

STATE OF KANSAS
BEFORE THE SECRETARY OF HUMAN RESOURCES

Santa Fe Trail Education Association, *
Complainant, *
vs. *
Board of Education of U.S.D. 434, *
Carbondale, Kansas, *
Respondent. *

CASE NO: 72-CAE-26-1982

ORDER

Comes now this 18th day of January, 1983 the above captioned matter for consideration by the Secretary of Human Resources. This case comes before the Secretary on petition of Santa Fe Trail Education Association alleging violations by Unified School District 434 of K.S.A. 72-5430 (b), (1), (3), (5), (6) and (7).

PROCEEDINGS BEFORE THE SECRETARY

1. Petition filed June 8, 1982 by Paul Harrison on behalf of Julie McNickle alleging violations of K.S.A. 72-5430 (b), (1), (3), (5), (6) and (7) by U.S.D. 434.
2. Answer filed June 17, 1982 by Fred W. Rausch, Jr. on behalf of U.S.D. 434.
3. Motion to Dismiss filed on July 23, 1982 by respondent U.S.D. 434.
4. Answer to Motion to Dismiss filed on July 26, 1982 by Paul Harrison.
5. Pre-hearing conference held on August 16, 1982 in Topeka, Kansas.
6. During the pre-hearing conference referenced in proceeding number five (#5), the parties agreed to submit the case to the Secretary for determination on stipulated facts rather than to hold a formal hearing.
7. Stipulations of fact submitted by Paul Harrison on August 30, 1982.
8. Stipulations of fact submitted by Fred Rausch, Jr. on September 14, 1982.

72-CAE-26-1982

9. Stipulations of fact submitted by Fred Rausch, Jr. on September 14, 1982 were accepted by Santa Fe Trail Education Association per Paul Harrison on September 21, 1982.
10. Petitioner's brief received on October 14, 1982.
11. Respondent's brief received on November 5, 1982.
12. Petitioner's rebuttal brief received on November 16, 1982.

FINDINGS OF FACT

The attached stipulations of fact are herein incorporated as findings by the Secretary of the Department of Human Resources.

CONCLUSIONS OF LAW - DISCUSSION

By agreement of the parties, the Secretary has not conducted a hearing into the factual matter presented in this case. The parties have stipulated to facts and have raised several questions of law for the Secretary to address.

The instant case raises a preliminary questions of law the Secretary feels compelled to address prior to ruling on the alleged prohibited practice. This question relates to the authority of the Secretary to grant relief once it has been established that a prohibited practice has been committed. More specifically the Respondent argues that the Legislature has exclusively vested the authority with the courts to compel parties to participate in arbitration pursuant to a contract. Respondent relies on K.S.A. 72-5424 (b) as the basis for his argument. Respondent dismisses K.S.A. 72-5430a (b) as being overly broad in its conferring of remedial authority to the Secretary. The Secretary recognizes that he is without authority to grant relief contrary to another Kansas statute. However, K.S.A. 72-5424 (b) does not expressly reserve to court the right to order arbitration pursuant to a negotiated agreement. Rather K.S.A. 72-5424 (b) allows a party to seek relief without having to prove that a prohibited practice has occurred. Use of the term "may" in K.S.A. 72-5424 (b) coupled with the language found at K.S.A. 72-5430 (b) (7), K.S.A. 72-5430 (c) (4) and K.S.A. 72-5430a (b), grants either party two options for enforcing arbitration provisions in a contract. Therefore, the Secretary must conclude that it is within his authority to order the parties to proceed to arbitration if a willful violation of K.S.A. 72-5430 (b) (7) or (c) (4) has occurred.

Petitioner argues that the second sentence under Article 28 provides for "the initiation of grievances relating to Article 28 at Step 3 of the grievance procedure rather than Step 1 and, further as waiving the requirement that the grievance form in Article 4 be filled out prior to the initiation of an appeal. Essentially, the second sentence of Article 28 provides for an advance-step filing of grievances under Article 28 by means of a written memorandum rather than the use of the grievance form".

