

STATE OF KANSAS  
BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

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AFSCME Council 64, \*  
Complainant, \*  
vs. \* CASE NO: 75-CAE-3-1982  
Winfield State Hospital and Training \*  
Center, \*  
Respondent. \*

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ORDER

The above captioned case comes before the Public Employee Relations Board for consideration in its January 25, 1982 meeting. The case comes on petition of William Edgerly on behalf of certain employees of Winfield State Hospital and Training Center. The petitioner alleges violations of K.S.A. 75-4333 (b) (5) (6) by the employer Winfield State Hospital.

APPEARANCES

American Federation of State County and Municipal Employees (AFSCME) Council 64 appears by and through its counsel, Terry Watson, Attorney at Law.

Winfield State Hospital and Training Center, appears by and through its counsel Mr. Charles Hamm, General Counsel for Social and Rehabilitation Services.

PROCEEDINGS BEFORE THE BOARD

1. Petition filed November 18, 1981 by William Edgerly on behalf of certain employees of Winfield State Hospital and Training Center.
2. Petition filed with respondent November 19, 1981.
3. Answer to allegations received in the Public Employee Relations Board office November 30, 1981.
4. Answer of respondent filed with complainant on December 1, 1981.
5. On December 15, 1981 attorneys of record, Mr. Watson and Mr. Hamm, agree to stipulate to facts as contained in previously filed pleadings and request oral argument before Board in its regularly scheduled meeting of December 21, 1981.
6. Oral argument presented to Board by complainant and respondent on December, 21, 1981.
7. Board took matter under advisement and set case for further consideration on January 25, 1982.

FINDINGS OF FACTS

1. That AFSCME was selected as the representative of certain employees of Winfield State Hospital on June 10, 1981.
2. That the representatives of Winfield State Hospital and representatives of AFSCME met on September 29, 1981 and presented their initial meet and confer proposals.
3. That AFSCME presented proposals on shift overlap and duty free lunch during the September 29, 1981 meet and confer session.
4. That on October 28 and 29, 1981 the parties discussed the AFSCME proposals listed in finding of fact number three (3).
5. That Dr. Michael L. Dey, the Superintendent of Winfield State Hospital had been considering the elimination of shift overlap prior to the commencement of the meet and confer process.
6. That Dr. Michael L. Dey had participated in meet and confer sessions and was aware of the contents of the proposals cited in finding of fact number three (3).
7. That Dr. Michael L. Dey made changes in some employees work schedules effective November 2, 1981.
8. That the changes cited in finding of fact number seven (7) were in compliance with the union proposal on shift overlap.
9. That Dr. Michael L. Dey inquired as to the propriety of his actions to his superior in the Department of Social and Rehabilitation Services and Mr. Steve Goodman, Labor Conciliator of the Department of Human Resources.
10. That Mr. Steve Goodman, Labor Conciliator of the Department of Human Resources, corresponded with Dr. Dey on November 17, 1981 concerning a misunderstanding which must have occurred during their telephone conversation of October 30, 1981.
11. That the unilateral change in shift overlap was not rescinded as of the Public Employee Relations Board hearing date of December 21, 1981.
12. That the respondent has stipulated that the action of respondent was not taken with malice or evil design.

CONCLUSION OF LAW - DISCUSSION

The Public Employee Relations Board has been asked to rule that the employers act of unilateral implementation of a change in a mandatory negotiable term and condition of employment constitutes a per se violation of K.S.A. 75-4333 (b) (5) and (6). K.S.A. 75-4333 (b) (5) and (6) states:

- "(b) It shall be a prohibited practice for a public employer or its designated representative willfully to:
- (5) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required in section 7 (75-4327) of this act;
  - (6) Deny the rights accompanying certification or formal recognition granted in section 8 (75-4328) of this act;" (Emphasis added)

The Board has been asked to disregard the "willful" provision contained in the statute. The union has stipulated that Dr. Dey did not take action to implement change with malice or evil design. Rather the union argues that the mere changing of a mandatorily negotiable term and condition of employment in and of itself constitutes a violation of the Act.

