BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
FOR THE STATE OF KANSAS

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| National Association of Government Employees<br>Petitioner,<br>vs.<br><br>Parsons State Hospital and Training Center, Kansas Neurological Institute, and Topeka State Hospital,<br>Respondents. | ) | Case No.'s<br>75-CAE-1/2/3-1991 |

# *INITIAL ORDER*

ON the 10th day of January, 1991, the above-referenced prohibited practice complaints came before presiding officer Monty R. Bertelli for decision on stipulated facts pursuant to K.S.A. 75-4334(a) and K.S.A. 77-517.

## APPEARANCES

Petitioner: Brief and argument submitted by Brent J. Jaimes, NAGE Midwest Office, 1695 S. Brentwood Blvd., Suite 214, St. Louis, Missouri 63144

Respondent: Brief and argument submitted by Darrell O. McNeil, Kansas Department of Social and Rehabilitation Services, Docking State Office Building, Room 625-S, Topeka, Kansas 66612

## ISSUES PRESENTED FOR DETERMINATION

1. Whether Respondents interfered, restrained or coerced public employees in the exercise of rights granted in K.S.A. 75-4324 in violation of K.S.A. 75-4333(b)(1) by allowing the Kansas Association of Public Employees use of the payroll deduction procedures for payment of membership dues.

2. Whether Respondents encouraged or discouraged membership in the National Association of Government Employees or Kansas Association of

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Public Employees by discrimination in hiring, tenure or other conditions of employment in violation of K.S.A. 75-4333(b)(3) by allowing the Kansas Association of Public Employees use of the payroll deduction procedures for payment of membership dues.

3. Whether Respondents denied the rights accompanying certification or formal recognition granted in K.S.A. 75-4328 to the National Association of Government Employees in violation of K.S.A. 75-4333(b)(6) by allowing the Kansas Association of Public Employees use of the payroll deduction procedures for payment of membership dues.

## Syllabus

**PROHIBITED PRACTICE** - Interference with employee statutory rights - test. In determining whether a public agency's conduct actually interferes with the exercise of employee rights guaranteed by K.S.A. 75-4324 a three-pronged test is to be applied; a) Are the employees engaged in a protected activity; b) Has the public agency engaged in conduct which could have adversely affected employee rights to some extent; and c) Was the public agency's conduct motivated by legitimate and substantial business justification rather than antiunion bias?

**PROHIBITED PRACTICE** - Public Agency Neutrality - Dues Deductions. To permit a payroll deduction for membership dues without regard to which employee organization is involved permits the public agency to maintain a neutral position as is clearly the intent of K.S.A. 75-4333(b)(2).

**DEFINITIONS** - Employee Organization - elements required. To be considered an "employee organization: within the meaning of K.S.A. 75-4322(i) the organization must include employees within the appropriate unit, and need only have as its goal or objective being able to represent those employees in dealings with the public agency concerning conditions of employment and grievances.

## FINDINGS OF FACT

Pursuant to agreement of the parties, the issues will be decided based upon the following stipulation of facts:

1. Petitioner National Association of Government Employees, (NAGE), is a recognized employee organization as the term is defined by K.S.A. 75-4322.

2. Respondents Parson State Hospital and Training Center, Kansas Neurological Institute and Topeka State Hospital are all public agencies as the term is defined by K.S.A. 75-4322.

3. NAGE Local R14-145 is the exclusive representative of certain non-professional employees at Parsons State Hospital and Training Center.

4. NAGE Local R14-141 is the exclusive representative of certain non-professional employees at Topeka State Hospital.

5. NAGE Local R14-156 is the exclusive representative of certain non-professional employees at Kansas Neurological Institute.

6. At all relevant times the Petitioner had written Memoranda of Agreements in effect with each separate Respondent which permitted bargaining unit employees to authorize Respondents to deduct union dues from employees payroll warrants upon receipt of written authorization to make such deductions. (Exhibits 1, 2 & 3)

7. Kansas Association of Public Employees, (KAPE), is a recognized employee organization as that term is defined by K.S.A. 75-4322.

