

BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

Unified School District No. 501,)
Topeka, Kansas,)
Petitioner,)
vs.)
National Education Association-Topeka,)
Respondent.)

Case No. 72-CAEO-1-1994

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

INITIAL ORDER

On the 22nd day of February, 1994, the above captioned matter came on for formal hearing pursuant to K.S.A. 72-5430a(a) on a complaint of a prohibited practice. The presiding officer was Monty R. Bertelli. The petitioner, Unified School District 501 Topeka, Shawnee County, Kansas, appeared by and through counsel, Wesley A. Weathers. The respondent, National Education Association-Topeka and its representatives, appeared by and through counsel, David M. Schauner. Witnesses appearing on behalf of the petitioner were Curtis Hartenberger, Les Kuhns and Linda Baker. Witness appearing on behalf of the respondent was Bruce Mallory. The complaint was filed by the employer on the 23rd of September, 1993. An answer was filed October 15, 1993 by the respondent. Both parties submitted a statement of issues. The prehearing was held on November 2, 1993, settlement did not occur, and the hearing was set for Wednesday, February 23, 1994, later amended to February 22nd at 9:00 a.m. at Robinson Courtroom, Washburn University, 17th & MacVicar, Topeka, Kansas.

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Petitioner filed an amended statement of issues on December 30, 1993. Respondent submitted a statement of issues January 10, 1994. Parties submitted witness and exhibit lists, petitioner on February 9th and respondent February 8, 1994. Several motions were made and disposed of. The petitioner submitted proposed findings of fact and conclusions of law and a brief in support thereof on May 11, 1994. The respondent submitted a brief including proposed findings of fact and a memorandum in support of the proposed findings of fact and conclusions of law on May 11, 1994.

The record transcript of this matter, as heard on February 22, 1994, is presented to hearing officer, Bernard J. Dunn for decision.

ISSUES

The issue to be decided by this hearing officer is whether the respondents committed a prohibited practice by interfering, restraining or coercing the board of education, or by refusing to negotiate in good faith with the board's representative, in violation of the law by reason of the telephone conversation placed by Les Kuhns to Curtis Hartenberger at Hartenberger's home, on the evening of September 22, 1993.

FINDINGS OF FACT

1. The petitioner is a duly organized school district pursuant to section 5, article 6, of the Kansas Constitution and chapter 72 of the Kansas Statutes Annotated (K.S.A.).

2. The respondent is a professional employees' organization, as defined by K.S.A. 1995 Supplement 72-5413(e), and is the recognized exclusive employees' organization, pursuant to K.S.A. 72-5416 *et seq.*, for the professionals of U.S.D. 501.

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3. At the time in question, September 22, 1993, the parties were engaged in professional negotiations under the Professional Negotiations Act concerning the 1993-94 professional agreement for teachers.

4. In February, 1993, U.S.D. 501 designated Dr. Ivan Klimko as exclusive representative for the professional negotiations to serve as its spokesperson and the leader of the negotiating team. (TR pages 29-30).

5. Linda Baker is the president of NEA-Topeka on behalf of the employees.

6. Les Kuhns, a teacher and member of NEA since 1978, has been a spokesperson for the bargaining team at various times and for considerable duration since that date and was currently on the bargaining committee. He was bargaining team spokesperson during the fall of 1979 through 1984. He was on the executive committee in the fall of 1979. He was president for two years, from 1984 to 1986. He was again spokesperson for the bargaining team from 1986 through 1993. Mr. Kuhns had a long and extensive involvement in the bargaining relationship between these parties. The bargaining committee was advisor to the bargaining team, and the president was on the committee. (TR pages 80-89.)

7. On the evening that the phone call was made bargaining had taken place earlier and respondent was engaged in negotiations with Dr. Klimko. Dr. Klimko, on behalf of the board, had made a straight forward old traditional kind of bargaining offer. This related to specific proposals respondents believed to have been previously settled.

