

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

LEAVENWORTH NEA,)
Petitioner,)
) Professional Negotiations Act
v.) CASE NO: 72-URE-4-1995
)
BOARD OF EDUCATION OF)
UNIFIED SCHOOL DISTRICT No. 453,)
LEAVENWORTH, KS.,)
Respondent.)

INTERMEDIATE ORDER GRANTING ELECTION TO DETERMINE
APPROPRIATE UNIT FOR SCHOOL NURSES
PURSUANT TO K.S.A. 72-5413 et. seq.

NOW on the 29th day of March, 1995, this case came on for formal hearing pursuant to K.S.A. 72-5417(a) and K.S.A. 77-523, before Lelyn J. Braun, Presiding Officer.

Petitioner, Leavenworth NEA, appears by and through Marjorie Blaufuss, counsel, and called Mary Ellen Lussier, Dianne Glynn and Shirley Rogers as witnesses.

Respondent, Unified School District 453, appeared by and through Louis Clothier, counsel, and called Leigh Johnson, Assistant Superintendent of Personnel as a witness.

ISSUES PRESENTED

ISSUE #1

WHETHER THE POSITION OF SCHOOL NURSE IS A "PROFESSIONAL" POSITION AS THAT TERM IS DEFINED IN K.S.A. 72-5413(b).

FINDINGS OF FACT

1. Petitioner, Leavenworth NEA, is the exclusive bargaining unit for the professional employees of Unified School District 453, Leavenworth, Kansas.

72-URE-4-1995-0

2. Respondent, The Board of Education of Unified School District 453, referred to as "District", administers to public schools in a school District duly organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated.

3. The school nurses employed by the Respondent are employed in a position which does not require a certificate from the State Board of Education (Tr. 82,118).

4. At least 5 of the 6 school nurses employed by the District hold certificates from the State Board of Education as school nurses (Tr. 59).

5. The District's existing professional bargaining unit currently includes a number of professional employees who are not classroom teachers, including school Social Workers, Occupational Therapists, Art Therapists, a Physical Therapist, Speech Therapists, school Librarians, and school Counselors (Tr. 50, 120, 129).

6. The practice of nursing in Kansas is governed by K.S.A. 65-1113 et seq. All six school nurses herein are professional registered nurses as that term is defined in K.S.A. 65-1113.

7. The Respondent has a job description for school nurses (Respondents Exhibit 1). Moreover, the District's job description requires that the school nurses employed by the Leavenworth School District have completed four years of college and possess either a degree as a registered nurse, or a Bachelor of Science in Nursing

degree, as well as be licensed by the State (Respondents Ex. 1; Tr. 5). Thus, the school nurses, clearly possess a knowledge of an advanced type customarily acquired by prolonged study at an institution of higher learning in order to perform their job as contemplated by the definition of "professional" adopted by the Department of Human Resources.

8. Mary Ellen Lussier is a graduate from a three year nursing school. She has 5 years experience in orthopedics; 1 year part-time in a doctor's office; 8 years as an in-service instructor of nurses; 8 years employment as a nurse in a hospital, and for the last 2 1/2 years has been a school nurse at Lincoln Elementary School and West Middle School (Tr. 22-25).

9. Shirley Rogers is presently assigned to both Leavenworth High School and the Alternative Education Program Project. She has been with the District 14 1/2 years. Rogers is a graduate of the School of Nursing at Research Medical Center in Kansas City, Missouri and obtained her BSN in Nursing from the University of Missouri. She has been a surgical nurse in an operating room; a member of a teaching faculty; and a clinical instructor for student nurses. She has also taken care of individual patients on a one-on-one basis, was a school nurse prior to moving to Leavenworth, and also worked in a medical unit at a VA hospital. She is a licensed Registered Nurse (Tr. 58-67).

10. To the knowledge of Mrs. Lussier and Mrs. Rogers, all of the other nurses employed by the District are certified by the Kansas State Board of Education as school nurses (Tr. 27).

11. Both Mrs. Lussier and Mrs. Rogers work as classified hourly employees 7 1/2 hours per day, 186 days per year, with a work schedule commencing at 7:45 a.m. and ending at 3:30 p.m. daily (Tr. 26).

12. All of the school nurses are required to report to the school Building Administrator and to the Assistant Superintendent for Personnel, Leigh Johnson.

13. The duties of school District nurses include:

- a) Ordering supplies for each school building's nursing clinic;
- b) reviewing the medical assessment and permission forms to determine which children have special medical needs;
- c) reviewing student records concerning immunizations;
- d) maintaining medical records on the children;
- e) handling emergency illnesses or injuries;
- f) conferring with teachers concerning children's vision and hearing disabilities;
- g) interpreting doctors' orders;
- h) instructing students on such things as influenza, basic hygiene, sexually transmitted diseases, CPR, basic life support and rescue breathing, and obstructed airway procedures;
- i) referring children for eyeglasses, emergency care, etc.;
- j) home visits with parents of school children;
- k) serving on District wide and building level committees, such as the Crisis Management Team (Tr. 22-38).

