions to retirement, issues still left open to them, one of which was fact-finding. It was at that time that Mr. Martin asked her if the parties could reach an agreement on all other issues and take salary and retirement to fact-finding. To that, Ms. Uchtman responded, "No", that she could not separate out the salary issues. Mr. Martin then asked if it was a possibility for them to examine the possibility of a resolution on all other issues if Early Retirement were the only issue going to fact-finding. (T-160, 161)

40) That Ms. Uchtman recalls that the only written proposal given to the Board negotiator during the meetings on August 24, 25 and 26, 1985 was the written proposal that she had prepared for the Saturday meeting. (T-187)

41) That Jerry Stogsdill is employed by NEA Shawnee Mission. Mr. Stogsdill is a member of NEA Shawnee Mission and is currently serving as president of NEA Shawnee Mission. (T-201)

42) That Mr. Stogsdill is not a member of the 1985 bargaining team bargaining on behalf of NEA Shawnee Mission. (T-202)

43) That Mr. Jerry Stogsdill was called by a reporter after the meetings had on August 24 and 25, 1985 between the parties to inquire regarding the results of the meeting. Mr. Stogsdill released to the news media at that time that he believed that the Board had made an offer of 7.5% salary to the NEA Shawnee Mission. Further, he informed the news reporter that the NEA's offer to the Board was at 7.75%. (T-204)

44) That Ms. Ruth Roudebush is currently serving on the Board of Education of Unified School District 512. Ms. Roudebush is currently serving as vice-president, a position that she has held since July 1, 1985. (T-262)

45) That when Ms. Roudebush was asked why the Board sent the August 12th letter to patrons, she replied, "Well, we felt, as a Board, from communications we had gotten from patrons, as well as teachers, that we felt that we needed to communicate our feelings to these people." (T-263)

46) That Ms. Roudebush recalled discussions at a Board meeting regarding the sending of the August 12th letter. Ms. Roudebush recalls that it was the general consensus of the Board that the letter was needed, and she, in fact, approved the letter at that time and affixed her signature. (T-264)

47) That the August 12th letter had a supplemental pay schedule and a teacher's salary schedule attached. Ms. Roudebush testified that at the time the August 12th letter, neither of the proposals had been adopted by the Board. (T-265)

48) That when Ms. Roudebush was asked the purpose for sending the August 30, 1985, letter to the patrons of the district, she replied, "Again, we thought it was necessary to communicate with the people in our school district as to our stand and where we stood at that point in the negotiations process, and that we were in impasse, and what we had offered, and what we had agreed to." (T-268, 269)

49) Ms. Roudebush testified that the Board was attempting to convey the idea that they had the same concerns as the teachers when they sent the August 30th letter. The Board wanted negotiations settled at this time as quickly as possible, and the Board was hoping that the settlement could occur. (T-269)

50) That the August 12th report on negotiations was drafted by an employee of the Board of Education, Ms. Donna Holman. The letter was subsequently discussed at a Board meeting and small changes were made. (T-274)

51) That the letter of August 30th "Dear Patron", was not signed by the individual Board members, since some of the members approved of the letter after having heard the letter read to them over the telephone, while some of the members came into the building on their own and read it. Ms. Roudebush believes that the letter was not approved by the Board as a whole but rather was approved by the Board members individually. (T-305)

52) That Ms. Donna Holman is employed by the Shawnee Mission public school district as the manager of communications. Ms. Holman has occupied that position since April of 1979. It is Ms. Holman's job to create brochures, news releases, news letters, media relations, and to answer questions for reporters, acting as a liason between media and various staff members. (T-311)

53) That the letter of August the 12th was a result of Associate Superintendent, Tom Mercer, contacting Ms. Holman to state that the Board and the superintendent thought a letter needed to be sent, and that it needed to include various kinds of information, which was, in fact, included within the letter. (T-316)

54) That Ms. Holman thought that the purpose of the August 12th letter was in keeping with district's policy regarding communication. That is, they not only have a responsibility but an obligation to keep the community, as well as the staff, informed about what's happening in the district. (T-318)

55) That Ms. Holman testified that she received specific instructions in terms of the kinds of things that were to be included within the August 12th letter. (T-319)