8. While the record does not set out in detail a definition of "old traditional", it may be gleaned from the context that the previously used style of bargaining, where each side

denies everything to the other while attempting to gain everything from the other in hopes that nothing will be lost and everything will be gained, frequently leading to impasse, had been employed this evening by Dr. Klimko. Prior to these collective bargaining, meet and confer, negotiating sessions, the parties had agreed to use what has been generally referred to in the transcript as "win-win bargaining". While this term is not specifically defined in detail in the transcript, it may be gleaned from the context, that this represented a style of collective bargaining which began with the premise that both sides would attempt to maximize their self-interest with the focus being on identification of factual elements followed by an analysis of possibilities, and the selection of those choices which best serve the interests of each party. This involved a willingness to disclose information and to cooperate to help each other get the best deal possible out of the facts. The "interest", or practical need, of each party is presented, as opposed to the stated "position", which is presented as a surface or facial representation to the other side while concealing true underlying interests. (TR page 69 and page 112.)

9. After the school district apparently resorted to old style techniques, Linda Baker became intensely upset and disappointed. (TR pages 125-126.)

10. Linda Baker called Mr. Les Kuhns on the phone. Mr. Kuhns then indicated to Ms. Baker that Mr. Kuhns would call Mr. Hartenberger, who is a member of the Board of Education, to express the concern that seven months of negotiations using win-win principles may have been abandoned by the board.

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11. Rather than relying on the practical reality that interest-based bargaining is, as a practical matter, more efficient for both parties in the long run, or resorting to a neutral third party as provided by law, Mr. Kuhns sought to influence Mr. Hartenberger to require Dr. Klimko to return to the "win-win" bargaining principle as the ground rules of the collective bargaining process in these negotiations. Linda Baker consented to the making of this phone call by Mr. Kuhns. (TR page 91 and page 155.)

12. Although Les Kuhns was not technically a bargaining representative at the time, he had a long standing position as being involved in labor negotiations in one role or another over fifteen years and was on the committee. Linda Baker called him to express her concern and indicated consent when Les Kuhns said he would call Mr. Hartenberger on the matter. He then reported back to Linda Baker. (TR pages 145-148.)

13. Mr. Kuhns then called Mr. Hartenberger and in the conversation gave indications of having the power to cause the employee representative organization to act if the board did not meet expectations with respect to the ground rules for bargaining. Mr. Kuhns stated that if the ground rules were not maintained as expected by the employee organization, negative consequences would result including negative consequences caused by Mr. Kuhns and the members of the employee organization over which he had influence. (TR p. 31-34, p. 66, p. 98, p. 105, p. 123 and p. 132.)

14. At the time of these events James Marchello was the actual spokesperson for the negotiating team on behalf of NEA-Topeka, (TR page 90) the respondents herein, and Linda Baker was the president. (TR page 142.) As president she was a member of the

bargaining committee though not the spokesperson for the bargaining team doing the negotiations. (TR page 84.) A network of communication existed amongst these persons. (TR pages 80-85.)

15. No neutral third party was involved in the collective bargaining to assist in maintaining the ground rules at this time. No neutral third party had yet been called for as the method of resolving the ground rules problem.

16. The complaint is properly presented by the petitioner and the petitioner had full authority from the Board of Education to file this prohibited practice claim. (TR pages 34-36, 55-56, 198.)

CONCLUSIONS OF LAW

1. Linda Baker acted on behalf of the respondents herein and, when presented the opportunity by Mr. Kuhns, authorized him to contact a member of the board, on her behalf, bypassing the negotiating representative, in an attempt to pressure and force the board to modify its activity, in form if not substance, at the negotiating table. Mr. Kuhns acted as an agent and representative for the respondents by reason Linda Baker's authorization and by reason of the clearly established appearance of authority as well as implied and explicit statements made by Mr. Kuhns regarding his power, his position, and his capacity and intent to cause results in the respondent's bargaining organization and team. This constituted interference with, restraint of, or coercion of, a board of education with respect to on-going negotiations and a refusal to bargain in good faith with the board's representative.