8. KAPE is the exclusive representative for certain employees at Parsons State Hospital and Training Center, Kansas Neurological Institute, and Topeka State Hospital in the statewide bargaining units for technical employees and for social workers and income maintenance workers.

9. Both NAGE and KAPE are employee organizations authorized to receive dues deductions from the State Director of Accounts and REports as specified by K.S.A. 75-5501(b).

10. Respondents permit employees in Petitioner's bargaining units to authorize deductions from payroll warrants for payment to employee organizations as that term is defined in K.S.A. 75-4322 including but not limited to KAPE, which do not hold the status of exclusive representative.

## CONCLUSION OF LAW AND OPINION

### ISSUE NO. 1

**Whether Respondents interfered, restrained or coerced public employees in the exercise of rights, granted in K.S.A. 75-4324 in violation of K.S.A. 75-4333(b)(1) by allowing the Kansas Association of Public Employees use of the payroll deduction procedures for payment of membership dues.**

At the outset it will be helpful to set forth the exact language of statutes important to the determination of this case:

> Section 75-4322(i) *"'Employee organization' means any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in dealings with that public agency over conditions of employment and grievances."*
>
> Section 75-4322(j) *"'Recognized employee organization' means an employee organization which has been formally acknowledged by the public agency or certified as representing a majority of the employees of an appropriate unit."*
>
> Section 75-4324 provides *"Public employees shall have the right to form, join and participate in the activities of employee organization's of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to the grievances and conditions of employment."*
>
> Section 75-4327 provides, in pertinent part, *"(a) Public employers shall recognize employee organizations for the purpose of representing their members in relations with public agencies as to grievances and conditions of employment. Employee organizations may establish reasonable provision for an individual's admission to or dismissal from membership.*
> *(b) 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."*
>
> Section 75-4328 provides *"(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."*

Finally, Section 75-5501(b) *"The director of accounts shall provide, as part of the system of payroll accounting, a plan for the deduction from the salary or wages of an amount equal to regular or wages of an amount equal to regular membership dues for state officer and employees who are member of the Kansas troopers association or who are in any employee organization which has filed an annual report pursuant to K.S.A. 75-4337 or which has a business agency registered pursuant to K.S.A. 75-4336.*

Although Kansas courts have not addressed the standard of proof necessary to establish a prohibited practice, federal law has made it clear that the burden of proving such a complaint lies with the party alleging an unfair practice. *"(T)he mere filing of charges by an agrieved party . . . creates no prsumption of unfair labor practices under the Act, but is is incumbent upon the one alleging violation of the Act to prove the charges by a fair preponderance of all the evidence. . . ."* Boeing Airplane Co. v. National Labor Relations Board, 140 F.2d 423, 433 (10th Cir. 1944). Findings of unfair labor practices must be supported by substantial evidence. Coppus Engineering Corp. v. National labor Relations Board, 240 F.2d 564, 570 (1st Cir. 1957).

K.S.A. 75-4333(b)(1) makes it a prohibited practice for Respondents to *"Interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324"*; those rights being to *"form, join or participate in the activities of employee organizations of their own choosing."* To determine whether the Respondents' conduct of allowing KAPE use of the payroll deduction procedures for payment of membership dues did interfere with the rights of NAGE affiliated employees several inquiries must be made:

a. Are the employees engaged in protected activities as set forth in the Act?

b. Is there a reasonable probability that the employer's conduct will have an interfering restraining or coercive effect on the employee's activity?

c. To what extent must the Respondents' legitimate business motives be taken into account?

### a. Protected Activities

The deduction and transmittal of dues to an employees' organization has the obvious effect of assisting that organization in its existence and administration by the collection of its dues. NEA Wichita v. U.S.D. 259, 4 Kan. App. 2d 443, 446 (1980). Since employees have the right to form, join and participate in activities of employee organization dues deductibility is protected by K.S.A. 72-4324.