56) That Ms. Holman recalls that when she first drafted the August 12th letter and disseminated it to various parties for their approval, she went through at least eight revisions before final approval was given. Ms. Holman believes that the salary schedule was included with the August 12th letter, because there was a feeling that teachers and the community did not have an accurate picture of what had actually been offered and what

teachers would be earning if that proposal had been accepted or would be accepted. (T-321)

57) That Newsline is a publication that has been in effect for several years, and it generally comes out following each Board of Education meeting. It's main purpose is to keep staff members apprised of what the Board is doing, what's happening at the district level and various other things that may be of interest to them. The Newsline publication goes only to staff members of U.S.D. 512. (T-323)

58) That Ms. Holman made the initial preparation of the August 27th issue of Newsline. (T-323)

59) That Ms. Holman was approached by Associate Superintendent Mercer with regard to the types of issues to put in the August 27th Newsline. Ms. Holman believes that the Newsline issue was devoted to the subject matter because the district needed to let staff members know that there had been efforts made over the weekend which were initiated by the Board. Those efforts were to come to some kind of negotiated agreement and to let teachers know what had happened as a result of those efforts. It was also to inform teachers what had happened the previous Monday evening regarding attempted agreement on all of the issues. Ms. Holman prepared the first draft of Newsline. (T-323)

60) That Ms. Holman made the first draft of the August 30th "Dear Patron" letter after having received instructions from Associate Superintendent Mercer to prepare such a draft. The August 30th "Dear Patron" letter was to go to anyone who had a child in the school district as well as to the "key communicators". Ms. Holman recalls that the purpose of the August 30th letter was to make patrons aware of what had happened over the weekend and on the previous Monday night. (T-325)

61) That Ms. Holman recalls that she received a number of telephone calls from media people, PTA people, and parents who seemed to be concerned that school was going to be starting while a lot of things remained unresolved. The callers wanted

to know, from Ms. Holman, what was going to happen and if teachers would teach, and if classes would go on as usual, what was happening, and when contracts would be resolved. Therefore, a part of the purpose of the August 30th letter was an effort to allie some of those fears, to let people know that efforts were still under way to try to reach a negotiated agreement, and to try to let them know what had been happening. (T-327)

62) That Ms. Holman believed that the purpose of sending the August 12th letter to "key communicators" within the community was to keep the community informed about where the Board stood on negotiations at that time. (T-355)

63) That Ms. Holman was under the belief that the entire cost of the early retirement plan in the current contract for both administrators and teachers was 3.7 million dollars. (T-358)

64) That Mr. Steve Martin, an attorney in private practice, served as the chief negotiator for Shawnee Mission School District, U.S.D. 512 during the past negotiation. Mr. Martin also served as the chief spokesperson for the district during the 1984 negotiations. (T-367)

65) That Mr. Martin recalls that the NEA requested, during the 1984 negotiations, that a committee be appointed to study the issue of Early Retirement. Further, he recalls that the board did agree that a committee would be appointed to study the issue. (T-369)

66) That a contract was negotiated between the parties, U.S.D. 512 and Shawnee Mission NEA, covering 1984-1986 school year. The negotiations during 1985 were of a nature of a re-opener in which salaries were to be opened plus two items or issues of each party's choice. (T-370)

67) That the district's position on Early Retirement at the outset of negotiation was that the current language should remain. This current contract language abolishes the Early Retirement program. (T-372)

68) That Mr. Martin recalls that both parties prepared their own petition requesting assistance at impasse on approximately the 13th day of May, 1985. (T-378)

69) That Mr. Martin, chief spokesman for U.S.D. 512, recalls making a statement to the press on or about May 14th basically stating, "Out of respect for the federal mediator, we'll show up. But they've gotten everything out of us that we can give." (T-378)

70) That Mr. Martin believes that the negotiation process differed this year from previous years, inasmuch as the Board had their total position, or last offer, on the table prior to the time that impasse was declared. Mr. Martin believes that this differs from actions in previous years inasmuch as he believes both parties has some room for movement after the declaration of impasse in the previous years. (T-379)

71) That the parties voluntarily returned to the bargaining table at least one time after impasse had been declared and prior to meeting with a mediator. (T-381)

72) That Mr. Martin believes that the school Board modified their position on the issues during mediation at least to the extent of offering to spread the same amount of money in three different ways on a salary schedule. (T-382)