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2. In contract negotiations under the Professional Negotiations Act, a board of education has the right to be exclusively represented by an agent or committee. *K.S.A. 72-5414; see also, USD 501 v. NEA-Topeka, 72-CAEO-1-1982 and 72-CAEO-3-1981, July 19, 1983 Order, p.9.*

3. A board of education has the duty to enter into professional negotiations with a duly recognized bargaining representative of its teachers. *K.S.A. 72-5423.*

4. "Professional negotiation" means meeting, conferring, consulting and discussing in a good faith effort by both parties through their designated representatives to reach agreement with respect to the terms and conditions of professional service. *K.S.A. 72-5413(g).* "(A)ny proposals submitted by (a professional employees association) regarding negotiations matters constitute professional negotiations for the purpose of the Act." *USD 501 v. NEA-Topeka, supra, p. 12.*

5. It is a prohibitive practice for professional employees' organizations or their designated representatives willfully to:

"(2) . . . interfere with, restrain or coerce a board of education with respect to rights or duties which are reserved thereto under *K.S.A. 72-5423* and amendments thereto, or with respect to selecting a representative for the purpose of professional negotiation . . . ;

(3) refuse to negotiate in good faith with a board of education or its designated representatives as required in *K.S.A. 72-5423* and amendments thereto;"

K.S.A. 72-5430(e).

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6. Once a school board has designated a representative for professional negotiations, that representative is the exclusive representative of the board for negotiation purposes, unless the board indicates to the contrary. *USD 501 v. NEA-Topeka, supra, p.10.*

7. While K.S.A. 72-5415(b) affords professional employees the right to "make known" their positions or proposals or both to a board of education, an individual teacher or collection of teachers has neither the right nor the responsibility to engage in professional negotiations for the bargaining unit. Also, a professional association cannot be said to be negotiating in good faith with a representative of the board if it is attempting to simultaneously negotiate directly with the board. *USD 501 v. NEA-Topeka, supra, p. 11.*

8. Discussions about bargaining tactics and whether certain matters have been tentatively agreed upon and should, therefore, be made a part of the other party's salary proposal and whether said salary proposal is sufficiently high to permit the parties to reach an agreement are clearly components of professional negotiation which should only be engaged in by the designated exclusive representatives of negotiating parties.

9. Nothing in the Act affords a duly recognized bargaining unit representative the unfair advantage of negotiating with both a board of education and its designated representative. *USD 501 v. NEA-Topeka, supra, at p. 12.*

10. Once an individual professional employee has been designated to act in an official capacity for a certified bargaining representative, they may not then disclaim that official capacity in their dealings with the board of education. *USD 501 v. NEA-Topeka, supra, p. 12.* Thus, once Kuhns assumed the position as chairperson of the NEA-Topeka

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bargaining committee which has responsibility for such things as choosing the NEA-Topeka bargaining committee which has responsibility for such things as choosing the bargaining team, determining what subjects should be bargained and determining ground rules and bargaining strategy, and which then stands ready to assist the team if necessary, he cannot simply move out of that role at his pleasure. Instead, his actions regarding negotiations are no longer merely those of an individual teacher, but instead are the actions of NEA-Topeka.

11. Kuhns' call to Hartenberger constituted an attempt at professional negotiations because it was the presentation of positions or proposals regarding negotiating subjects, i.e., that RIF and leave sharing should be deemed as tentatively agreed upon and no longer on the table, that the USD 501 team should return to "Win-Win" bargaining and that USD 501 should increase its financial offer. However, since USD 501 has a designated representative, NEA-Topeka must negotiate only with that representative and attempting to circumvent USD 501's designated representative by making such proposals directly to the Board constitutes interference with USD 501's right to designate and negotiate only through its exclusive representative and also constitute a refusal to negotiate in good faith with the exclusive representative.

12. When Kuhns called Hartenberger on September 22, 1993, he was acting as an agent of NEA-Topeka.

13. "It is a fundamental rule underlying the structure of agency law that the principal is bound by, and liable for, the acts which his agent does with or within the actual or apparent authority from the principal, and within the scope of the agent's employment, or

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which the principal ratified." 3 *Am. Jur.2d, Agency*, § 270, p. 771. The law of Kansas expressly recognizes those two distinct types of agency, i.e., actual and ostensible or apparent. *Mohr v. State Bank of Stanley*, 214 Kan. 42, 45, 734 P.2d 1071 (1987).