The facts show that a proposal on shift overlap was placed on the meet and confer table by the union. Subsequently, Dr. Dey, as Superintendent of Winfield State Hospital and Training Center implemented a change in the shift overlap policy at the hospital. The change implemented was in concurrence with the proposal on the table.

Respondent argues that its action was tempered by inexperience or lack of knowledge of the meet and confer process and by advice given by an employee of the Public Employee Relations Board. It is undisputed that Dr. Dey was inexperienced, however, respondent admits that supervisory advice was sought. Mr. Goodman clarified his advice in his letter to Dr. Dey dated November 17, 1981. The decision not to rescind the unilaterally implemented change was made by Dr. Dey and his superiors sometime after November 18, 1981 and before December 21, 1981. Notwithstanding, however, the sequence of events after the change, the decision to implement the change does not square with the concept of meet and confer as contemplated by the statute.

The Board wonders how any employer can profess to be setting at the meet and confer table discussing, in good faith, a mandatorily negotiable term and condition of employment, while at the same time they are unilaterally implementing change on the very subject under consideration. Such an act demonstrates a complete lack of a desire to reach agreement via the meet and confer process. The action was taken with full knowledge that the subject was under discussion at the meet and confer table. Such action indicates an utter disregard for reaching agreement as contemplated by the statute.

The Board can not ignore the term "willfully" as specified by the statute. However, the employer was aware that the union intended to seek agreement on the subject of shift overlap. Therefore, the unilateral action of implementing change in this term and condition of employment demonstrates a knowing and willful violation of the employers obligation to meet and confer over the subject.

The Board finds the action of Winfield State Hospital and Training Center to constitute a willful violation of K.S.A. 75-4333 (b) (5) and (6) as alleged by complainant. K.S.A. 75-4323 (d) (1) states:

"(d) In addition to the authority provided in other sections, the board may:

(1) Establish procedures for the prevention of improper public employer and employee organization practices as provided in K.S.A. 1973 Supp. 75-4333, except that in the case of a claimed violation of paragraph (5) of subsection (b) or paragraph (3) of subsection (c) of such section, procedures shall provide only for an entering of an order directing the public agency or employee organization to meet and confer in good faith. The pendency of proceedings under this paragraph shall not be used as the basis to delay or interfere with determination of representation status pursuant to K.S.A. 1973 Supp. 75-4327 or with meeting and conferring."

Based upon this statute the Board may only enter an order directing Winfield State Hospital and Training Center to return to the meet and confer table and to enter into good faith meeting and conferring. However, K.S.A. 75-4333 (b) (6) refers to denying rights granted in K.S.A. 75-4328 which states:

"Recognition of right of employee organization to represent employees

(a) A public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances, and also shall extend the right to unchallenged representation status, consistent with subsection (d) of section 7 (75-4327), during the twelve (12) months following the date of certification or formal recognition." (Emphasis added)

The hospital denied this right to the union when they unilaterally implemented a change in a mandatorily negotiable term and condition of employment. Therefore, it is within the scope of the Public Employee Relations Board's jurisdiction to order appropriate relief for the unlawful act. Winfield State Hospital and Training Center is hereby ordered to rescind its unilateral implemented change in shift overlap and to enter into good faith meeting and conferring regarding shift overlap.

IT IS SO ORDERED THIS 26<sup>th</sup> DAY OF January, 1982, BY THE PUBLIC EMPLOYEE RELATIONS BOARD.

James J. Mangan, Chairman, PERB

Louisa Fletcher  
Louisa Fletcher, Member, PERB

Lee Ruggles  
Lee Ruggles, Member, PERB

Art Veach  
Art Veach, Member, PERB

"See Board Minutes of January 25, 1982"  
Donald Allegrucci, Member, PERB

1-26-82

I dissent as shown by separate  
order signed by me.

Jim Mangan

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

AFSCME Council 64

vs.