73) That the impasse in negotiations between U.S.D. 512 and Shawnee Mission NEA is at the point of awaiting a fact-finding hearing. That fact-finding hearing has been set by mutual agreement of the parties for the 26th and 30th of October, 1985. (T-385)

74) That subsequent to mediation and prior to fact-finding, Mr. Martin believes that the parties had agreed to the amount of hourly pay, agreed to a supplemental pay schedule still at issue to be presented to the fact-finder, agreed to a second year calendar, agreed to go back to the current contract language with respect to duty-free lunch, and had agreed on the one twenty-five

cafeteria plan. These agreements were drawn up and signed off on by Mr. Tom Madden, representing the NEA Shawnee Mission, and Mr. Martin, representing U.S.D. 512. (T-388, 389)

75) That sometime prior to the starting of school in August Mr. Martin was instructed by the Board of Education of U.S.D. 512 to run an idea by the NEA to see if that idea could form the basis for a formal agreement. Mr. Martin's authorization extended to keeping the Board's position exactly as it was at their last offer except that a change in the salary schedule could be made by the Board, if, in fact, the NEA would agree to allowing the district to start teachers on the second step of the salary schedule. Mr. Martin was authorized to ascertain whether or not this idea or concept could serve the basis for a total agreement between the district and the NEA. (T-391, 392)

76) That Mr. Martin called Ms. Phyllis Uchtman to see if she could come to his office to discuss the idea as set out in the previous finding. (T-392)

77) That Mr. Martin, chief spokesperson for U.S.D. 512, testified that during the meeting referenced in the previous two findings, between he, Ms. Uchtman, and Mr. Madden, he made it clear to the NEA that he did not want to reopen negotiations in order to get into the merit of each issue. Mr. Madden then informed Mr. Martin that the NEA might want to change something else besides the salary proposal. Mr. Martin informed Mr. Madden that he hoped they didn't, but it was his duty to listen to anything that they had to say. (T-394)

78) That on the three days following this Friday meeting, numerous meetings and telephone conversations were held between Mr. Martin and members of the NEA bargaining team. During these conversations, the NEA made numerous changes in position on the issues at impasse. (T-397, 398, 399)

79) That Mr. Martin was aware that a great deal of the money spent on an early retirement by the district was, in fact, spent on administrators as well as teachers within the appropriate bargaining unit. (T-428)

80) That the August 22, 1985 news release (Complaint #8) stated that the Board's chief negotiator was directed to conduct an informal meeting with the NEA Shawnee Mission to discuss a possible modification of the Board's position regarding salary. The release also reported a statement of Mr. Dick Spears which said; "In order to achieve a settlement, the Board is also willing to modify its position on all other issues that are still on the table, providing NEA does likewise." (Complaint Exhibit #8)

81) That the committee report on early retirement states:

"The committee unanimously agreed that they could not recommend the continuation of the present early retirement plan for the following reasons. . ."

The report further states:

"Therefore, subject to the above determinations which are deemed necessary by the committee, the committee recommends a supplemental retirement income program be established for employees of the district (to encourage employees to make career commitments to the district and to serve as a true benefit to those employees who make such a commitment."

82) That the August 12, 1985 Progress Report on negotiations states in part:

". . . Despite the fact that the Board has offered to raise teachers' salaries an average of 7%, the NEA-SM representatives are asking more."

". . . Because that plan cost District patrons \$3,712,569 over the past five years, the community has been overwhelmingly opposed to it. The Board remains opposed to the reinstitution of an early retirement plan."

". . . Even if the Board is compelled to issue a unilateral contract, it intends to recognize the quality of its teachers by giving the 7% average increase it offered at the last mediation session, (see the attached schedule)."

83) That the August 27, 1985 Newsline which was distributed to all teachers, stated in part;

". . . At that meeting, the Board offered-- if NEA would agree on all other issues-- to redistribute its 7% offer on the current salary schedule."

". . . A special meeting of the Board was called to review the NEA-SM proposal, which was substantially as follows."

". . . A \$16,100 base salary."

". . . \$1,200 put into the schedule as a fringe option and implementation of the Section 125 cafeteria plan."

". . . A raise in hourly pay from \$12.00 to \$12.75."

