

STATE OF KANSAS

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

SERVICE EMPLOYEES' UNION)
LOCAL 513,)
Complainant,)
vs.)
CITY OF WICHITA, KANSAS,)
Respondent.)

CASE NO: 75-CAE-6-1986

ORDER

The instant case comes before the examiner on petition of Service Employees' Union Local 513 under the signature of Art J. Veach, Financial Secretary, Treasurer. The union alleges that the city has engaged in activities which violate the provisions of K.S.A. 75-4333 (b) (2), (5), and (6). This matter comes on before Jerry Powell the duly appointed hearing examiner for the Public Employee Relations Board.

APPEARANCES

This matter is before the Secretary on stipulations entered into on behalf of the parties by counsel.

For the Complainant: Richard Shull, Attorney at Law.

For the Respondent: Janell R. Jenkins, Attorney at Law.

STIPULATIONS OF FACT

1) On June 21, 1974, the Service Employees' Union - Local 513, was recognized by the Public Employee Relations Board of the State of Kansas as the authorized employee organization representing certain employees of the City of Wichita, Kansas.

2) Police employees of the City of Wichita, Kansas are represented by a separate organization, the Fraternal Order of Police (FOP), Lodge No. 5. (Certified on June 17, 1974)

3) Firefighters of the City of Wichita, Kansas are represented by a separate organization, the International Association of Firefighters (IAFF), Local #666. (Certified on October 22, 1974)

4) From 1974 to 1984 representatives of the Employer met and conferred with each of these three employee organizations separately and during that decade all memoranda of agreement were negotiated separately.

5) In the years during which the 1985 and 1986 agreements were negotiated there was a mutual agreement between the Employer and the three employee organizations to meet and confer jointly. The memoranda of agreement reached during those two years were negotiated jointly.

6) On May 21, 1986, the Employer representative informed the employee organizations that it no longer wished to negotiate jointly and that all meet and confer sessions would be held separately. The first meet and confer session between the Employer and the SEU - Local #513 was scheduled for June 9, 1986.

7) On June 9, 1986, the representative of the Employer, Ray Trail, arrived at the agreed location to begin negotiations. SEU representatives, including Business Agent, Art Veach, were present. However, also present at the bargaining table was Det. Randy Lawson, Vice-President of FOP - Lodge #5. Mr. Veach introduced Mr. Lawson as a resource person.

8) Mr. Trail objected to the presence of an FOP official at the meet and confer session and asked Mr. Veach to request that Det. Lawson leave. Mr. Veach refused to do so and, in turn, Mr. Trail discontinued the session.

9) On June 13, 1986, and June 20, 1986, the representative of the Employer and representatives of the SEU - Local #513 met and conferred regarding the 1987 contract. No representatives of the FOP were present. Mr. Veach advised Mr. Trail that his full committee was not present.

10) The ground rules orally agreed upon by the parties were, generally, (1) that the meetings were to be closed sessions, not open to the public or news media; (2) that there would be no coalition bargaining; (3) that formal proposals would be presented in writing; and (4) that each side would designate a chief negotiator.

CONCLUSION OF LAW AND ORDER

The union alleges that the city's representative Mr. Ray Trail violated the provisions of K.S.A. 75-4333 (b) (2), (5), and (6) when he discontinued the June 9, 1986 negotiations session between the union and the city. Stipulation number 8 clearly states that Mr. Trail's action was prompted by the union's refusal to exclude Det. Lawson from the negotiations session. Counsel for the union argues that the union has a statutory right to designate and pick its own bargaining committee which can include experts or resource persons from whatever field. Further the union argues that the city has attempted to dictate the makeup of the union's committee to the extent they refused to meet so long as Det. Lawson was present.

The city makes two defenses. First the city argues that although the union alleges (b) (2), (5), and (6) violations they only accuse the city of failing to meet and confer (b) (5). Secondly the city argues that Mr. Trail's action was proper since the city is only obligated to meet and confer with the effected public employees and their representatives. The unit over whose terms and conditions of employment the parties were meeting did not include Det. Lawson nor did Det. Lawson represent unit members. The city believes that Det. Lawson's presence in the SEU negotiations was contrary to the agreement to bargain three separate contracts with the police unit, the fire unit and the unit of other employees of the city.

The examiner shall first look to the provisions of K.S.A. 75-4333 (b) (2) and (6), as they relate to the facts.

K.S.A. 75-4333 (b) (2) states:

"(b) It shall be a prohibited practice for a public employer or its designated representative willfully to:

(2) Dominate, interfere or assist in the formation, existence, or administration of any employee organization."