Case #75-CAE-3-1982

WINFIELD STATE HOSPITAL and  
TRAINING CENTER et al

O R D E R

On the 21st day of December the above matter came on before the Board.

Counsel for complainant and respondents are present, stipulated relative to the material evidence and argued the matter.

The Board after considering the evidence and arguments of counsel finds that respondents are not guilty of a prohibited practice as defined in KSA 75-4333 (b)(5) and (6). The Board's reasoning is as follows:

1. KSA 75-4333 in part reads as follows:

(a) The commission of any prohibited practice, as defined in this section, among other actions, shall constitute evidence of bad faith in meet and confer proceedings. (Emphasis added.)

(b) It shall be a prohibited practice for a public employer or its designated representative wilfully to: (Emphasis added.)

(5) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required in KSA 75-4327.

(6) Deny the rights accompanying certification or formal recognition granted in KSA 75-4328.

2. If the word wilfully were deleted from KSA 75-4333(b) the admitted unilateral act of the employer complained of in this matter and the timing thereof would constitute strong evidence of bad faith as stated in sub-section (a) and, standing alone

with/<sup>out</sup> extenuating circumstances, could very well be the basis of a finding that a prohibited act had been committed by the employer.

However, we do have the word "wilfully" in our statute and we are bound by the words of our Act. The meaning of a statute is gleaned from the words of the statute itself and only if that language is ambiguous can we look to extrinsic evidence for aid in construction. The word "wilfully" implies a wrongful motive. Complainant admits that the actions of Dr. Michael L. Dey were not malicious and it appears that the meet and confer process was new to the Winfield unit. Based upon the evidence presented we cannot find wilful conduct. However, it behooves respondents to become aware of the PERB Act and its relationship to respondents, their employers and their bargaining agents. There are many unilateral acts which may conclusively demonstrate an employer's lack of good faith in the sense that the conduct is utterly inconsistent with a sincere desire to meet and confer in good faith. The rights of employee organizations must not be denied.

3. Counsel for complainant forcefully argued that the acts complained of constitute bad faith per se and cited several Federal cases, one of which was Labor Board vs. Katz, 369 U.S. 736. The facts in that case involved unilateral acts of a private employer during negotiations with the bargaining agent of the employees and involved an interpretation of the National Labor Relations Act. The employer was charged with a violation of the duty to "bargain collectively" imposed by Sec. 8,(a)(5) of the NLRA in instituting changes regarding matters of mandatory bargaining under Sec. 8(d) (This section requires conferring in good faith.) without first consulting the bargaining agent with which it was then carrying on negotiations. On Page 747 of the opinion the U. S. Supreme Court stated:

...."Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct

bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of Sec. 8(a)(5), without finding the employer guilty of over-all subjective bad faith...."

However, the court went on to state that it did not fore-close the possibility that there might be circumstances which the Board could or should accept as justifying unilateral action.

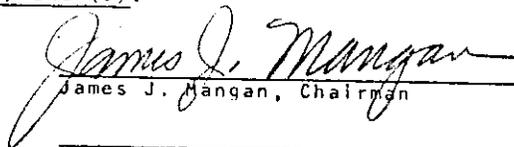
The NLRA does not contain the word "wilfully". However, the absence of good faith would include a wrongful motive.

In National Education Association vs. Board of Education, 212 KAN 741, the NEA claimed unilateral action of the Board evidenced bad faith per se. The court ruled as stated in Syllabus 8:

"Unilateral actions by a party to negotiations may be so utterly inconsistent with a sincere desire to reach agreement as to conclusively demonstrate a lack of any intention to negotiate 'In good faith'. Whether any particular conduct falls into that class is a question of fact to be determined in the first instance by the trial court in the light of surrounding circumstances."

Due to the surrounding circumstances in this matter we cannot find bad faith.

On this 25th day of January, 1982, it is the order of the Board that respondents are not guilty of a prohibited act as defined by KSA 75-4333 (b)(5) and (6).

  
James J. Mangano, Chairman

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Louisa Fletcher

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Art Veach

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Lee Ruggles