

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

Auburn-Washburn NEA,
Petitioner,

v.

Board of Education of
Unified School District No. 437,
Auburn-Washburn,
Respondent.

Professional Negotiations Act:
Prohibited Practice Complaint
No. 72-CAE-13-1995

Pursuant to K.S.A. 72-5413 et seq.
and K.S.A. 77-501 et seq.

INITIAL ORDER

On the 22nd day of August, 1995, this matter came on for a formal hearing in Topeka, Kansas before Don Doesken, presiding officer.

Petitioner Auburn-Washburn NEA appeared by David Schauner, counsel, and called Howard Shuler, Audrey Roberts, Jennifer Spencer, Linda Klem, and James Marchello as witnesses. Respondent USD 437 appeared by William Enright, counsel, and called Howard Shuler as a witness.

After the hearing was completed, a transcript was prepared, and the parties submitted their arguments and authorities. The Petitioner filed a Brief, which was received September 29, 1995, and the Respondent filed Proposed Findings of Fact and Conclusions of Law, which were received October 4, 1995.

Question Presented

Whether Respondent committed a prohibited practice in violation of K.S.A. 72-5430(b)(2), (b)(5) or (b)(6) when it created a School Employee Compensation Task Force, and invited individual teachers to serve on it.

72-CAE-13-1995

Findings of Fact

1. Petitioner Auburn-Washburn NEA is the exclusive bargaining representative of the professional employees of Unified School District No. 437.

2. Respondent is the elected school board which administers the public schools in Unified School District No. 437, Auburn-Washburn.

3. Under the Professional Negotiations Act K.S.A. 72-5413 et seq., Petitioner and Respondent are required to negotiate in good faith with each other about the terms and conditions of professional service of the teachers in the school district, and they must avoid the "prohibited practices" described in K.S.A. 72-5430, which are considered evidence of bad faith in professional negotiations.

4. Petitioner contends in its Complaint filed January 26, 1995 that the Respondent committed a willful prohibited practice in violation of K.S.A. 72-5430(b)(2), (b)(5) and (b)(6), when it recruited individual teachers to participate in a School Employee Compensation Task Force (Petitioner's Complaint, ¶ 2 h).

Petitioner contends that the direct solicitation of teachers to participate in the Task force was an attempt by the school administration to bypass the Petitioner as the exclusive bargaining representative of the teachers in the bargaining unit. Petitioner has asked that the Respondent be enjoined from soliciting members of the bargaining unit to serve on any such task force, and that the Respondent be enjoined from using any of

the work product of the task force in professional negotiations (Complaint, ¶ 4).

5. Respondent admits that it formed the School Employees Compensation Task Force without first negotiating the creation of that task force with the Petitioner (Respondent's Answer, ¶ 2 d; Testimony of Superintendent Shuler, Tr. p.30). However, Respondent contends the sole purpose of the task force was to gain information (Respondent's Answer, ¶ 2 g). Respondent denies that the creation or operation of the task force was a prohibited practice under K.S.A. 72-5430(b)(2),(b)(5) or (b)(6) (Respondent's Answer, ¶ 2 h).

6. The stated purpose of the School Employee Compensation Task Force was to provide a comprehensive review of all employee compensation by job category for all employees of the Auburn-Washburn School District. The task force was charged with the responsibility to collect, organize, and evaluate information from other school districts for each job category, and to prepare a report indicating the strengths and weaknesses of the compensation paid by the Auburn-Washburn school district in each category (Task Force Mission Statement, attached as Exhibit "A" to Respondent's Answer) .

7. The task force was split into two groups. Task Force A participants were asked to compile information about teacher salaries in other districts of similar size, enrollment, and per-pupil expenditure. Task Force B participants collected similar

information about compensation paid to administrators (Testimony of Superintendent Shuler, Tr. p. 26).

8. With regard to teacher salaries and benefits, the information to be collected by Task Force A was the same type of information that had been used in the past by the Petitioner and the Respondent when arguing their cause to a fact-finder (Testimony of Superintendent Shuler, Tr. pp 17-24; Testimony of Capital Uniserv Director James Marchello, Tr. pp. 93-95).

