BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES

STATE OF KANSAS

BUTLER COUNTY COMMUNITY COLLEGE EDUCATION ASSOCIATION,	)	
Petitioner,	)	
vs.	)	Case 72-CAE-13-1989
BUTLER COUNTY COMMUNITY COLLEGE,	)	
Respondent.	)	

INITIAL ORDER

NOW, on the 27 th day of September, 1990, the above-captioned prohibited practice complaint came on for hearing before presiding officer Monty R. Bertelli at the Butler County Community College, El Dorado, Kansas.

APPEARANCES

Petitioner: Appears by counsel E. L. Lee Kinch of Post, Syrios & Kinch, 204 Occidental Plaza, 300 North Main, Wichita, Kansas 67202.

Respondent: Appears by counsel Robert D. Overman of Martin, Churchill, Overman, Hill & Cole, Chartered, 500 North Market, Wichita, Kansas 67214.

ISSUES PRESENTED FOR DETERMINATION

1. Whether the discussions held in accordance with paragraph 2 of page 2 of the Tentative Agreement constituted "professional negotiations" as that term is defined in K.S.A. 72-5413(q).

2. If the answer to Issue No. 1 is in the affirmative, did Respondent violate K.S.A. 72-5430(b)(5) by refusing to negotiate in good faith in the following particulars:

   A. By failing to vest its bargaining representatives with sufficient authority to carry on meaningful negotiations?

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B. By failing to recommend ratification of the report and recommendations of the inequities committee to the Board of Trustees?

C. By circumventing the faculty bargaining agent and formulating and recommending for ratification by the Board of Trustees a proposal which changed the terms and conditions of employment and which was never negotiated at the table?

D. By ratifying a proposal unilaterally formulated by the Administration and never negotiated at the table?

3. If the answer to Issue No. 1 is in the negative, did Respondent have a duty under K.S.A. 72-5423 to negotiate with Petitioner with respect to the report and recommendations of the inequities committee prior to submitting a proposal concerning salary inequities to the Board of Trustees for ratification?

A. If the answer to Issue No. 3 is in the affirmative, did the Board of Trustees' failure to submit the committee's report and recommendations to negotiations constitute a refusal to negotiate in good faith under K.S.A. 72-5430(b)(5)?

4. If it is determined there is a violation of K.S.A. 72-5430, what is the appropriate remedy?

SYNOPSIS

PROHIBITED PRACTICE - Professional Negotiations - definition. While all professions negotiations involve meeting and conferring on terms and conditions of employment, all instances where parties meet and confer do not rise to the level of professional negotiations. The element of the definition of "professional negotiations" key to resolving the issue presented in the present case is the requirement of "a good faith effort by both parties to reach agreement."

PROHIBITED PRACTICE - Professional Negotiations - definition. Professional negotiations is premised on the existence of two parties which are essentially in adversarial roles with each representing and looking out for its own interests. It cannot be equated with an academic collective search for truth.

PROHIBITED PRACTICE - Professional Negotiations - refusal to negotiate in good faith. The Board's adoption of the administration recommendation could be considered the formulation of a proposal as the prelude to professional negotiations. The true intentions of the Board cannot be determined because the Association forclosed any possible negotiations when it indicated no action would be taken on the Committee recommendations pending determination of the prohibited practice complaint.

FINDINGS OF FACT

1. Negotiations for the 1988-1989 Agreement began March 31, 1988 and culminated in a Tentative Agreement on August 2, 1988 following impasse and mediation. The Tentative Agreement was ratified by the Board of Trustees (hereinafter referred to as the "Board") and the members of the professional employees unit (hereinafter referred to as the "Faculty") on August 9, 1988.

2. The Tentative Agreement contained a provision calling for establishing a committee composed of six members, three appointed by the college administration (hereinafter referred to as the "Administration") and three appointed by the professional employees' organization (hereinafter referred to as the "Association"), to study the prevention of future inequities in salaries and workload. The Committee was to make recommendations to the Board and the Association by May 15, 1989.

3. The Board was to issue by July 1, 1989 a decision on how to address salary and workload inequities and whether to implement the decision as part of the 1989-90 Agreement.

4. By October 7, 1988 the Association had appointed Kevin Belt, Janice Jones and Marvin Dobson to the Committee. The Administration appointed Tom Erwin, Patricia Bayles and Frank Veeman. Kevin Belt and Tom Erwin were identified as co-chairs for the purpose of communicating meeting schedules and circulating documents.

5. The members of the Committee worked in a collegial manner, with open, honest and free-flowing communication.

6. The Committee met October 7, 1988 and on at least ten additional occasions during the fall and spring semesters resulting in a committee report dated March 9, 1989 setting forth three alternative recommendations, A, B and C, to solve the salary inequities issue.

7. On March 10, 1989 when the report was submitted to the college President it contained a fourth alternative, recommendation D, unilaterally prepared by committee member Erwin to which the Association representatives objected. The report was withdrawn and on March 13, 1989 a final committee report was resubmitted to the president without alternative recommendation D. The recommendations were not listed in any order of preference or priority.