". . . A raise in intramural pay from \$7.50 to \$8.00 an hour."

". . . A 7% increase on the elementary and secondary supplemental pay schedule."

". . . Implementation of the Section 125 fringe benefit plan by January 1, 1986 or sooner."

". . . A return to current contract language on both binding arbitration and duty-free lunch."

". . . Taking the early retirement issue to fact-finding."

". . . By 7:30, the Board had agreed to all the terms of the offer with the exception of the early retirement item."

". . . In accepting the \$16,100 base salary, the Board modified its salary increase from 7% to 7.6%."

". . . We are sorry to report that despite the Board's acceptance of all the salary issues and its willingness to remove its proposals regarding binding arbitration and duty-free lunch, settlement attempts failed; the NEA-SM insists on an early retirement program (a program which the NEA-SM agreed would expire on August 31, 1985. See page 43 of your current contract). Without it, they say, there will be no contract.

". . . It is important to note that throughout the weekend, both parties had reserved the right to adhere to their former positions as presented for fact-finding in the event that this compromise should fail."

84) That the August 30, 1985 "Dear Patron" letter states
in part:

". . . In the interest of focusing the attention of teachers, parents and students back where it belongs."

". . . First and foremost, you should realize that the NEA is a union, which does not necessarily represent the views of all SM teachers."

". . . between teachers and the union."

". . . but it does not believe that the union always acts in the best interests of SM teachers, students or taxpayers."

". . . The early retirement plan was negotiated out of the contract last year after patrons had made it abundantly clear to the Board that there was no public support for this obsolete plan, which has cost the District \$3.7 million over the past five years."

". . . You may be able to help achieve that settlement. What can you do? You could start by calling teachers you know and telling them that you support the best possible salaries for teachers--just as the members of the Board of Education do--and that you support the Board's efforts to reach an agreement. Then call NEA headquarters in Overland Park (649-3175) and ask for Tom or Jerry. Share with them your opinion on whether we should spend millions of dollars on an early retirement plan that in essence pays teachers not to teach."

". . . We'd appreciate your support."

CONCLUSION OF LAW

The examiner believes that it is necessary to clarify the scope of the pending complaint prior to addressing the individual allegations contained therein.

In its pleading Complainant cites a violation of K.S.A. 72-5430 (b) 5 which states:

"(b) It shall be a prohibited practice for a board of education or its designated representative willfully to:

(5) refuse to negotiate in good faith with representatives of recognized professional employees' organizations as required in K.S.A. 72-5423 and amendments thereto."

K.S.A. 72-5423 then states in part:

"(a) Nothing in this act, or the act of which this section is amendatory, shall be construed to change or affect any right or duty conferred or imposed by law upon any board of education, except that boards of education are required to comply with this act, and the act of which this section is amendatory, in recognizing professional employees' organizations, and when such an organization is recognized, the board of education and the professional employees' organization shall enter into professional negotiations on request of either party at any time during the school year prior to issuance or renewal of the annual teachers' contracts. Notices to negotiate on new items or to amend an existing contract must be filed on or before February 1 in any school year by either party, such notices shall be in writing and delivered to the superintendent of schools or to the representative of the bargaining unit and shall contain in reasonable and understandable detail the purpose of the new or amended items desired."

This statute relates to the requirement placed upon an employer to recognize organizations and once recognized to enter into good faith negotiations at anytime prior to the issuance of contracts if timely notice is given. This statute contemplates good faith efforts throughout the negotiations process.

There are statements in the record to suggest that Respondent USD 512 did not negotiate in good faith prior to the time impasse was declared. Specifically these statements relate to movement on the issues, in particular the issue of early retirement. A close reading of the complaint, however, reveals no specific allegation of bad faith bargaining prior to the declaration of impasse on May 13, 1985.

One might argue that a display of bad faith at a particular point in time could be construed to constitute a previous or continuing pattern of bad faith bargaining. The examiner does not embrace this argument. The examiner believes that a charging party must not only specifically plead actions of bad faith but must also show that specific occurrences have tainted a specific portion of the process. In addition, the examiner believes that the charging party must clearly identify the actions they seek to be remedied.