The petitioner could have submitted the above question to an arbitrator by simply grieving the district's failure to proceed to arbitration. Stated another way, the district and petitioner have a dispute over the interpretation of the second sentence of Article 28 as it relates to Article 4. Such questions are most properly submitted to an arbitrator via the grievance procedure contained in the negotiated agreement. The agreement does not preclude either party, however, from bringing a charge of prohibited practice to the Secretary. It appears that Petitioner has chosen to bring the charge of prohibited practice to the Secretary rather than to grieve the dispute over the interpretation of the Memorandum of Agreement. It now becomes the duty of the Secretary to look to these provisions in making his determination relating to the prohibited practice charge.

Petitioner has alleged violations of K.S.A.72-5430 (b), (1), (3), (5), (6) and (7). K.S.A. 72-5430 (b) states:

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

(1) Interfere with, restrain or coerce professional employees in the exercise of rights granted in K.S.A. 72-5414;

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

(3) discriminate in regard to hiring or any term or condition of employment to encourage or discourage membership in any professional employees' organization;

(4) discharge or discriminate against any professional employee because such profes-

sional employee has filed any affidavit, petition or complaint or given any information or testimony under this act or because such professional employee has formed, joined or chosen to be represented by any professional employees' organization;

(5) refuse to negotiate in good faith with representative 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;

(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; or..."

While Petitioner has cited violations of subsections (b) (1), (b) (3), (b) (5) and (b) (6), he argues a (b) (7) violation and seems to indicate that with a finding of a (b) (7) violation the other violations occur by implication. A close reading of the above cited subsections of K.S.A. 72-5430 leads the Secretary to the following conclusions. Subsection (b) (1) speaks to an employee's free choice to form, join, or participate in union activities including the maintenance and protection of terms and conditions of employment. One procedure for maintaining and protecting terms and conditions of employment would be through the good faith use of a negotiated grievance procedure. One can conclude, then, that a finding of a (b) (7) violation necessarily implies a (b) (1) violation.

K.S.A. 72-5430 (b) (3) provides for management's actions to be motivated by encouragement or discouragement of membership in a professional employees' organization. The Secretary finds nothing in the record showing Ms. McNickel's status as a member of the association or that Ms. McNickel was treated in any different manner than other employees. Therefore, the Secretary must rule that no evidence exists to support the finding of a K.S.A. 72-5430 (b) (3) violation.

K.S.A. 72-5430 (b) (5) speaks to a refusal to negotiate in good faith. While one might argue that a contract violation evidences bad faith in the negotiations process, the Secretary does not hold such argument to be valid except under very specific circumstances. For example, one might show that there was never any intent by a party to adhere to contractual provisions. The unilateral scrapping of a negotiated agreement would also exemplify bad faith negotiations. Allegations in the instant case do not, however, support a finding of a (b) (5) violation. Additionally, the Secretary has previously ruled that an individual employee has no standing to allege a violation of K.S.A. 72-5430 (b) (5).

K.S.A. 72-5430 (b) (6) speaks to the exclusivity of an employee organization to represent employees in an appropriate negotiating unit. The Secretary finds nothing in the record to support a finding of a (b) (6) violation.

K.S.A. 72-5430 (b) (7) makes it a prohibited practice for an employer to willfully refuse to participate in arbitration pursuant to an agreement.

The question to be answered by the Secretary then is whether the respondent willfully refused to participate, in good faith, in arbitration pursuant to an agreement. There is no doubt that an agreement exists which provides for arbitration of grievances. The facts also show that Ms. McNickle, through her agent Paul Harrison, requested to take her "grievance" to arbitration as provided by the agreement. The employer refused to proceed to arbitration saying that Ms. McNickle's "problem" was not a proper grievance thus not subject to the arbitration provision.

In issuing this ruling the Secretary concurs with both parties that he cannot look to the merit of the alleged grievance. The Secretary must, however, in some manner determine if the alleged grievance is, in fact, a proper grievance and whether the process outlined in the agreement has been followed. Without answering at least one of the above questions it would be impossible for the Secretary to rule on the commission of a prohibited practice.

The agreement in evidence provides in part:

ARTICLE 4. GRIEVANCE PROCEDURE

"A. Definitions

1. Grievance: A complaint by a teacher or a

group of teachers based on an alleged violation, misinterpretation or misapplication of the negotiated agreement."