9. The school administration was aware that the information collected by the task force might be useful at the bargaining table during teacher-school board negotiations. Respondent states at Paragraph 2(e) of its Answer that: "While the information obtained through the task force is not specifically designed with negotiations in mind, such information will obviously not be ignored by 437 [the school district] or the Association [the teachers' organization]." In addition, the task force was set up by the school board at a time when the parties were at the bargaining table and were getting ready to go to fact finding (Testimony of Linda Klem, Tr. p 66-67).

10. The information collected by the task force was information which was a matter of public record (Tr. pp.108-115). As such, the information could have easily been assembled by school administrators. There was no need to involve individual teachers in the collection of the information.

11. Two teachers volunteered to participate in the Task Force because they needed a project for their college course on educational finance (Tr. pp. 32-33; 46, 54-56). Other teachers were asked to participate because they had been Teachers of the Year (Testimony of Supt. Shuler, Tr. pp. 31-32; Testimony of Linda Klem, Tr. p. 65-66).

12. Linda Klem and Betsy Wiens were co-presidents of Auburn-Washburn NEA (Tr. p. 61). Linda Klem was asked to participate in the salary task force because she was a Teacher of the Year, and possibly also because she was a co-president of Auburn-Washburn NEA (Testimony of Superintendent Shuler, Tr. pp. 31-32). However the Auburn-Washburn NEA bargaining team was never invited to participate in the salary survey (Testimony of Superintendent Shuler, Tr. pp.42-44).

13. When informed of the purpose of the salary task force, Linda Klem advised teachers not to participate, and she expressed disappointment to Superintendent Shuler that the Washburn-Auburn NEA negotiating team had not been invited to participate jointly with the school board in the salary survey (Testimony of Linda Klem, Tr. pp. 63-64, 67-68). Later, the Washburn-Auburn NEA Executive Council voted to file this prohibited practice charge (Testimony of James Marchello, Tr. pp.91-92).

14. The salary survey task force did not engage in any professional negotiations with the school board or its representatives. There is no evidence in the record of any give-and-take negotiation sessions between the task force and the school board.

Conclusions of Law

1. The specific prohibited practices which have been alleged in this case are defined as follows in K.S.A. 72-5430(b):

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

(2) dominate, interfere or assist in the formation, existence, or administration of any professional employees' organization;

(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;

(6) deny the rights accompanying recognition of a professional employees' organization which are granted in K.S.A. 72-5415; ... "

2. The Petitioner has the burden of proving its allegations by a preponderance of the evidence.

3. The Petitioner has alleged in part that the School Employee Task Force was a competing "professional employees' organization" and that the Respondent's domination of that organization was a violation of K.S.A. 72-5430(b)(2). However, K.S.A. 72-5413(e) defines "professional employees' organizations" as follows:

"Professional employees' organizations" means any one or more organizations, agencies, committees, councils or *groups of any kind in which professional employees participate*, and which exists for the purpose, *in whole or in part*, of engaging in professional negotiations with boards of education with

respect to the terms and conditions of professional service." (Emphasis added).

K.S.A. 72-5413(g) in turn defines "professional negotiation" as follows:

"Professional negotiation" means meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service."

4. Although it is true that the Task Force Report included information which might prove useful at the bargaining table, there is no evidence in the record that the task force actually performed any function other than the collection of information. The presiding officer cannot conclude that the task force was a competing "professional employees' organization", or that there was a violation of K.S.A. 72-5430(b)(2), because there is no evidence in the record of any meetings, conferences, consultations, or negotiations between the task force and the school administrators that were undertaken for the purpose of reaching an agreement.

5. To prove its allegation under K.S.A. 72-5430(b)(5) that the school board willfully "refused to negotiate in good faith", the Petitioner must show that the Task Force was formed in order to avoid professional negotiations. However, the record shows the school board's negotiating team was engaged in meaningful negotiations with the Petitioner's negotiating team at all times while the Task Force was carrying out its information-gathering mission. There was nothing about the way the task force was

formed or operated that suggests an intent to interfere with or avoid negotiations at the bargaining table. There is also no evidence that the task force actually had an effect of any kind upon the negotiations at the bargaining table. As such, this portion of the complaint must fail for lack of evidence.