14. The authority of an actual agent may be either express or implied. *Mohr, supra; Theis v. Dupont, Glore, Forgan, Inc.*, 212 Kan. 301, 306, 510 P.2d 1212 (1973). Express authority occurs by actual delegation authorizing certain actions, but implied authority of an agent can exist even if such authority is later denied by the principal and regardless of whether the parties actually understood there to be an agency created in the first place:

The authority of an agency may be either express or implied. To determine whether there is evidence sufficient to show actual agency, the record must be examined to ascertain if they one sought to be charged as principal has delegate authority to the alleged agent by words which expressly authorize him to do the delegated act. If there is evidence of that character, the authority of the agent is said to be express. If there is no express authorization, the evidence must be examined to determine whether the test being whether, from the facts and circumstances of the particular case, it appears that there was at least an implied intention to create an agency, in which event the relations may be held to exist, notwithstanding a denial by the alleged principal, and whether or not the parties understood it to be an agency. (Emphasis supplied.)

Rodgers v. Arapahoe Pipeline Company, 185 Kan. 424, Syl. 3, 345 P.2d 702 (1959).

15. Kuhns, as head of the NEA-Topeka bargaining committee, had express authority from NEA-Topeka to provide help and assistance to its bargaining team, including assistance in the area of communications, and when Baker, NEA-Topeka President and a member of its bargaining team, called Kuhns on September 22, 1993, she was requesting his assistance, so that when he responded by advising her that he was going to call Hartenberger, to which

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she consented, an express agency relationship was created and NEA-Topeka is bound by his actions.

16. Even if no express authority be found, then the communication between Kuhns and Baker on the evening of September 22, 1993, together with the official role each held as regards the on-going negotiations and Kuhns' long and active history in the negotiation process, provided him with implied authority to act as a NEA-Topeka agent in contracting Hartenberger in order to attempt to change the course of negotiations between the parties on both procedural and substantive matters.

17. "Apparent, or, as it is also called, ostensible authority . . . is that authority which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing." *3 Am. Jur.2d, Agency, § 71, p. 575.* Under the law of Kansas, apparent or ostensible agency is defined as follows:

However, the liability of the principal for the acts and contracts of his agent is not limited to such acts and contracts of the agent as are expressly authorized, necessarily implied from express authority, or otherwise actually conferred by implication from the acts and conduct of the principal. All such acts and contracts of the agent as are within the apparent scope of the authority conferred on him, although no actual authority to do such acts or to make such contracts has been conferred, are also binding upon the principal. Apparent authority, or ostensible authority as it is also called, is that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing. Accordingly, an apparent agent is one who, with or without authority, reasonably appears to third persons to be authorized to act as an agent of another. (Emphasis supplied.)

Miotk v. Rudy, 4 Kan. App.2d 296, 300, 605 P.2d 587, rev. den., March 7, 1980; see also, Ford

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v. Guarantee Abstract and Title Company, 220 Kan. 244, 268, 553 P.2d 254 (1976).

18. In addition to the actual and/or implied express authority of Kuhns to call Hartenberger on behalf of NEA-Topeka, he also clearly possessed apparent authority which was then reasonably relied upon by Hartenberger in forming the belief that the call was actually on behalf of NEA-Topeka. Baker called Kuhns for assistance, he said he would call Hartenberger in an attempt to help and she consented, thus permitting his to act on NEA-Topeka's behalf.

19. "Even where neither actual nor apparent authority has been given prior to an act, authority may be conferred by the principal after the act by means of ratification." *3 Am. Jur., Agency*, § 71, p. 575. Under Kansas law, if a principal learns that its agent has performed some unauthorized act, the principal has an affirmative duty to come forward and repudiate the act if it wants to avoid being bound thereby through ratification:

Ratification is the adoption or confirmation by a principal of an act performed on his behalf by an agent, which act was performed on his behalf by an agent, which act was performed without authority. Upon acquiring knowledge of his agent's unauthorized act, the principal should promptly repudiate the act, otherwise it will be presumed he has ratified and affirmed the act. (Emphasis supplied.)

Schraft v. Leis, 236 Kan. 28, Syl. 9, 686 P.2d 865 (1984). Kuhns called Baker to tell her about his call to Hartenberger and Baker did nothing to repudiate the call. NEA-Topeka has, therefore, ratified Kuhns' call and is bound thereby.