There is no allegation that the city attempted to dominate the union or that they attempted to interfere or assist in the formation or existence of the union. One might question, however, whether the city attempted to interfere in the administration of the union as that relates to the selection process for negotiation team members. This interference hinges on the question of whether the city is required to meet and confer with any persons designated by the union or whether the city can rightfully refuse to meet when other than bargaining unit members or business agents are present. This question is the same question as is presented by the allegation of a (b) (5) violation. In other words a finding of a (b) (5) violation in this case will also necessitate a finding that the city attempted to interfere with the administration of the employee organization.

K.S.A. 75-4333 (b) (6) states:

"(b) It shall be a prohibited practice for a public employer or its designated representative willfully to:

(6) Deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328."

K.S.A. 75-4328 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 K.S.A. 75-4327, during the twelve (12) months following the date of certification or formal recognition."

There is again no allegation that the city attempted to negotiate with any union other than SEU or that the City issued any challenge to the representation status of SEU. Further the city did not attempt to deny SEU the right to represent employees within the bargaining unit except as that right might relate to the one incident which again hinges on the legal conclusion to the

question presented under the (b) (5) allegation. However, a finding of a (b) (5) violation in this factual situation might not necessarily require a finding of a (b) (6) violation. Rather it must be shown that the bad faith act was designed to deny the right of the organization to represent employees. This required "willful" intent to deny is contrasted to the "willful" act of telling a union who they may or may not have on their bargaining team.

It appears to the examiner that he must first rule on the question of a (b) (5) violation and then either dismiss the complaint or look further to see if a (b) (2) and a (b) (6) violation also occurred.

K.S.A. 75-4333 (b) (5) 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 K.S.A. 75-4327."

The applicable section of K.S.A. 75-4327 is then subsection (b) which states:

"Where an employee organization has been certified by the board as representing a majority of the employees in an appropriate unit, or recognized formally by the public employer pursuant to the provisions of this act, the appropriate employer shall meet and confer in good faith with such employee organization in the determination of conditions of employment of the public employees as provided in this act, and may enter into a memorandum of agreement with such recognized employee organization." (Emphasis Added)

This section basically states that the employer shall meet and confer in good faith with the employee organization. The section gives no hint of the legislative intent of the definition of "such employee organization". K.S.A. 75-4322 (i) and (j) define employee organization and recognized employee organization without listing the persons or types of persons who may serve as representatives. Further the terms "recognized" or "certified" employee organization are used throughout the Public Employer-Employee Relations Act without a clear delineation of the persons or types of persons who might serve as "representatives of the employee organization".

Business Agent is defined at K.S.A. 75-4322 (h) but one must note that this definition relates only to full-time officials of an employee organization. This definition uses the term "act" or attempts to "act" but does not specifically use the term "represent".

Let us now contrast this failure to define "representatives of an employee organization" with the definition found at K.S.A. 75-4322 (h), "representative of the public employer".

K.S.A. 75-4322 (h) states:

"'Representative of the public agency' means the chief executive officer of the public employer or his or her designee, except when the governing body provides otherwise, and except in the case of the state of Kansas and its state agencies. Such chief executive shall be for counties, the chairman of the board of county commissioners; for cities, the mayor, city manager of city superintendent; for school districts, the president of the board of education; and for other local units, such similar elected or appointed officer. In the case of the state of Kansas and its state agencies, 'representative of the public employer' means a team of persons, the head of which shall be a person designated by the secretary of administration and the heads of the state agency or state agencies involved or one person designated by each such state agency head." (Emphasis added).

The examiner notes that the Kansas Legislature saw fit to name the representatives who are to meet and confer in good faith on behalf of the public agency. Further it is noted that the Legislature clearly gave the public agency the right to designate anyone to serve as their representative. There are no qualifications or limitations on the public agency representative as witness the use of the language "or his or her designee". The Chief Executive Officer is therefore free to designate anyone to represent the agency.

The examiner cannot believe that the Legislature intended to limit the employee organization relative to the types of persons who could serve as their representatives. If the Legislature had so intended they would have so stated. Thus the examiner cannot rule that the city representative had any right, founded in statute, to refuse to meet and confer with anyone designated by the union as a representative or resource person.

Stipulation number six clearly show that the city no longer desired to meet jointly with representatives of the three bargaining units. Stipulation #10 shows that SEU agreed within the ground rules to bargain in a manner other than the coalition of years past. Counsel for the city states in her brief; "It was clearly the intent of the employer to negotiate separately for the 1987 contracts. To negotiate separately meant that the three employee organizations were not to participate in each other's negotiations." The examiner suggests that perhaps the city's interpretation of the ground rule as stated in the previous statement, was not the union's interpretation of that ground rule. The examiner cannot arrive at such an interpretation from the ordinary language found in stipulation number 10. Further the examiner might question the meaning of the term "participate". Does this term "participate" mean, attend, speak, provide information, or some combination thereof? At very least the examiner can find no basis within the ground rule for excusing the city's behavior in discontinuing the negotiations session.

