

BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

STATE OF KANSAS

EMPORIA-NEA,)
)
 Complainant,)
)
 vs.) CASE NO. 72-CAE-6-1986
)
 U.S.D. 253 - Emporia, KS.,)
)
 Respondent.)
 _____)

Comes now on this 22nd day of January, 1987, the above captioned case for consideration by the Secretary of Human Resources. The case comes before the Secretary alleging that certain actions of the U.S.D. 253 Board of Education in issuing "unilateral contracts" to teachers of the district constitute violations of K.S.A. 72-5430 (b) (4) and (7).

APPEARANCES

David M. Cooper, Staff Attorney for Kansas National Education Association, appeared on behalf of complainant Emporia-NEA at the formal hearing and David M. Schauner, Attorney for complainant filed the post hearing brief on behalf of Emporia-NEA.

Patricia E. Baker, Senior Legal Counsel for Kansas Association of School Boards, appeared on behalf of respondent U.S.D. 253 - Emporia, Kansas.

Mr. Jerry Powell, Labor and Employment Standards Administrator for Kansas Department of Human Resources, served as hearing examiner and after full consideration of the record now makes and issues the following Findings of Fact, Conclusions of Law, and Order on behalf of the Secretary of the Kansas Department of Human Resources.

PROCEEDINGS BEFORE THE SECRETARY

1) Petition filed on February 20, 1986 on behalf of Emporia-NEA under the signature of David Cooper, Staff Attorney requesting the Secretary to find that an emergency existed pursuant to the provisions of K.S.A. 72-5430a.

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2) Request for emergency treatment of complaint denied on February 20, 1986 by Jerry Powell.

3) Answer of Respondent, U.S.D. 253 under signature of Patricia E. Baker, Attorney for Respondent received March 11, 1986.

4) Answer of Respondent served on Complainant, Emporia-NEA, on March 13, 1986.

5) Prehearing conducted by Mr. Paul K. Dickhoff, Jr., on April 10, 1986.

6) Motion To Dismiss filed on April 17, 1986 under the signature of Patricia Baker, Attorney for Respondent.

7) Complainant granted fifteen (15) days to respond to Motion To Dismiss on May 18, 1986.

8) Complainant requested three additional days to respond to Motion To Dismiss on May 6, 1986.

9) Motion for additional time to respond to Motion To Dismiss orally granted by Jerry Powell.

10) Complainant's Memorandum in Response To Respondent's Motion To Dismiss filed on May 9, 1986 under the signature of David M. Cooper, Attorney for Complainant.

11) Parties notified by Jerry Powell of his determination to hold the Motion To Dismiss in abeyance pending the resolution of various factual questions.

12) Notice of Hearing mailed to parties on August 14, 1986.

13) Hearing conducted on September 9, 1986.

14) Entry of appearance filed on November 12, 1986 by David M. Schauner on behalf of Complainant, Emporia-NEA.

15) Brief of Complainant received on November 14, 1986.

16) Brief of Respondent received on December 2, 1986.

FINDINGS OF FACT

1) That the instant matter is properly and timely before the Examiner.

2) That there exist two pending motions requesting dismissal filed by the Respondent, U.S.D. 253. The first motion requests dismissal stating that the Emporia-NEA has failed to properly state a cause of action. The second motion, an oral motion made at the outset of the hearing, requests dismissal of the matter stating that the matter is now moot, in that the teachers have at this time received all of the monies in dispute and that the contract year involved in this complaint has now passed.

3) That the counsel for Complainant orally requested the Hearing Examiner, at the outset of the hearing, to disregard the requested relief of a fine to be levied against Emporia Board of Education U.S.D. 253.

4) That Kathy Taylor of 1306 Grand, Emporia, Kansas, is an employee of the Emporia School District. Furthermore, Ms. Taylor served as chief negotiator for the teacher's association during the contract year in dispute. Ms. Taylor attended all of the bargaining sessions regarding the contract period in dispute.