"C. Procedure

1. Level One.

To initiate the grievance procedure the aggrieved person must within twenty (20) school days of his becoming aware of the alleged violation of the agreement, first discuss the problem with his principal or other immediate superior."...

"2. Level Two

(a) If the aggrieved person is not satisfied with the disposition of the grievance at Level One, ...he may continue the grievance to Level Two. To do so, he must within ten (10) school days, file the grievance on the grievance form with his principal or other immediate superior." (Emphasis added)

"4. Level Four

(a) If the aggrieved person (teacher) is not satisfied with the disposition of his grievance at Level Three, he may request in writing that the Association submit his grievance to arbitration...
If any question arises as to arbitrability, such question will first be ruled upon by the arbitrator selected to hear the dispute."

ARTICLE 28. DISCIPLINE

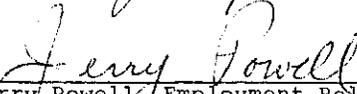
"Any teacher who believes he has been unfairly or improperly disciplined by his immediate supervisor or principal may appeal such action to the superintendent. Such appeal shall be in writing and shall give full details of the disciplinary action about which the teacher is complaining and shall be delivered to the Clerk of the Board within ten school days following the imposition of such discipline."

There is no doubt that Ms. McNickle or someone acting on her behalf chose to appeal the November, 1981 disciplinary action pursuant to the provisions of Article 28 of the labor agreement. The grievance form was not filed until February 5, 1982 and states the date of the cause of the grievance to be November 25, 1981. Ms. McNickel was aware of the November, 1981 disciplinary action as shown by her choice on December 10, 1981 to appeal said action pursuant to Article 28 of the agreement. Stipulation of fact number seven (7) admits that Ms. McNickel received the disciplinary letter of respondent on September 25, 1982. Level one and level two of the grievance procedure allows thirty (30) days from the date the grievant becomes aware of an occurrence for a grievance to be filed. By any calculation then, the "grievance" was untimely thus raising a good faith doubt that the employer was under any obligation to proceed with the "grievance" as it was filed on February 5, 1982.

As mentioned earlier in this opinion, petitioner has argued that Article 28 of the agreement somehow provides for the initiation of grievances, relating to Article 28, at Step Three of the grievance procedure. The Secretary finds nothing in Article 4 or Article 28 to support this argument. The Secretary concludes that an employee may choose to utilize the provisions of Article 4, or he might choose to utilize both Article 4 and Article 28. Although the choice rests with the employee, nothing in the agreement allows an employee to commence one procedure then switch to the other. Ms. McNickle made her choice and proceeded to appeal under Article 28. She made no effort to grieve, pursuant to the grievance procedure, either the outcome of the appeal procedure found in Article 28 or the district's refusal to proceed to arbitration. Rather she or her representatives chose to file an untimely grievance of the disciplinary action on February 5, 1982. It, therefore, appears that the Respondent school district was well within its rights to refuse to arbitrate a matter not properly taken through the established grievance procedure.

The Secretary orders that 72-CAE-26-1982 be dismissed in its entirety.

IT IS SO ORDERED THIS 18th DAY OF January, 1983.



Jerry Powell, Employment Relations
Administrator, (Designee for the
Secretary of Human Resources)

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BEFORE THE SECRETARY OF HUMAN RESOURCES

AUG 30 '82

In the Matter of)
 Santa Fe Trail Education Association)
 v.)
 Board of Education of U.S.D. 434)

72-CAE-26-1982)
 KANSAS DEPARTMENT)
 OF HUMAN RESOURCES)