### b. Reasonable Probability Test.

Whether the Respondent's conduct actually restrains, coerces or interferes with the exercise of employee rights, or whether the Respondents intend such a result is not usually required to prove a violation of K.S.A. 75-4333(b)(1). The test applied in the private sector and equally applicable to public sector labor organization is one of reasonable probability, i.e., whether the Respondents' conduct reasonably tends to interfere with, restrain, or coerce employees in the exercise of their statutory rights to some extent. As the N.L.R.B. concluded in American Freightways Co., 44 L.R.R.M. 1302 (1959):

> *"It is well settled that the test of interference, restrain and coercion. . . does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably said, tends to interfere with the free exercise of employee rights under the Act."*

As noted in NLRB v. Grower-Shipper Vegetable Ass'n., 122 F2d 368, 377 (9th Cir. 1941):

> *"The Act prohibits interference with, restraint and coercion of the employees in the exercise of the rights, guaranteed (by statute)... Interference, restraint and coercion are not acts themselves but are descriptive and are the result of acts. Whatever acts may have the effect of interference, restraint and coercion are included in those terms, and are therefore prohibited. Thus they include a great number of acts which, normally, could be validly done, but when they interfere with, restrain or coerce employees in the exercise of their rights, they are prohibited by the act."*

The deduction and transmittal of dues to an employee organization has the obvious effect of assisting the organization in its existence and administration by the collection of its dues. National Education Ass'n - Wichita v. U.S.D. 259, 4 Kan.App.2d. 443 (1980). Pursuant to K.S.A. 75-4324 employees have the right to form join and participate in employee organization activities. Any conduct which interfers with the administration of the employee organization obviously interferes with these rights of the employee. If NAGE is correct that the granting of dues deduction to the recognized organization by the memorandum of agreement precludes the granting of that right to other employee organizations, then Respondents' conduct in allowing KAPE use of the payroll deduction process for payment of membership fees could reasonably tend to interfere "to some extent" with NAGE and conseqently the rights of its employee members.

### c. Legitimate Business Justification

Once the reasonable probability of interference to some extent has been established the inquiry shifts to whether the public agency's conduct was motivated by a legitimate and substantial business justification. See Litton Dental Product, 90 L.R.R.M. 1592 (1975). As stated in Gorman, Basic Text on Labor Law (1976):

> *"It shall be an unfair labor practice of an employer to take action which, regardless of the absences of antiunion bias, tends to interfere with, restrain, or coerce a reasonable employee in the exercise of the rights guaranteed in section 7, provided the action lacks legitimate and substantial justification such as plant safety, efficiently or discipline."*

K.S.A. 72-5440(b)(1) requires weighing the effect on employee rights against the public agency's business justification for its conduct. N.L.R.B.v. Southern Plasma Corp., 626 F. 2d 1287, 1293 (5th Cir. 1980). As the U.S. Supreme Court stated in Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1964):

> *"Naturally, certain business decision will, to some degree, interfere with concerted activities by employees. But it is only when the inference with Sec 7 rights outweighs the business justification for the employe's action that Sec. 8(a)(1) is violated."*

In N.L.R.B. v, John Brown, 380 U.S. 278 (1965) the Supreme Court concluded:

> *"It is true the Board need not inquire into employer motivation to support a finding of an unfair labor practice where the employer conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends."*

Finally, in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) summarized the test as follows:

> *"First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if*

> *the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,; an antiunion motivation must be proved to sustain the charge if the employer had come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him (Emphasis in original.)"*

The initial inquiry is whether the conduct of the Respondents was "inherently destructive" of an important employee right. In the instant case the right in question is the right of employees to form, join, and participate in activities of employee organizations. If allowing KAPE use of the payroll deduction process for payment of membership fees is determined to be "inherently destructive", no further inquiry is required, and a violation of K.S.A. 75-4333(b)(1) is established. If, however, the conduct is found not "inherently destructive", the burden shifts to the Respondents to establish its conduct was motivated by a legitimate business justification.