5) That after four negotiating sessions and sometime during the last week of May, a petition for impasse was filed with the office of the Secretary of the Department of Human Resources. (T-25)

6) That there were approximately nine to ten unresolved issues that were presented to the mediator at a mediation session on the 24th of June, 1985. (T-26)

7) That approximately five of the issues mentioned in the previous finding were resolved during the mediation session with Mr. Walton. (T-27)

8) That Ms. Taylor recalls that an agreement was reached over a voluntary merit proposal during the mediation sessions with Mr. Walton. (T-28)

9) That neither the board team nor the association team included merit pay on its list of items at impasse which was prepared for fact-finding. (T-29)

10) That the U.S.D. 253 Board offered a seven percent (7%) increase in wages to the teachers during negotiations.

(Complainant Exhibit #2)

11) That the fact-finding report contains no reference to the method by which salary increases would be paid for the remainder of the contract year. (T-29)

12) That the fact-finder in the Emporia impasse recommended a 7.75% increase in wages. (Complainant Exhibit #2)

13) That Ms. Taylor believes that the method of payment for salary increases was never discussed during any bargaining session nor at any time during the impasse procedure up to and including the issuance of the fact-finders recommendation. (T-29)

14) That the fact-finding report contains no reference to merit pay, except in a section entitled, "Summary of Negotiations". (T-30)

15) That the parties met in a negotiations session subsequent to the receipt of the fact-finding report. Agreement was reached on all the recommendations made by the fact-finder. (T-32)

16) That no mention was made during the meeting referenced in the previous finding concerning the method by which any salary increases would be distributed. (T-32)

17) That during the meeting referenced in the previous two findings, the Board proposal on merit pay was, in Ms. Taylor's estimation, changed from what the NEA had agreed upon during mediation. (T-33)

18) That Ms. Taylor believed that the board's team refused further negotiations on the merit pay issue at a time subsequent to the post fact-finding negotiations session. (T-34)

19) That the Board prepared a package to be submitted to the teachers for a ratification vote. The package contained no reference to the method for paying back pay. (T-39)

20) That a ratification vote was taken on approximately December 20th. The vote was two hundred and five (205) to ninety-six (96) to reject the package as proposed by the Board. (T-39)

21) That Ms. Taylor prepared a document entitled, "Negotiations Notes". This document was submitted to the teachers and basically reflected Ms. Taylor's opinion that the teachers should vote no on the ratification of the package prepared by the Board of Education. (T-42)

22) That Ms. Taylor submitted a letter addressed to Mr. Lorenz, Assistant Superintendent, on December 23, 1985. That letter stated in part, "It is a desire of the people I represent to receive any back pay as a lump sum upon the acceptance of a new contract. It is our contention that this money has been earned and that we should receive what is due at the time of signing a new contract rather than have the money held and distributed throughout the remainder of the contract's monthly installments." (T-43, Exhibit C-6)

23) That Ms. Taylor wrote the letter mentioned in the previous finding because of speculation from unit members as to what was going to happen to them and to the money that they might receive as a result of an increase in salary. (T-44)

24) That Ms. Taylor recalls Mr. Lorenz stating to her that it might be an administrative inconvenience to comply with the request as stated in the letter mentioned in the previous finding. (T-45)

25) That Ms. Taylor recalls attending a board meeting wherein the board voted on the issuance of a unilateral contract. At that meeting, Mr. Duane Hendrickson stated that it would be administratively very difficult to handle the back pay in any way other than distributing it over the remaining paychecks. (T-46)

26) That Exhibit C-8 is a copy of the "unilateral contract" that was offered to the teachers by the Board of Education. This contract contained a 7.75% wage increase. (T-47 - Complainant Exhibit #8)

27) That the unilateral contract mentioned in the previous finding addresses the issue of back pay. This document contains a statement that pay increases will be prorated for the remainder of the contract year. (T-48)

28) That the package voted on by the teachers on or about December 20th, did not contain a statement concerning the prororation of back pay. However, the unilateral contract that was issued to the teachers did, in fact, include such a statement. (T-48)