14. All six of the District's school nurses wish to be part of the current bargaining unit now represented by the Leavenworth National Education Association (Tr. 38). Nurses over the years have

considered making a request to become a part of the Teachers negotiating unit and have decided to do so now (Tr. 97, 98).

15. Nurses and teachers have the students' interests in common (Tr. 83).

16. Nurses responsibilities and work is different from that of classroom teachers, librarians, counselors, occupational therapists, and psychologists (Tr. 89). Nurses spend little time in classroom presentations. Their main responsibility is meeting health needs of students (Tr. 80, 81).

17. Leigh Johnson is presently employed as Assistant Superintendent of Personnel. He has been in the school district for 29 years and in Personnel since 1978 (Tr. 110-113).

18. There are two categories of employees in the District, Classified and Certified (Tr. 111). Certified employees generally have a background as a school teacher or have completed a teachers educational program or a educational counseling or psychology program (Tr. 114-116).

19. The Respondent considers only those members of the school district with a teachers certificate as a "professional" (Tr. 115-116, 126-127)

20. This is the first incident where nurses have petitioned to become part of a bargaining unit in the Leavenworth School System (Tr. 122-123).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE #1

WHETHER THE POSITION OF SCHOOL NURSE IS A "PROFESSIONAL" POSITION AS THAT TERM IS DEFINED IN K.S.A. 72-5413(b).

K.S.A. 72-5413(b) gives "professional employees" the right to form, join or assist professional organizations and to participate in professional negotiations with Boards of Education. Pursuant to K.S.A. 72-5420, in each case where the question of unit composition is at issue, the Secretary of Human Resources is to decide an "appropriate" unit. It has been a long standing rule there is nothing requiring a bargaining unit approved by the Secretary be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be an appropriate unit. See Colby Community College Faculty Alliance v. Colby Community College, ("Colby") Case #72-UCA-4-1992 (November, 1993); Butler County Community College Education Association v. Butler County Community College, Case #72-UCA-1-1993.

The determination of appropriateness requires a three (3) step inquiry:

1. Does the job classification meet the definition of "professional employee"?
2. Is the individual excludable from the unit as an "administrative employee"?
3. Does the job classification share a sufficient community of interest with the other classifications proposed for the unit?

Only after a position has successfully satisfied each step of this test is it appropriate to include the position or positions in the bargaining unit. Consequently, a complete understanding of what is meant by "professional employee", "administrative employee", and "community of interest", is essential to proper application of the tests.

The school nurses employed by the Board of Education of the Leavenworth U.S.D. No. 453 are not employed in a position which requires a certificate issued by the State Board of Education (Tr. 82,118). However K.S.A. 72-5413(c) clearly sets forth two alternative means by which an individual may qualify as a "professional employee" for purposes of the PNA. Colby Community College Faculty Alliance v. Colby Community College, Case No. 72-UCA-4-1992, at P. 19. Non-certified employees, therefore, will be "professional employees" if they are employed by the District in either a professional, educational, or instructional capacity. Colby, at P. 20. Because that portion of the statute is written in the disjunctive, it must be construed that the legislature viewed each "capacity" as having a separate and distinct meaning, with performance within any one being sufficient to confer the status of "professional employee." Butler County, at P. 35; Colby at P. 20.

It is true, at one time, the statutory definition of "professional employee" under the PNA read, "Employed in a professional educational capacity." 1970 Kan. Sess. Laws, Ch. 284, §1. However, the legislature amended the statutory definition to

its present form in 1980. 1980 Kan. Sess. Laws, Ch. 220, § 1. "When the legislature revises an existing law it is presumed that the legislature intended to change the law as it existed prior to the amendment." Galindo v. City of Coffeyville, 256 Kan. 455, Syl. ¶ 3, 885, P. 2d 1246 (1994). When a statute is plain and unambiguous the Court must give effect to the intention of the legislature as expressed, rather than rewrite legislation. Martindale v. Tenny, 250 Kan. 621, Syl. ¶ 2, 829 P. 2d 561 (1992); Pestock v. State Farm Auto. Ins. Co., 9 Kan. App. 2d 188, Syl. ¶ 3, 674 P. 2d 1062 (1984).