8. At the May 9, 1989 meeting of the Board the Committee's report containing the three alternative recommendations was presented by the college President. In addition, the president

presented the Administration's recommendation. The Administration recommendation had not been formally submitted to the Committee for consideration. The Board by motion accepted the Committee's report and the Administration's recommendation and adopted the Administration's recommendation for inclusion in the 1988-89 Agreement.

9. On May 11, 1989, the Association advised it would take no action on the committee recommendations and would be filing a prohibited practice complaint.

10. On June 11, 1989, the Association filed a prohibited practice complaint with the Public Employee Relations Board.

11. The Board held a special meeting on July 25, 1989 and rescinded it action concerning the salary inequities issue taken May 9, 1989 based upon the Association's failure to ratify any of the recommendations of the committee report or the recommendation adopted by the Board.

CONCLUSIONS OF LAW AND OPINION

ISSUE NO. 1

It is the position of the Association that the study conducted by the committee in accordance with paragraph 2 of page 2 of the Tentative Agreement (hereinafter referred to as "paragraph 2") constituted "professional negotiations" as that term is defined in K.S.A. 72-5413(q). That definition provides:

> "Professional negotiations 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."

The Board maintains paragraph 2 provided a process, different from the professional negotiation process, to enable the Board of Trustees to issue a decision concerning the prevention of future salary inequities and appropriate workload for the 1989-90 school year. Neither position is correct.

While the Board may have reached the incorrect conclusion, the analysis employed to differentiate between the activity of the committee and professional negotiations does lead to the correct resolution of the complaint. That analysis calls for a comparison of terms normally and usually associated with professional negotiations to the terms used in paragraph 2 or the activities undertaken by the committee pursuant thereto.

Paragraph 2 provides for both the Administration and the Association appointing three members to a "Committee". Webster's Ninth New Collegiate Dictionary defines "committee" as "a body of persons delegated to consider, investigate, take action on, or report on some matter." Such definition contemplates the members acting together as a unit to accomplish an assigned task. By contrast, professional negotiations are usually undertaken by separate and distinct negotiating teams seeking to advance their own interest, See NLRB v. Insurance Agent's Int'l Union, 361 U.S.

477 (1968). This division is recognized in the definition of "professional negotiations" which speaks to an agreement reached "by both parties". Finally, the testimony revealed the committee activities were coordinated by "co-chairs" whereas in professional negotiations each negotiating team has a designated "chief negotiator".

Paragraph 2 further provided the task of the committee was to "study" the prevention of future inequities in salaries and professional workload. "Study" has been defined as "careful or extended consideration; a careful examination or analysis of a phenomenon, development or question", Webster's Ninth New Collegiate Dictionary, and "earnest and careful examination of a particular question", The Winston Dictionary. Professional negotiations involve, as the name implies, "negotiation" defined as the "process of submission and consideration of offers until acceptable offer is made and accepted" or "to communicate or confer with another so as to arrive at the settlement of some matter. To meet with another so as to arrive through discussion at some kind of agreement or compromise about something", Black's Law Dictionary, 5th ed. To characterize the difference, the negotiation process is not so much the earnest and careful search for truth or fact but rather the search for a common ground of agreement.

It should be also noted that paragraph 2 used the term "study" rather than the statutory phraseology of "meet and confer" usually associated with the professional negotiation process. As quoted in National Education Association v. Board of Education, 212 Kan. 741, 746, 512 P.2d 426 (1973), "meet and confer is the method of determining conditions of public employment through discussions between representatives of the employer and employee organizations."

Following completion of the study the Committee was to "make recommendations". "Recommendation is defined in Webster's Ninth New Collegiate Dictionary as "something recommended". "Recommend" is further defined as "to present as worthy of acceptance or trial" and "to endorse as fit, worthy or competent." The successful conclusion of professional negotiations results in a tentative agreement setting forth the final language and provisions upon which the parties have reached agreement. No further selection of alternatives is required by the parties. The only step remaining is ratification. Ratification of the Tentative Agreement is expected to be recommended in good faith by the negotiating teams and considered in good faith by the Board and the members of the professional organization. National Education Association v. Board of Education, supra at 749. Only upon ratification by both parties does it become binding.

In the instant case it is true the members of the committee did meet, confer, consult and discuss terms and conditions of professional employment. However, while all professional negotiations include meeting and conferring, all instances where parties meet and confer do not rise to the level of professional negotiations.

The element of the definition of "professional negotiations" key to resolving the issue presented in this case is the requirement of "a good faith effort by both parties to reach agreement". The Committee did reach agreement but that agreement was as to the alternate recommendations or options to be included in the final report and not an agreement on the manner in which the inequities issue would be resolved and which would be submitted to the parties with recommendation for ratification. The committee, rather than reaching agreement on a single proposal, prepared a report containing three "recommended alternatives or options to help provide solutions to the inequities issue." The recommendations were not listed in any order of preference or priority. There was no recommendation for ratification of any one of the recommendations. In fact, the testimony revealed that members of the Committee were of the belief that the Board had the right to accept one of the alternatives; to send the report back to the committee; to propose something else to the committee; or

to not accept any of the committee recommendations. Such alternatives are inconsistent with the ratification process.