29) That Ms. Taylor believes that the average raise for the teachers for the contract year was somewhere in the neighborhood of One Thousand Seven Hundred Sixty and 00/100 Dollars (\$1,760.00). (T-54)

30) That Ms. Taylor remained on the same salary schedule as on which she had been paid the previous school year until the unilateral contract was issued in 1986. (T-58)

31) That Ms. Taylor believed that the Board of Education commenced paying the salary increase for 1985-1986 on the March 1, 1986 paycheck. (T-59)

32) That the individual contracts for the teachers for the 1985-1986 school year show a beginning date of August 27, 1985 and an ending date of May 30, 1986. (T-63, Complainant's Exhibit #13)

CONCLUSIONS OF LAW

This case comes before the examiner on petition of Emporia NEA alleging that certain actions of the U.S.D. 253 Board constituted violations of K.S.A. 72-5430 (b) (4) and (7). It appears that there are few disputed factual matters in the case. A brief review of those facts is as follows.

Emporia NEA and the U.S.D. 253 Board commenced negotiations on a contract for 1985 - 1986 pursuant to the provisions of K.S.A. 72-5413 et seq. There were four negotiation sessions and during the last week of May it was determined that an impasse existed. The parties met with Mr. Harold Walton of the Federal Mediation and Conciliation Services to consider approximately ten issues remaining unresolved for the 1985 - 1986 school year. During the mediation sessions approximately five to six issues were resolved and Mr. Walton recommended fact-finding to resolve the four to five issues remaining open.

The parties met with the fact-finder, appointed by the Secretary to assist the parties, as required by K.S.A. 72-5428. The fact-finder's recommendations were received by the parties on approximately November 11, 1985. The parties then met on December 5, 1985 as required by K.S.A. 72-5428. Both parties made concessions at the December 5, 1985 meeting and agreement was reached on all issues except the merit pay issue. The NEA believed that agreement on the merit pay issue was reached during mediation thus that issue was not addressed by the fact-finder.

The Board urged the NEA to take the Board's final offer back to the teachers for a ratification vote as required by K.S.A. 72-5421. NEA representatives stated that they could not recommend ratification of the Board's final offer so long as the merit pay issue was stated in its present form. The Board proceeded to print its final offer containing the objectional language in the merit pay proposal.

The package as proposed by the Board was submitted to the teachers and a vote was taken on December 20, 1985. The vote resulted in a rejection of the proposed package. Ms. Taylor then wrote a letter on December 23rd to Mr. Lorenz asking that any increase in wages over the 1984 - 1985 salary schedule be paid in a lump sum payment. Specifically Ms. Taylor wrote; "It is the desire of the people I represent to receive any back pay as a lump sum upon the acceptance of a new contract. It is our contention that this money has been earned and that we should receive what is due at the time of signing a new contract rather than have the money held and distributed throughout the remainder of the contract's monthly installments."

Mr. Lorenz stated to Ms. Taylor that a lump sum payment would prove to be administratively difficult. The Board then met to approve a "unilateral contract". This unilateral contract included a provision stating that; "Pay increases will be prorated for the remainder of the contract year." This provision was not contained within the package presented to teachers for ratification. Further this contract provided for a 7.75% increase in salary as was recommended by the fact-finder.

Ms. Taylor states that the distribution of pay increases was not discussed at any time during negotiations or subsequent impasse resolution processes. The only mention of distribution of pay increases was in the December letter written by Ms. Taylor, a statement by Mr. Lorenz in response to Ms. Taylor's letter, and during the Board meeting when unilateral contracts were approved. At this time all increases have been paid to the teachers and the 1985 - 1986 contract year has passed.