In this case Complainant has requested, at least in part, a return to the bargaining table but has failed to plead that illegal actions occurred prior to the declaration of impasse. Complainant has not alleged within its complaint that Respondent took an unyielding position on the issues under negotiations. Therefore, the examiner is without jurisdiction to issue any ruling relating to a violation of statute prior to the declaration of impasse.

Next Complainant alleges a violation of K.S.A. 72-5430 (b) 7 which states:

"(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 or fact-finding efforts as provided in K.S.A. 72-5428 or arbitration pursuant to an agreement entered into pursuant to K.S.A. 72-5424."

This statute requires an employer to participate in the mediation and fact-finding process in good faith. The record reveals that the parties participated in the mediation process at sometime in late June or July but at least prior to the distribution of the August 12, 1985 progress report (Complainant Exhibit #3). Further, the parties at this time have not utilized the fact-finding process. The only action addressed in Complainant's pleading which occurred prior to mediation was the statement made to the press by Mr. Martin on May 13, 1985. The record then is almost void of any testimony and evidence concerning the mediation process.

Ms. Uchtman testified that the district made some movement during mediation on the issues, except early retirement. Once again, however, Complainant does not allege in its complaint that the district took an unyielding position during mediation. While Mr. Martin's statement concerning mediation may or may not constitute bad faith, Complainant has failed to show that the statement tainted the mediation process. Therefore, the examiner cannot rule that the mediation process was marred by bad faith participation.

It therefore appears to the examiner that the thrust of the complaint revolves around Complainant's allegations that the documents produced and distributed by the district to patrons and teachers constitute a circumvention of the exclusive representative's rights to represent employees in violation of K.S.A. 72-5430 (b) 6. That is not to say that such a circumvention would not also constitute a violation of K.S.A. 72-5430 (b) 5. However, the events specified within the complaint indicate that the bad faith acts took place during a very limited time period. The examiner shall therefore limit his review of the complaint to the statement made by Mr. Martin on May 13, 1985 and the events occurring after mediation.

The examiner first turns to the allegation that a statement made by Mr. Stephen Martin, Chief Negotiator for Respondent, as reported in the May 14, 1985 Kansas City Times, is evidence of the districts bad faith in negotiations. Mr. Martin admits that he made the statement, "Out of respect for the federal mediation, we will show up. But they have gotten everything out of us we can give." Mr. Martin explains that the statement related to his authorization from the board to move further on the issues under negotiations. Further, he relates that his position at impasse this year differed from his positions at impasse in previous years. That is, this year he believed that the Board had offered everything it had to offer prior to impasse declaration.

The examiner notes that there is no definition of "impasse" found within K.S.A. 72-5413 et seq. However, the historical definition most often given to that term requires that both parties

have exhausted all possibilities of agreement on issues under negotiations. The examiner believes that the most prudent response to the press or the public concerning positions at mediation is no response. However, he recognizes the parties "right" to make factual statements designed to inform and therefore finds no basis for the allegation that the statement by Mr. Martin either violated the statute or evidences a pattern of bad faith negotiations.

Complainant next urges the examiner to find that the various correspondences sent by the Board to patrons and teachers were an attempt to circumvent the teachers exclusive bargaining representative. Respondent answers that the correspondences were simply intended to present factual information concerning negotiations. Further Respondent argues that the letters in question were in some part precipitated by earlier documents distributed by the KNEA. Respondent also seems to argue that negotiations end once impasse occurs. Further that "negotiations" consist of a formal process occurring only at the bargaining table when all team members are present. This theory does not equate with the attitude adopted by the Board. Testimony offered by Board members indicates that the various correspondence sent out were in part to assure teachers and patrons that the Board wanted a settlement to the impasse as quickly as possible. Further, the Board's direction to the chief negotiator to pursue a settlement over the weekend of August 25, 1985 indicates the Board's willingness to continue negotiations after impasse had occurred. Additionally, whether formal or informal, the process between the parties on that August weekend constitutes negotiations. The examiner recognizes these and other efforts by the parties to resolve the dispute after the impasse was perceived. Further, he congratulates both parties on these efforts. It is evident from the record that those efforts were fruitful. Certain issues were agreed upon between the parties subsequent to impasse and prior to fact-finding. These efforts are contemplated by the statute and although they may not result from formal meetings they are nevertheless a very essential part of the negotiations process.