The Committee, instead of participating in professional negotiations, served as a research vehicle to facilitate future professional negotiations on the subject of inequities by researching, developing, testing and evaluating possible solutions and presenting the best for consideration by the parties. The recommendations provided the base from which the Board and the Association could formulate proposals to enter into negotiations. This the Board apparently did when it considered the Committee report and the recommendation from the Administration before adopting the Administration proposal.

Had the Board's proposal been acceptable to the Association, it could have been submitted to both parties for ratification. If the proposal was unacceptable the Association could have formulated its own proposal and the parties proceeded to professional negotiations in an attempt to resolve their differences. However, in this case, upon being advised of the action of the Board, the Association filed their prohibited practice complaint rather than addressing the Board's proposal. Professional negotiations as contemplated by the Act, on the issue of inequities, never commenced, not from any action by the Board but due to the decision of the Association to proceed with the prohibited practice complaint rather than address the Board's proposal.

In summary, professional negotiations is premised on the existence of two parties which are essentially in adversarial roles with each representing and looking out for its own interests. As the U.S. Supreme Court has observed, "The parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest." NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488 (1968). Here the Committee worked in a collegial fashion where members engaged in open, honest, and free flowing communication in an attempt to develope potential solutions to the inequities issue. However, as the Supreme Court has noted collective bargaining "cannot be equated with an academic collective search for truth." Id. at 488.

The discussions of the Committee pursuant to paragraph 2 of page 2 of the Tentative Agreement does not constitute "professional negotiations" as that term is defined in K.S.A. 72-5413(q).

ISSUE NO. 3

Having determined the discussions of the Committee did not constitute "professional negotiations", it is necessary to determine if the Board has a duty to negotiate with the Association the recommendations of the Committee concerning salary inequities prior to ratification of a proposal and if so, did the Board breach its duty when it adopted the Administrations recommendation which had not been discussed by the Committee.

The Association asserts the Board's failure to submit the Committee's report for negotiations constitutes a refusal to negotiate in good faith. The facts do not support the Association's position. Paragraph 2 required the the Board "to issue its decision concerning such matters [committee recommendations] (including implementation in the collective bargaining agreement for the school year 1989-90) by July 1, 1989." On May 9, 1989 the Board, by motion, accepted the Committee report and adopted the recommendation of the administration to take language from the report and merge it with the 1989-90 Agreement. By such action the Board satisfied its responsibilities under paragraph 2.

It is apparently the Association's position that the action of the board constituted final, unilateral action on the issue. Such position is without merit. It is clear from the testimony of Mr. Burch that the adoption of the May 9th motion was not intended to constitute unilateral action by the board nor final action on the issue of salary inequities. In explaining why the Board rescinded the May 9th motion Mr. Burch stated:

> "Q. Am I correct that the reason given for the recision was the failure on the part of the Board - - of the Association to ratify the alternatives?"
>
> "A. That's right. We felt that there had been no - - either no action or disagreement or whatever, and we were not getting any response so we withdrew the recommendation."

Obviously, if final action had been taken no response would be expected or required. The fact that the Board was waiting for a response and potential disagreement indicates an awareness of the potential for future negotiations. Finally, Mr. Burch's reference to the action of the Board as a "recommendation" further indicates that concurrence would be required before final action taken. It should also be noted that the terms "ratify" or "ratification" do not appear in the May 9th motion.

As noted above, the Board's adoption of the administration recommendation could be considered the formulation of a proposal as the prelude to professional negotiations. However, the true intent of the Board cannot be determined because on May 11, 1989, only two days after the May 9th Board meeting, the Association foreclosed any possible negotiations in the immediate future by indicating no action would be taken on the Committee recommendations until resolution of a prohibited practice complaint to be filed. There is nothing in the record revealing a refusal by the Board to enter into negotiations or an intent not to negotiate the issue of salary inequities. Any responsibility for the failure of negotiations to proceed must rest with the Association.

The Association was premature in the filing of its complaint. After learning of the Board's action, it could have requested the Board meet and confer on the issue of salary inequities, or

rejected the Board's recommendation and requested to meet and confer, or it could have taken action on the Committee's recommendations which were inconsistent with the Board's proposal. At that point, the Board would have been required to negotiate in good faith. However, at the time of filing the prohibited practice complaint the Board's actions did not evidence a refusal to negotiate in good faith.

CONCLUSION

The discussions of the Committee pursuant to paragraph 2 of page 2 of the Tentative Agreement did not constitute "professional negotiations" as that term is defined in K.S.A. 72-5413(q), and the Board, by adopting the Administration's recommendation did not refuse to negotiate in good faith the issue of salary inequities.

Dated this 27th day of September, 1990.

Monty R. Bertelli
Senior Labor Conciliator
Employment Standards & Labor Relations
1430 Topeka Blvd. - 3rd Floor
Topeka, KS 66603

NOTICE OF RIGHT TO REVIEW

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of September, 1990, the above and foregoing Initial Order was mailed, first class, postage prepaid to the following:

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