6. To prove its allegation under K.S.A. 72-5430(b)(6), the Petitioner must show that the Respondent willfully denied Petitioner the rights which accompany recognition under K.S.A. 72-5415. Those rights are described in K.S.A. 72-5415 as follows:

K.S.A. 72-5415. Exclusive representation of negotiating units; any employee or group may present its position or proposal.

(a) When a representative is designated or selected for the purposes of professional negotiation by the majority of the professional employees in an appropriate negotiating unit, such representative shall be the exclusive representative of all the professional employees in the unit for such purpose.

(b) Nothing in this act or in acts amendatory thereof or supplemental thereto shall be construed to prevent professional employees, individually or collectively, from presenting or making known their positions or proposals or both to a board of education, a superintendent of schools or other chief executive officer employed by a board of education.

7. The evidence on this question of exclusivity is as follows: The school board asked individual teachers to participate in a salary task force, which was clearly intended to assist the board in developing a bargaining position on that subject. The information to be collected was a matter of public record, and could have been collected by school administrators without any assistance from individual teachers. Nevertheless, the school

board chose to ask influential teachers (Teachers of the Year) to participate in the survey, while completely failing to extend a similar invitation to the Auburn-Washburn NEA bargaining team.

It appears to this presiding officer that the Task Force was used, at least in part, as a political tool, not only to collect information, but also to subtly influence (or "co-opt") individual teachers, by encouraging them to participate in, and come over to, the Respondent's side of the bargaining table. It should be emphasized that the task force was formed: (1) while bargaining was going on; (2) without the prior approval of the Auburn-Washburn NEA; and (3) for the purpose of developing strategic information about teacher salaries and benefits which could be used later at the bargaining table.

As such, the creation of the task force was a direct challenge to, and a denial of, the exclusive right of Auburn-Washburn NEA to represent all of the teachers in the district in professional negotiations. To be sure, the school board's challenge was blunted to a considerable degree when Auburn-Washburn NEA officials advised teachers not to participate in the task force. Nevertheless, it was a prohibited practice for school administrators to bypass the teachers' bargaining team and to solicit input directly from individual teachers on the subject of teacher salaries and benefits.

Teachers do have the right under K.S.A. 72-5415(b), either individually or collectively, to make their positions known to their board of education or to their school

superintendent. However, school administrators do not have the right to confer directly with teachers on the subject of their salary and benefits. Bypassing the teachers' exclusive bargaining representative is a prohibited practice in violation of K.S.A. 72-5430(b)(6). The school board may not ignore the exclusive right of Auburn-Washburn NEA to represent the teachers in these matter.

Remedy

The Respondent U.S.D. 437 School Board is hereby directed to cease and desist from inviting individual teachers to participate in any teacher salary or benefit surveys. Since the results of such surveys are likely to be used in professional negotiations, such invitations should be directed to the Auburn-Washburn NEA as the exclusive bargaining representative, rather than to individual teachers.

However, under the circumstances of this case, the presiding officer declines to prohibit either party from using the results of this particular task force survey in professional negotiations. The information speaks for itself, can be verified and updated by the parties at the bargaining table, and may be of some use to the parties as they develop their bargaining positions.

IT IS SO ORDERED this 27th day of February, 1996.



Don Doesken, Presiding Officer

Notice of Right to Review

This is an Initial Order issued by a presiding officer pursuant to K.S.A. 77-526. This order will become a Final Order pursuant to K.S.A. 77-530 unless reviewed by the Secretary of Human Resources pursuant to K.S.A. 77-527.

Any party seeking review of this order must file a Petition for Review with the office of the Secretary of Human Resources within 18 days after the mailing of this order, or by the close of business on 18th, March _____, 1996.

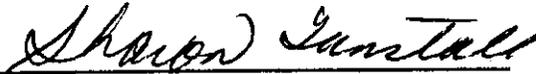
Certificate of Service

I, Sharon Tunstall, do hereby certify that on this 28th day of February, 1996 true and correct copies of the foregoing Initial Order were deposited in building mail and in the United States Mail, first-class, postage pre-paid, addressed to:

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