The examiner believes a brief review of K.S.A. 72-5413 et seq. is necessary in order to ascertain legislative intent relative to the term "good faith negotiations" as it relates to the public's "right to know" and the parties' obligations to negotiate directly with each other.

K.S.A. 72-5420 clearly states that all certified teachers employed by a Board of Education shall be included within an appropriate unit of classroom teachers. K.S.A. 72-5416, K.S.A. 72-5417 and K.S.A. 72-5418 all provide procedures under which a professional employees organization may be selected to represent teachers within an appropriate unit. K.S.A. 72-5415 (a) then provides that when a representative is chosen to represent teachers in an appropriate unit such representative shall be the exclusive representative for all teachers in the unit. K.S.A. 72-5430 (b) 5 requires a board to enter into negotiations in good faith with the exclusive representative of all teachers. There is no question that Shawnee Mission NEA has gone through the process and is the exclusive bargaining representative for all teachers of U.S.D. 512 regardless of the teacher's membership or sympathies toward Shawnee Mission NEA.

The Kansas Legislature recognized the public's right to know what was going on in negotiations or else the Legislature would not have enacted K.S.A. 72-5423 (b) which states:

"Rights and duties of boards of education reserved; recognition and negotiation required; applicability of open meetings law, exceptions; strikes not authorized; adoption of agreements by reference.

(b) Except as otherwise expressly provided in this subsection, every meeting, conference, consultation and discussion between a professional employees' organization or its representatives and a board of education or its representatives during the course of professional negotiation and every hearing conducted by the secretary under K.S.A. 72-5426 for determination of the question of the existence of impasse is subject to the provisions of the Kansas open meetings law, and any amendments or supplements thereto. Meetings, conferences, consultations and discussions held by the secretary under K.S.A. 72-5426 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, as provided for in K.S.A. 72-5427 and 72-5428, are specifically made exempt from the provisions of the Kansas open meetings law, and any amendments or supplements thereto."

However, the examiner notes that certain types of meetings were statutorily exempted from the open meetings act. Specifically meetings and discussions held in the course of and in connection with the resolution of impasse are exempt. Certainly there had to be a reason for this exemption. The examiner believes that the intent was to insure that the parties make every attempt to resolve disputes at the bargaining table without outside pressure. However well intentioned public pressure might be at this point, the process exists between the Board and the exclusive representative of teachers.

Individual teachers are granted two statutory methods to express their agreement or disagreement with negotiations positions held by their exclusive representative. First K.S.A. 72-5415 (b) gives every teacher the right to make known his/her position or proposals to boards, superintendent, or other executive officer employed by the board. The Secretary of Human Resources has previously issued an interpretation of this statute. (See NEA-Topeka vs. U.S.D. 501, Topeka, Kansas, case number 72-CAE-16-1981). Secondly, each teacher is given the right by K.S.A. 72-5421 to vote on the acceptance or rejection of a negotiated agreement. The Legislature recognized then that some teachers would not agree with the positions taken by their elected representatives thus they provided these avenues to the teachers. Further, the Legislature recognized that in some cases a majority of the teachers might desire to remove or replace their representative thus a decertification process was created at K.S.A. 72-5417. The Legislature recognized that these matters were to be resolved between the teachers and their exclusive representative thus they by statute, directed the employer to negotiate with the exclusive representative until such time as the teachers voted to remove or change that representative.

The Kansas Legislature further expressed their concern that public and teacher pressure not be utilized during impasse resolution by the enactment of K.S.A. 72-5428 (e) which states:

"Fact-finding; report or findings and recommendations of board; meeting required after report to be made public, exceptions; final action by board of education.

(e) Within the ten (10) days immediately after receipt of the report of the fact-finding board, the parties shall meet at least once in an effort to reach agreement for resolution of the impasse. Either the board of education or the professional employees' organization may make public the report of the fact-finding board. The secretary shall make the report public ten (10) days after receipt of the report unless (1) the board of education and the recognized professional employees' organization agree to an extension of the ten day period and give notice of such agreement to the secretary in which case, subject to provision (2), the report shall be made public by the secretary upon the expiration of such extended period of days, except that such ten day period shall not be extended by the parties beyond a maximum of seven (7) additional days; or (2) the board of education and the recognized professional employees' organization notify the secretary at any time prior to the expiration of the applicable period of days that agreement for resolution of the impasse has been reached."