Complainant, Emporia NEA argues that the Board's action of giving pay increases prorated over the remainder of the year rather than giving lump sum payments, caused teachers to suffer economic harm and was punitive in nature. Complainant states in its brief that this action violates K.S.A. 72-5430 (b) (4) and (7) since; "(1) the board's decision constitutes discrimination or retaliation against the professional employees for their decision to be represented by Emporia NEA in impasse proceedings (See K.S.A. 72-5430 (b) (4)); and (2) the Board's decision constitutes a refusal to participate in good faith in impasse proceedings, specifically with regard to its statutory obligation to include the interests of the professional employees in issuing a unilateral contract (See K.S.A. 5430 (b) (7))."

The issue to be addressed by the examiner then rests solely on the Board's act of prorating pay increases. Neither the Board's right to issue the "unilateral contract" nor the question of "changing" the merit pay proposal are within the scope of this complaint. The examiner has no jurisdiction to rule on the propriety of occurrences surrounding the arrival at the merit pay provision.

The examiner first looks to Respondent's Motion To Dismiss based upon the allegation that the question is now moot. Respondent alleges that all compensation due teachers has now been paid. The facts support this allegation except to the extent that some interest or damages might have accrued to the teachers.

The examiner has consistently ruled that a case is not mooted by a subsequent settlement of negotiations between the parties if in fact the questionable action is one which is likely to reoccur in this process of ongoing or annual negotiations. Further the instant case would not be moot if the action of the Board was in bad faith and resulted in harm to the employees which would require payment of damages as a remedy.

The examiner will point the parties to K.S.A. 44-313 et seq., as amended by the 1986 Legislature. That law requires that an employer pay employees all earned wages on a regularly scheduled basis at least once per month. The law did not apply to public employees prior to July 1, 1986. The aforementioned amendment to the statute extended coverage of the statute to public employees. It does not appear to the examiner that the provisions of K.S.A. 74-4940 in any way conflict with the provisions of K.S.A. 44-313 et seq., (Wage Payment Act). Rather it appears that K.S.A. 74-4940 supplements the provisions of the Wage Payment Act. That is, one statute insures that money is available for the months when no work is performed and that the teachers may receive the balance of their compensation once all contracted work is performed. The other sets out a procedure for insuring that all money is paid when due. It therefore appears to the examiner that any raises given for prior months work would now become earned when final settlement is affected. The exception to this interpretation of K.S.A. 44-313 et seq., would occur when representatives of teachers agreed to some other method of receiving back pay. The examiner believes that the topical heading of "salaries and wages" as listed at K.S.A. 72-5413 (1) extends not only to the amount but also to how and when payment will be made. Therefore the amount given as a raise for work performed in September, October, November, December and January would now by law be due and payable with the issuance of a unilateral contract in January. The situation which occurred in U.S.D. 253 and which is now the subject of this prohibited practice cannot, therefore legally reoccur. The question, then, is now moot as far as subsequent occurrences are concerned.

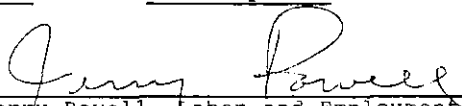
The remaining issue which impacts the question of mootness relates to damages or interest which might accrue to the employees as a result of a bad faith act of the district.

The examiner finds no prevailing reason for not giving a lump sum payment to the teachers but he cannot simply rule that the failure to do so constitutes bad faith absent such a prevailing reason. Rather there must be some showing that a willful intent to harm caused the prorated payment. While some employees obviously desired a lump sum payment, as witness the letter requesting a lump sum, the record is void of evidence to show that the action was taken as a punitive measure. The examiner must note that the district did in fact grant the amount of wage increase as recommended by the fact-finder.

In sum the examiner finds that Complainant has failed to show a willful intent by the Board to cause harm in paying wage increases over the remainder of the contract term. Furthermore the Board's action is now precluded by the amendment to K.S.A. 44-313 et seq., thus the action has no possibility of reoccurrence and is thus a moot issue.

It is therefore the order of the Secretary that the matter now pending be dismissed in its entirety.

IT IS SO ORDERED THIS 22nd DAY OF January, 1987.



Jerry Powell, Labor and Employment
Standards Administrator
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