20. Even if Kuhns does not have actual or apparent agency authority to call Hartenberger or that NEA-Topeka had subsequently ratified same, Kuhns clearly is an agent

of NEA-Topeka regarding the general subject of professional negotiations and NEA-Topeka is, thus, responsible for his actions in that area under the doctrine of respondeat superior. Principals are responsible for the torts and wrongful acts of their agents which are incidental to and in furtherance of the principal's business, even though said action may be outside the scope of the individual agent's actual authority. *Kline v. Multa-Media Cablevision, Inc.*, 233 Kan. 988, 989, 666 P.2d 711 (1983); *Atkinson v. Wichita Clinic*, 243 Kan. 705, 707, 763 P.2d 1085 (1988) ("Under Kansas law, there is no distinction between the liability of a principal for the torts of his agent and the liability of a master for the torts of his servant. Liability in both cases is based upon the Doctrine of Respondeat Superior.")

21. Dr. Klimko had express authority to file a prohibitive practices complaint on behalf of USD 501 on September 23, 1993, by virtue of his appointment as exclusive representative of USD 501 for professional negotiations concerning the 1993-94 contract and, moreover, the filing of this prohibitive practice was then ratified by the Board of Education of USD 501 during an executive session of an official Board meeting later that same day where the filing of this complaint was disclosed and discussed and where no repudiation followed, nor was Klimko instructed to withdraw said complaint.

22. The call from Kuhns to Hartenberger constitutes interference with USD 501's duty to engage in professional negotiations through an exclusive representative and its right to be free from interference, restraint or coercion in the selection of said representative for that purpose and is, thus, a prohibitive practice by NEA-Topeka in violation of K.S.A. 72-5430(c)(2).

23. The call from Kuhns to Hartenberger constitutes a refusal by NEA-Topeka to negotiate in good faith with the designated representative of USD 501 and, thus, is a prohibitive practice in violations of K.S.A. 72-5430(c)(3).

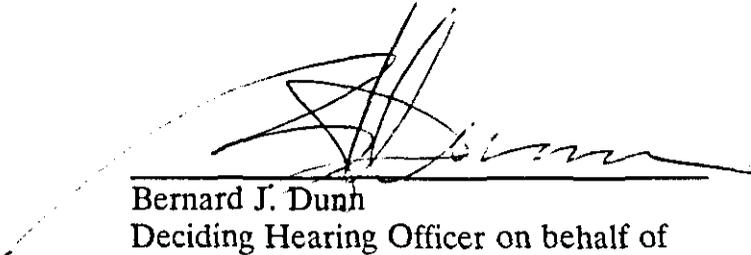
ORDER

IT IS HEREBY JUDGED AND DECREED that based upon the facts presented in this case, the respondent, National Education Association-Topeka and representatives, for the reasons set-forth above, has committed a prohibited practice in violation of K.S.A. 72-5430(c)(2) and (3), relative to the parties' 1993 collective bargaining process.

IT IS THEREFORE ORDERED that the petitioner's request for relief is hereby granted, to wit: respondents are hereby ordered to cease and desist contact directly with the Board of Education that circumvents designated representative, Dr. Ivan Klimko.

IT IS FURTHER ORDERED, that no other sanctions are deemed appropriate or granted.

IT IS SO ORDERED this 8th day of NOVEMBER, 1996.


Bernard J. Dunn
Deciding Hearing Officer on behalf of
Monty R. Bertelli

NOTICE OF RIGHT TO REVIEW

This Initial Order is the official notice of the presiding officer's decision in this case. The Initial Order may be reviewed by the Secretary, either on his own motion, or at the request of a party, pursuant to K.S.A. 77-527. The Order will become final fifteen (15) days from the date of service, plus three (3) days for mailing, unless a petition for review is filed pursuant to K.S.A. 77-526 within that time with the Secretary, addressed to: Kansas Department of Human Resources, Labor Relations, 1430 S.W. Topeka Blvd., Topeka, Kansas 66612.

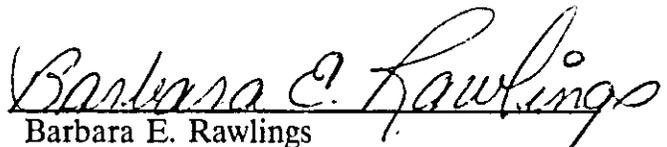
CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 1996, a true and correct copy of the above and foregoing Initial Order was placed in the U.S. mail, first class, postage prepaid to:

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