The examiner next looks at the factual situation from purely a logical viewpoint. That is, what could transpire in a negotiations session which could not then be transmitted by Mr. Veach or other public employees within the unit to the representatives of the police or fire units? Certainly there are no statutory restraints disallowing Mr. Veach's communication with other bargaining unit representatives. Therefore he could relate to those representatives anything which might be discussed in negotiations with the bargaining unit he represented. These revelations would provide the same end result as would the presences of the police or fire unit representatives setting through the SEU bargaining session. There appears to be no harm to the City by Det. Lawson's presence in the SEU bargaining session which could not otherwise occur. Conversely, it appears that the only possible harm which might occur by Det. Lawson's presences could befall the union. That is, the detective's presence might cause the city to make less of an offer to SEU if they could not afford to make the same or a greater offer to the police.

The above line of reasoning is based upon the presumption that the union did not intend to negotiate in a coalition manner. It is impossible to judge this intent since the city discontinued negotiations prior to any dialogue between the parties relative to contract terms.

In sum, the examiner finds nothing in the statute to limit the persons who might serve as representatives of the employee organization during negotiations. "Representatives of the public agency" is specifically defined by statute at K.S.A. 75-4322 (h). It is logical to assume that the Legislature would have also defined "representatives of the employee organization" if the intent was to place limitations on an organization. Furthermore, the above cited statute gives the chief executive officer of the public agency the right to designate anyone as the representative of the public agency. It seems that the employee organization should have the same right in designating their representatives. The examiner finds nothing in the ground rules which limits either parties' right to designate their representatives.

The city's act, then, of unilaterally discontinuing the negotiations session because of Det. Lawson's presence, was not within their statutory rights. This act was based solely upon the fact that Lawson was present and certainly does not indicate a good faith effort to meet and confer with the union. The examiner recognizes the city's position and interpretation of the ground rules. However, the stipulated facts state that the City's representative "asked Mr. Veach to request that Det. Lawson leave". When Mr. Veach refused to make such a request the city's representative discontinued the session. The examiner submits that good faith bargaining contemplates more than taking a position and walking out if that position is not adopted by the other party. There is certainly room for discussion of such issues and the statute provides a forum for resolution of these issues. One forum which could have been utilized by the parties was to make joint inquiry of the Public Employee Relations Board.

No such inquiry was made. The examiner can only speculate what occurred between the parties except for the facts as specified at stipulated fact number 8.

K.S.A. 75-4333 (b) states in part;

"It shall be a prohibited practice for a public employer or its designated representative willfully to:"

The use of the term "willfully" within the statute requires that any act which is not within the bounds of "good faith", be taken in a knowing manner designed with an intent to harm the other party.

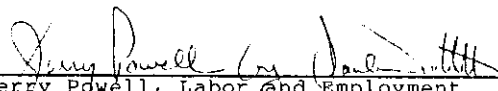
The facts reveal that the City's representative made his interpretation of the ground rules and issued an ultimatum to the union. He made no effort to resolve the question short of adherence by the union to his position. When the union would not acquiesce to his demand he simply discontinued the session. This act can only be construed by the examiner as punishment for the union's failure to continue the meetings in the manner desired by the city. As such the city has willfully failed to meet and confer in good faith with the employee organization thus violating the provisions of K.S.A. 75-4333 (b) (5). Further the act as described violates the provisions of K.S.A. 75-4333 (b) (2) inasmuch as the City has willfully interfered in the administration of the employee organization.

There are no facts shown which support the finding of a violation of K.S.A. 75-4330 (b) (6). That is, nothing shows a scheme, plan, or even a desire by the city to deny bargaining rights to the union. Rather this denial of certification rights was a by product of the willful (b) (5) violation. When the union subsequently gave in to the City's demand of removing Det. Lawson from the sessions, the City met with union representatives.

It is therefore the recommendation of the hearing examiner that the City be found to have violated the provisions of K.S.A. 75-4333 (b) (2) and (5) and that the allegation of a violation of K.S.A. 75-4333 (b) (6) be dismissed. Further the City is ordered to cease and desist such actions and to participate in all meet and confer sessions with the certified employee organization

without regard to the make up of the union bargaining committee.

IT IS SO RECOMMENDED THIS 30th DAY OF December,
1986.



Jerry Powell, Labor and Employment
Standards Administrator
512 West Sixth Street
Topeka, Kansas 66603

The hearing examiner's report and recommended findings are hereby
approved and adopted, as amended, as a final order of the Board.

IT IS SO ORDERED THIS 5th DAY OF February, 1987, BY THE
PUBLIC EMPLOYEE RELATIONS BOARD.

Robert L. Kennedy
Robert L. Kennedy, Chairman

Mayveedis R. Jamison
Mayveedis R. Jamison, PERB Member

Art J. Veach, PERB Member

Lee Ruggles
Lee Ruggles, PERB Member