This statute requires the parties to meet at least once in a meeting exempt from the open meetings act, within 10 days following the receipt of the fact-finding report. Further, the statute requires the Secretary to make the fact-finding report public after its receipt. The Kansas Legislature thus recognized the need for the public to be informed at a certain point in impasse resolution but they also recognized the need for the parties to negotiate at the bargaining table during impasse resolution without public pressure.

There is a great deal of testimony on the record relating to both parties "rights" to inform the public or posture for the public. While the examiner must respect the parties rights to free speech he believes that the obligation to bargain imposed by statute places certain restrictions on that "right" if in fact one is to comply with his statutory duty. Respondent argues that, "In negotiations involving public agencies and institutions, there is nothing sinister or perverse in seeking broad support for one's

position or in encouraging that support to make itself known to the other participants." The examiner submits that such a theory is totally incompatible with the theory of good faith negotiations between the parties or the theory of exclusivity of representation. If the examiner was to adopt Respondent's theory it would seem that there would be no need for any discussions or bargaining between the parties. Rather both parties could simply state a position on each issue, mount an advertising campaign and then submit the question of resolution to the public. The examiner believes the legislature intended the negotiations process to resolve problems between the parties without pressure from outside forces.

Certainly there comes a time in this negotiations process when each party is held accountable by the public for its actions and positions on issues. That time is at the conclusion of the impasse resolution process when a fact-finder issues a report. Requested public support and pressure prior to that time can only be construed as an effort by one party to coerce the other party into making a concession on an issue(s) thus circumventing its duty to bargain in good faith with the other party.

The record in the instant case shows that both parties have, throughout negotiations, chosen to seek public support for their respective positions on the issues. Statements on positions as well as responses, were made to members of the press. It appears to the examiner that both parties were "making their case" for public sympathy when and if the negotiations reached the point where the Board is "to take such action as it deemed in the public interest."

Numerous examples have been pointed out by the NEA to the examiner which support the allegation that the district was attempting to "set up" the public for the issuance of unilateral contracts. The list includes;

- 1) press release relating to the boards willingness to "modify its position on all

issues when in fact the only board authorized move was on salary.

- 2) August 12th Progress Report wherein the Board uses such language as, "Despite the fact that the Board has offered to raise teachers salaries an average of 7%, the NEA Shawnee Mission representatives are asking for more".
- 3) August 12th Progress Report in which the district fails to mention the fact that the \$3,712,569 cost of the early retirement program includes costs for administrators as well as bargain unit members.
- 4) August 12, 1985 Progress Report wherein the Board states that the community has been overwhelmingly opposed to the early retirement program when in fact a committee had recommended that some type of retirement program be established.
- 5) August 12th Progress Report in which the Board "assures" the public that the Board intends to give teachers a 7% average increase even if they are required to issue a unilateral contract.
- 6) August 30, 1985 Dear Patron letter wherein the Board points out to patrons that the NEA does not always act in the best interest of Shawnee Mission teachers, students, or taxpayers.
- 7) August 30 Dear Patrons letter wherein the Board states that it has been made abundantly clear that there is no public support for the obsolete early retirement plan without stating that a predominately public committee had

recommended that some type of supplemental income retirement program be established.

Testimony was offered by Ms. Roubush and Ms. Holman that both the August 12th and the August 30th letters were intended to inform and answer questions raised by teachers and the public concerning negotiations. The examiner submits that the above listed and other actions by the board transcends the bounds of informing and answering questions. Rather these statements can only be construed to sway teacher and/or public opinion toward the Board's position on the issues under negotiations. Statements and actions for this purpose appear to be contrary to the legislative intent of a negotiated agreement between the parties at the bargaining table. Such statements and actions are only within the legislative intent of an open ended collective bargaining law, such as K.S.A. 72-5413 et seq. once the impasse resolution process has been completed. That is why the legislature has exempted impasse resolution meetings from the open meetings law until after the parties have met following the receipt of the fact-finding report. It is at that point when the Board must take action, must make such action public, and the Secretary must make the fact-finding report public. It is then when the public must decide whether their elected officials have acted in the public interest.