Although the PNA does not now define what it means to be employed in a "professional," "instructional," or "educational," capacity the Department of Human Resources has interpreted those terms in prior cases for the purpose of determining whether or not non certificated personnel are "professional employees" under the PNA. In Colby, the Secretary found that the Definition of "professional employee" used by the Public Employer/Employee Relations Act (PEERA) provided a comprehensive test to determine whether or not one is employed in a "professional capacity." Colby, at pp 21-23. See also Butler County at 36-37. Under KDHR previous interpretations, a non-certified employee is employed by a school District in a "professional capacity" if that employee is one:

"(1) Whose work is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; involves consistent exercise of discretion and judgment; requires knowledge

of an advanced type in a field of science or learning, customarily acquired by prolonged study in an institution of higher learning; or

(2) who has completed courses of prolonged study as described in paragraph (1) of this section, and is performing related work under the supervision of a professional person in order to qualify as a professional employee as defined in paragraph (1) of this subsection; or

(3) attorneys-at-law or any other person who is registered by a board of registration or other public body established for such purposes under the laws of this state." Colby at P. 21.

In Kansas, the practice of nursing, including school nursing, is controlled by the Kansas Nurse Practice Act, K.S.A. 65-1113 et. seq. (Tr. 13-22) It is clear from these governing statutes and their derived regulations that school nurses satisfy the Department of Human Resources' definition of "employed in a professional capacity."

K.S.A. 65-1113(d) specifies:

"The practice of professional nursing as performed by a registered professional nurse. . . means the process in which *substantial specialized knowledge derived from the biological, physical, and behavioral sciences* is applied to: the care, diagnosis, treatment, counsel, and health teaching of persons who are experiencing changes in the normal health or the prevention or management of illness, injury or infirmity; administration supervision or teaching of the process as defined in this section;. . ."
(Emphasis added.)

It is apparent from K.S.A. 65-1113 that registered nurses possess knowledge of an advanced type in a field of science or learning, customarily acquired by prolonged study at an institution

of higher learning as required by the definition of "professional" adopted by the Secretary.

Diane Glynn, Practice Specialist for the Kansas State Board of Nursing, testified to the advanced level of knowledge and training required for registered nurses (Tr. 18-22). Similarly, those nurses employed by the District who testified at the hearing testified to the advanced level of education, knowledge and training that they possess (Tr. 23-24, 58-59).

The evidence presented establishes that school nurses exercise the requisite degree of judgment and discretion. Mary Ellen Lussier, a nurse for the Leavenworth School District, testified that the school nurses must be able to exercise nursing judgment when presented with a medical emergency involving school children (Tr. 31). Similarly, Shirley Rogers, also a school nurse for the District, gave several examples of how the use of professional or nursing judgment was required in a typical day at work (Tr. 61-63, 65-67).

Because the position of school nurse satisfies the definition of "professional" adopted in Colby, and in Butler County, the school nurses are employed in a "professional capacity" by the Leavenworth School District and, consequently, are "professional employees" of the District.

Is the individual in the job classification excludable from the unit as an "administrative employee?"

From the evidence, it is clear that school nurses do not fall within the definition of "administrative employee" pursuant to K.S.A. 72-5413(d). Therefore, the Presiding Officer finds school nurses are entitled to participate in professional negotiation with the Leavenworth School Board for the purpose of establishing and improving the terms and conditions of their professional employment.

ISSUE #2

WHETHER THE EXISTING UNIT OF PROFESSIONAL EMPLOYEES IS AN APPROPRIATE UNIT FOR THE SCHOOL NURSES.

Once a determination has been made that a particular group of employees are "professional employees" of a school District, the additional question remains, "What would be an appropriate unit for those professional employees for the purpose of professional negotiations under the PNA?"

It is the responsibility of the Secretary to decide whether or not the existing unit for those professional employees based on community of interest, the wishes of the professional employees and/or the established practices among the professional employees, including, among other things, the extent to which such professional employees have joined a professional employees' organization. K.S.A. 72-5420. The long-standing rule is that there is nothing that requires the bargaining unit approved by the Secretary to be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be an

appropriate unit. Butler County, at P. 33. In general, the existing bargaining unit will be an appropriate unit if the new job classifications share a sufficient community of interest with the other classifications already in the unit. Butler County, at P. 34.

When resolving a question of the existence of a community of interest, the Secretary must weigh the similarities and differences with respect to wages, hours, and other conditions of employment between those employees sought to be added to the unit and members of the existing unit, rather than relying solely on traditional job classifications. Butler County, at P. 55. The factors to be considered in determining whether or not a group of employees share a community of interest include:

- 1) common supervision of employees;
- 2) functional integration of operations and job duties;
- 3) similar skills, training, and qualifications;
- 4) interchangeability and contact between employees;
- 5) similar work situations;
- 6) common wages and benefits;
- 7) payment of wages;
- 8) working hours;
- 9) regularity of work (full-time, part-time, temporary, seasonal); and
- 10) geographic proximity. Butler County, at P. 49.

While these factors are the most frequently cited, they are not exclusive, and no single factor or group of factors is controlling. The weight to be assigned each factor is within the sole discretion of the Secretary.