While no definition of "inherently destructive" could be found, The Winston Dictionary, College ed., does define "inherent" as *"residing inseparably in something else, inseparable."* A similar definition may be found in Black's Law Dictionary, 5th ed. To prove Respondents' conduct was "inherently destructive" it must be shown that allowing KAPE use of the payroll deduction profess will consequently and inescapably be destructive to employees' rights. A rigid formula for determining when conduct becomes "inherently destructive" must be avoided in deference to a case by case examination. Here, under the facts and circumstances as set forth in the record, the

Respondents' conduct cannot be characterized as "inherently destructive".

NAGE was selected as the exclusive representative for all employees in the appropriate unit of each of Respondents' hospitals, and while NAGE may properly negotiate for membership dues deductions, it does so for all of the employees of the unit whether they are members of NAGE or a rival association. NEA-Wichita v. U.S.D. 259,. supra at 446-47. To negotiate otherwise would be highly suspect as a prohibited practice under K.S.A. 75-4333(c)(1) as a violation of the recognized employee organization's duty of fair representation. This requirement that the organization fairly represent all employees in the unit leads to the conclusion that allowing KAPE use of the payroll deduction process is not "inherently destructive" of employee K.S.A. 75-4324 rights.

The burden now shifts to Respondents to come forward with evidence to prove the decision to allow KAPE use of the payroll deduction process was motivated by legitimate and substantial business justification. Such justification can be found in Respondents' compliance with K.S.A. 75-5501(b) which mandates, as part of the state system of payroll accounting, a plan for deduction of membership dues for employees **"who are in any employee organization."** There is no questions KAPE is an employee organization, or that its members have a right to take advantage of any such deduction plan. It is equally apparent from the use of the word "any" in the statute that participation may not be

limited to solely those employees affiliated with a particular employee organization. As a result, it appears from K.S.A. 75-5501(b) that negotiated membership dues deductions must be available to all employees in the unit whether a member of NAGE or a rival organization; in this case KAPE.

Additional justification for the Respondents' conduct of allowing deductions for KAPE dues may be found in K.S.A. 75-4333(b)(1) which requires the public agency maintain a neutral position. As the court concluded in NEA-Wichita v. U.S.D. 259, supra at 446:

> *"Both NEA-Wichita and the Wichita Federation of Teachers are professional employees' organizations as defined by K.S.A. 1979 Supp. 72-5413(e). The deduction and transmittal of dues to a professional employees' organization has the obvious effect of assisting that organization in its existence and administration by the collection of its dues, and granting that privilege to one and not to the other would be highly suspect as a prohibited practice under K.S.A. 1979 Supp. 72-5430(b)(2). However, to permit a payroll deduction for membership dues a the request of professional employees concerned without regard to which professional association is involved permits the Board to maintain a neutral position, as is clearly the intent of 72-5430(b)(2)."*

Although the court in NEA-Wichita was interpreting the Professional Negotiations Act, the court's reasoning is equally applicable to the Public Employer Employees Relation Act.

NAGE argues Respondents have the affirmative duty to negotiate only with it as the "recognized employee representative", and hence the duty not to negotiate with any rival organization. NAGE charges that KAPE cannot be considered an "employee organization" as defined in K.S.A. 75-4322(i) since it is precluded from representing employees *"in dealings with that public agency over conditions of employment and grievances."* Such argument is without merit.

K.S.A. 75-4327(a) specifically requires a public agency to meet with employee organizations representing their members as to grievances and conditions of employment. There is nothing in the Act which limits the number of employee organizations which may be so recognized by the public agency prior to certification or formal recognition of a single employee organization as representing a majority of the employees in the appropriate unit. While there can be only one "recognized employee organization", the certification of exclusive representation status to one employee organization does not cause other rival organizations to loose their "employee organization" status.

Who may be considered an "employee organization" is controlled by K.S.A. 75-4322(i). Of importance here is the requirement that the organization *"has as one of its primary purposes representing such employees in dealings with that public agency over conditions of employment and grievances."* NAGE argues, as noted above, that once it was certified as the recognized employee representative KAPE cannot have as its primary purpose the activity of representing employees in dealings with the public agency.