Attempts to sway the public and teachers to a board position prior to exhausting all impasse procedures is evidence that the board is not meeting with the recognized representative of all teachers in good faith as intended by the statute. The examiner once again recognizes that much of the negotiations process between U.S.D. 512 and Shawnee Mission NEA has been done via the news media and by various documents distributed to the public. Both parties appear to have been posturing for the community as much as they have been negotiating between themselves. It is therefore difficult to find the Respondent guilty of a "willful" violation of statute for engaging in conduct that seems to be the excepted negotiations process for both sides. The Secretary designee there-

fore, admonishes both parties to approach future negotiations in the spirit the Kansas Legislature intended. That is, a give and take process designed to resolve problems between the parties without outside posturing to influence the public.

The examiner must next look to the districts behavior relating to an attempt to circumvent the exclusive negotiating representative. As previously stated in this order the statutes provide that an employer must deal or negotiate with the exclusive representative of teachers at the bargaining table. It is difficult for the examiner to understand how one party could possibly be negotiating with an exclusive representative while at the same time it is asking teachers and members of the public to, "help achieve a settlement" . . . (by) "calling teachers you know" . . . (to state that) "you support the Boards efforts to reach an agreement", and also by urging the public to call NEA headquarters to state an "opinion on whether we should spend millions of dollars on an early retirement plan that in essence pays teachers not to teach". These requests made at any time prior to the last meeting after fact-finding can only be designed to force a change in position on the issues by the exclusive representative. Even if such statements were designed to force the return of the exclusive representative to the bargaining table, such actions would be contrary to statute. However, when these statements are coupled with other statements pertaining to positions taken in negotiations there can be no doubt of their intended purpose. That purpose usurps the exclusive representative's rights and blatantly violates the provisions of K.S.A. 72-5430 (b) 5 and 6.

The examiner also views the statement concerning the "assurance" that the district will give teachers 7% even if they are forced to issue a unilateral contract in a questionable light. The issuance of the August 27, 1985 Newsline to teachers removes all doubt that the Board was attempting to pressure a change in position by the exclusive representative. First, the Board reports in Newsline that they had offered 7.6 salary increase,

removal of board proposals on binding arbitration and duty free lunch but that the NEA had refused these items by refusing to drop early retirement as an issue. Next the Board informs teachers in the same Newsline that both parties had reserved the right to adhere to their former positions if the compromise should fail. Testimony on the record indicates that the purpose of the Newsline was to "inform" teachers. The examiner believes the content of the August 27 issue of Newsline goes far beyond mere informational purposes. The examiner views the statements contained in the August 27, 1985 Newsline as a thinly disguised threat intended to coerce teachers into forcing the NEA bargaining team to drop early retirement in order to insure receipt of the 7.6 salary offer and the continuation of current contract language on duty free lunch and binding arbitration.

This "subtle" attempt to negotiate directly with the teachers and the requested public pressure on Shawnee Mission NEA can only lead the examiner to a finding that the Board has violated K.S.A. 72-5430 (b) 5 and 6. It appears that these violations have not, however, succeeded in bringing about any change in position thus the examiner finds no harm to remedy. The process at the table and during mediation was not influenced by these subsequent violations of statute. The examiner can see no harm to the fact-finding process being caused by these violations. It is only any subsequent possibility of agreement which could be harmed by the violations. That is, any future pressure by teachers or the public resulting from these publications on Shawnee Mission NEA to agree to the Board proposal. The examiners findings and conclusions coupled with a cease and desist order should serve to diffuse such pressure. The examiner is hopeful that this order shall serve to guide both parties in future negotiations.

In sum the examiner has found the actions of U.S.D. 512 in the preparation and distribution of the August 12, 1985 "Report on Negotiations", the August 27, 1985 Newsline, and the August 30th "Dear Patron" letter to constitute a willful attempt to circumvent

the exclusive negotiations representative in violation of K.S.A.
72-5430 (b) 5 and 6. The examiner is hereby ordering the district
to cease and desist from such actions in the future and to approach
the resolution of the existing impasse in good faith as contemplated
by K.S.A. 72-5413 et seq.

IT IS SO ORDERED THIS 6th DAY OF November, 1985.



Jerry Powell, Designee of the Secretary
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