As noted above, school nurses share with the District's teachers, the requirement of advanced training. School nurses work the same hours, work the same days, and have the same days off as

do teachers (Tr. 26-27). School nurses also report to the Building Principal, as do teachers (Tr. 27, 84). Both teachers and school nurses employed by the District attend in-service education programs during the year (Tr. 27; Exhibit 1, School Nurse Job Description, "Skills Needed," at ¶ 14). In some cases, school nurses have continuing education requirements for the renewal of their license, as do teachers (Tr.21; K.A.R. 60-9-105-9). On occasion, school nurses serve as a resource for the teachers, and participate in teaching sections in health classes, hygiene classes, sex education classes, and biology classes (Tr. 34, 41, 46, 64-65).

School nurses are classified employees in the District. The school nurses are paid on an hourly basis, not salaried as are teachers (Tr. 48, 60-61, 82, 87). Furthermore, it is also the desire of the majority of the nurses in the school District to be members of the bargaining unit (Tr. 38).

Therefore the Presiding Officer finds that school nurses of Unified School District 453 have a sufficient community of interest with the members of the existing professional bargaining unit to be included among its members. After reviewing the record, the suggested findings of fact, conclusions of law, and briefs of Respondent and Petitioner, the Presiding Officer does hereby decide this second issue in favor of the Petitioner.

REPRESENTATION ELECTION

The school nurses have petitioned the Secretary for a Representation Election. An affidavit certifying that 5 of 6, or 83% of the school nurses employed by the Leavenworth District are members of Leavenworth - National Education Association, the current exclusive bargaining representative, accompanied this petition. The nurses should therefore be allowed to vote on whether or not to be included in the existing bargaining unit. Since the Presiding Officer has found that Nurses are "professional employees" of the District, and have a shared community of interest with the members of the existing unit, such election shall be held.

The Presiding Officer adopts an Armour-Globe election. Butler County at 117.

CONCLUSION

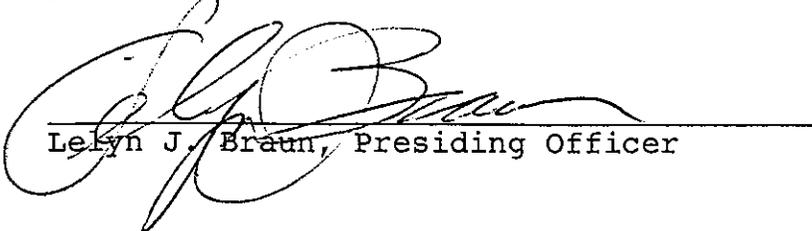
It is clear that, under the definitions of "professional," "educational," and "instructional" adopted by the Secretary in the Colby and Butler County decisions, and from the evidence presented, the school nurses employed by the Leavenworth School District #453 are "professional employees" of the District as that term is defined in K.S.A. 72-5413 et seq. As such, they shall have the right to participate in professional negotiation with the Board, through representatives of their own choosing, for the purpose of establishing, maintaining, protecting, or improving the terms and conditions of professional service. K.S.A. 72-5414.

Furthermore, as the evidence reveals, the school nurses have a sufficient community of interest with the members of the existing professional bargaining unit to be included among its members. However, because traditionally they have been excluded from the now existing unit, inclusion is not automatic, but must come as a result of an Armour-Globe type of election Butler County, at 117-118. Because the Leavenworth school nurses have already satisfied the requisite showing of interest for such an election, the Presiding Officer finds such an election should be conducted among the school nurses employed by the Leavenworth School District #453, to determine whether or not they wish to be included within the existing professional bargaining unit, along with the teaching faculty.

The Presiding Officer does hereby order a pre-election conference to determine the wording of the Questions on the ballot at the office of the Secretary of Human Resources, Employment Standards and Labor Relations, 512 W. 6th Avenue, Topeka, Kansas at 10:00 A.M. on the 18th day of September, 1995.

After the results of the election are in, the Presiding Officer will issue a further Order.

Entered this 17th day of August, 1995.


Lelyn J. Braun, Presiding Officer

NOTICE OF RIGHT TO REVIEW

This is not an Initial order but a determination of a procedural matter related to the filed petition. Pursuant to PERB policy established in Teamsters Union Local 795 vs. City of Wichita and Wichita Airport Authority, Case No. 75-UDC-1-1992 and 75-UDC-2-1993 (June 16, 1993), this order is intermediate in nature and not a proper subject for immediate review in accordance with K.S.A. 77-527. An appeal of this decision to the Secretary will not be timely until the presiding officer has ruled on the remaining issues in the case.

CERTIFICATE OF SERVICE

I, Sharon L. Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 17th day of **August, 1995**, a true and correct copy of the above and foregoing Intermediate Order Granting Election was served upon each of the parties in this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

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