PROPOSED STIPULATIONS OF FACT

1. That the Board of Education of U.S.D. 434 is the duly authorized employer of professional employees in U.S.D. 434;
2. That the Santa Fe Trail Education Association is the duly recognized exclusive representative of professional employees in U.S.D. 434;
3. That Santa Fe Trail Education Association and the Board of Education had entered into a negotiated agreement on terms and conditions of professional service for 1981-82; (exhibit A)
4. That said negotiated agreement contained Article 4, Grievance Procedure, which includes a provision for binding arbitration of grievances; (Exhibit A)
5. That said negotiated agreement contains Article 28, Employer Discipline, which includes a procedure for appealing disciplinary actions; (Exhibit A)
6. That Julie McNickle was a professional employee in U.S.D. 434 during 1981-82;
7. That Ms. Nickle received a letter of reprimand from Lynn Smith on Ncvember 25, 1981; (Exhibit B).
8. That Ms. McNickle appealed said letter of reprimand through the procedure outlined in Article 28; (Exhibit C)
9. That a meeting was held to discuss Ms. McNickle's appeal on January 7, 1982;
10. That Ms. McNickle's appeal was denied;
11. That Ms. McNickle requested S.F.T.E.A. to take the matter to binding arbitration pursuant to Article 4; (Exhibit D)
12. That S.F.T.E.A. notified the B.O.E. of its demand for arbitration on February 5, 1982; (Exhibit E)

13. That the B.O.E. refused to proceed to arbitration;
(Exhibit F)

14. That S.F.T.E.A. renewed its demand for arbitration on
February 16, 1982; (Exhibit G)

15. That the B.O.E. again refused; (Exhibit H)

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Respectfully submitted,
KANSAS DEPARTMENT
OF HUMAN RESOURCES



Paul R. Harrison, Director
Sunflower UniServ District/KNEA/NEA
P.O. Box 409 116½ S. Main
Ottawa, Kansas 66067
913)242-5550
Representing Petitioner

CERTIFICATE OF MAILING

I certify that I mailed the original of the above and foregoing Proposed Stipulations of Fact by United States Mail, certified mail prepaid on the 27th day of August, 1982, addressed to Jerry Powell, Kansas Department of Human Resources, Labor-Management Relations and Employment Standards, 512 West Sixth, Topeka, Kansas 66603-3178 and a copy of the above and foregoing Proposed Stipulations of Fact by United States Mail, first class postage prepaid on the 27th day of August, 1982, addressed to Fred Rausch, Jr., Attorney and Counselor at Law, Suite 202, Ambassadors Building, 220 W. 33rd St. (White Lakes), Topeka, Kansas 66611.



Paul R. Harrison

In the Matter of)
Santa Fe Trail Education Association)
)
)
Board of Education of U.S.D. 434)

SEP 14 '82

72-CAE-26-1982

KANSAS DEPARTMENT
OF HUMAN RESOURCES

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2. That the Santa Fe Trail Education Association is the duly recognized exclusive representative of professional employees in U.S.D. 434;
3. That Santa Fe Trail Education Association and the Board of Education had entered into a negotiated agreement on terms and conditions of professional service for 1981-82; (exhibit A)
4. That said negotiated agreement contained Article 4, Grievance Procedure, which includes a provision for binding arbitration of grievances; (Exhibit A)
5. That said negotiated agreement contains Article 28, Employer Discipline, which includes a procedure for appealing disciplinary actions; (Exhibit A)
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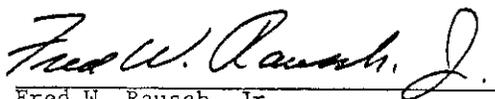
14. That S.F.T.E.A. renewed its demand for arbitration on
February 16, 1982; (Exhibit G)

15. That the B.O.E. again refused; (Exhibit H)

16. That Dr. Clarence Hickman, Superintendent of Schools
of U.S.D. No. 434, filed an eight page written report in regard
to the appeal hearing referred to in Fact No. 9; (Exhibit I)

17. That in reaching the decision referred to in Fact No.
16, Dr. Hickman considered statements made by Paul Harrison,
Julie McNickle's representative; that Julie McNickle did not
testify in her own behalf at the appeal hearing referred to in
Fact No. 9.

Respectfully submitted,



Fred W. Rausch, Jr.
Suite 202, 220 S.W. 33rd Street
Topeka, Kansas 66611
(913) 267-3470
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that I mailed a copy of the above and foregoing
Proposed Stipulation of Facts by first class United States Mail,
postage prepaid on the 13th day of September, 1982, addressed to
Paul R. Harrison, P. O. Box 409, Ottawa, Kansas 66067, Petitioner's
representative.



Fred W. Rausch, Jr.