NAGE's focus is misplaced. To constitute an employee organization under the Act, an organization need not actually represent employees in dealings with the public agency, it only must have that as a "primary purpose". Black's Law Dictionary, 4th ed., defines "purpose" as:

> *"That which one sets before him to accomplish; an end, intention, or aim, objective, plan, project."*

To be considered an "employee organization" within the meaning of K.S.A. 75-4322(i) the organization need only have as its goal or objective being able to represent employees in dealings with the public agency concerning conditions of employment and grievances. Obviously an employee organization can possess such purpose even when a rival organization is the recognized employee representative. It is for just this reason organizations file petitions for representation elections seeking to unseat the recognized employee representative.

There is nothing in the stipulated record to show that KAPE did not include employees of the appropriate unit or did not have as one of its primary purposes representing such employees in dealings with Respondents over conditions of employment and grievances. Consequently, those conditions must be presumed to exist. Having met the qualifications set forth in K.S.A. 75-4322(i), KAPE must be considered an "employee organization". As such it may take advantage of the payroll deduction plan for employee organization dues mandated by K.S.A. 75-5501(b). Accordingly, Respondents did not interfere with any employee rights in violation of K.S.A. 75-4333(b)(2) by allowing KAPE to use the dues deduction process.

Pursuant to Great Danes Trailers, supra, once the Respondents have come forward with evidence of legitimate and substantial business justification for its conduct NAGE must prove "an antiunion motivation" to sustain its charge. There is nothing in the stipulated record which evidences any antiunion motivation.

Upon careful scrutiny of the record and weighing the evidence it is determined the interference with employee rights guaranteed by K.S.A. 75-4325 caused by Respondents allowing KAPE use of the payroll deduction process for membership dues does not outweigh the legitimate business justifications for Respondents' conduct.

**ISSUE NO. 2**

**Whether Respondents encouraged or discouraged membership in the National Association of Public Employees by discrimination in hiring, tenure or other conditions of employment in violation of K.S.A. 75-4333(b)(3) by allowing the Kansas Association of Public Employees use of the payroll deduction procedures for payment of membership dues.**

Blacks Law Dictionary, 4th ed., defines "discrimination" as *"a failure to treat all equally."* A review of the stipulated record reveals no evidence that any member of NAGE was treated differently relative to availability of dues deductions for organization membership dues. To the contrary, the conduct of Respondents indicate an equality of treatment between NAGE and KAPE consistent with the requirement of K.S.A. 75-4333(b)(2) that public agencies remain neutral, NEA-Wichita v. U.S.D. 259, supra, while NAGE's position would appear to be discriminatory by limiting dues deductibility only to employees with NAGE affiliation.

**ISSUE NO. 3**

**Whether Respondents did denied the rights accompanying certification or formal recognition granted in K.S.A. 75-4328 to the National Association of Government Employees in violation of K.S.A. 75-4333(b)(6) by allowing the Kansas Association of Public Employees use of the payroll deduction procedures for payment of membership dues.**

Respondents are requried to recognize NAGE for two purposes only, i.e. *"to represent employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances,"* K.S.A. 75-4327(a). There is nothing in the stipulated record to indicate this has not so far been accomplished, or that Respondents have failed to honor the contract's provisions for NAGE dues deductions.

## ORDER

IT IS THEREFORE ORDERED that the above-referenced prohibited practice complaints filed by the National Association of Government Employees be dismissed.

Entered this 15th day of January, 1991.

Monty R. Bertelli
Senior Labor Conciliator
Employment Standards and Labor Relations
1430 S. Topeka Blvd.
Topeka, Kansas 66603

## NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become final fifteen (15) days from the date of service unless a petition for review pursuant to K.S.A. 77-526(2)(b) is filed with the Public Employee Relations Board, Employment Standards and Labor Relations, 1430 S. Topeka Blvd., Topeka, Kansas 66603

**CERTIFICATE OF SERVICE**

the undersigned hereby certifies that on the 16th day of January, 1991, the above and foregoing Initial Order was mailed, first class, postage prepaid to the following:

Brent J. Jaimes,
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