BEFORE THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES
STATE OF KANSAS

Allen County Community College-NEA, Petitioner	)	
v.	)	Case No. 72-CAE-15-1989
Allen County Community College, Respondent	)	

I N I T I A L O R D E R

NOW, on the 11th day of October, 1989, this matter comes on for formal hearing pursuant to K.S.A. 72-5430a(a) and K.S.A.77-517 before presiding officer Monty R. Bertelli.

APPEARANCES

Petitioner: Appears by and through counsel Steve Lopes, 116 1/2 South Main, Ottawa, Kansas 66067
David Schauner, 715 W. 10th Street, Topeka, Kansas 66612

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

ISSUE TO BE DECIDED

"Did Allen County Community College violate the Professional Negotiations Act by distributing a packet of materials identified as the Board of Trustees' proposal for a two year package (1989/90 - 1990/91) to members of the bargaining unit without the prior approval of the certified employee organization during the time collective bargaining negotiations were in progress?"

72-CAE-15-1989

SYLLABUS

1. **PROHIBITED PRACTICE- Interpretation of Statute - NLRB Decisions.** Where there is no published Kansas case law it is appropriate to look at the National Labor Relations Act (NLRB) for guidance. While such decisions cannot be regarded as controlling precedent, they may have value in areas where the language and philosophy of the acts are analogus.

2. **PROHIBITED PRACTICES- Direct Dealing - Communications to Professional Employees.** The Professional Negotiations Act does not, on a per se basis, preclude a board of education from communicating, in noncoercive terms, with its professional employees during collective bargaining negotiations.

3. **PROHIBITED PRACTICES - Direct Dealing - Rights of Board of Education.** A board of Education has a fundamental right to communicate with its professional employees concerning its position in collective bargaining negotiations and the course of negotiations.

4. **PROHIBITED PRACTICES- Direct Dealing - Burden of Proof.** A board's right to communicate with its professional employees during collective bargaining is not unlimited. To establish bad faith in negotiations the Petitioner must show the board's communication contained a threat of reprisal or force or promise of benefit or denigrated the negotiating team or certified representative organization or encouraged bargaining unit members to abandon the certified representative and negotiate for better terms directly with the board.

5. **PROHIBITED PRACTICES - New Offers.** Distribution by the board of education of a proposal previously offered to and rejected by the bargaining unit members, which contains no new items or proposals, is protected by the board's right to communicate with its professional employees and is not to be considered a new offer.

6. **PROFESSIONAL NEGOTIATIONS ACT- Purpose.** The underlying purpose of the Professional Negotiations Act is to encourage good relationships between a board of education and its professional employees and to create a favorable climate in which a healthy and stable bargaining process can be established and maintained.

FINDINGS OF FACT

1. The Allen County Community College - NEA, hereinafter referred to as "Petitioner", and Allen County Community College, hereinafter referred to as "Respondent", entered into negotiations in 1988 for a master agreement. The parties failed to reach agreement and Respondent's Board of Trustees issued an unilateral contracts for 1988 (Tr. P.53, L. 14 P. 54, L.8).
2. By letter dated January 30, 1989, the Petitioner submitted to Respondent its notice of items proposed to be negotiated for inclusion in the 1989/90-1990/91 collective-bargaining agreement. The items listed being both monetary and nonmonetary. (Respondent's Ex. C)
3. By letter dated February 1, 1989, Respondent submitted to Petitioner its notice of items proposed to be negotiated for inclusion in the 1989/90-1990/90 collective-bargaining agreement (Petitioner's Ex. 2). Included were language items tentatively agreed upon in the 1988 negotiations (Tr. P.56, L. 10-13)
4. The 1989 negotiating team for Petitioner was comprised of Van Thompson, Ed Lind and spokesman Don Benjamin. (Tr. P. 12, L. 6-11). Respondent's team included Robert Overman and John Masterson (Tr. P.12, L. 12-15).

5. In February, 1989, the parties commenced negotiations on the 1989/90-1990/91 Master Agreement (Tr. P. 13, L. 1-4). On May 15th Respondent's negotiating team presented to Petitioner's negotiating team a complete package proposal for a 1989/90-1990/91 Master Agreement. The proposal was characterized by Respondent's negotiating team as "the last and best proposal of the Board." (Tr. P. 14, L. 4-6) (Respondent's Ex. B). (Respondent's Ex. A). A cover letter to Petitioner's negotiating team stated "we request that it be submitted to the Association for ratification."

6. Petitioner's negotiating team rejected the package because of the salary proposal but agreed to take it to their membership. Don Benjamin told Respondent's negotiating team "we'll try to get them (the membership) together within 10 days." (Respondent's Ex. B) (Tr. P. 147, L. 7-25)

7. After the May 15th negotiating session the Petitioner's negotiating team met and decided the most expedient method of determining the opinion of the bargaining unit members was through a one-on-one poll. The basis for this decision being the college faculty were not all available on campus during the summer vacation period to attend a meeting. The polling was conducted on May 16th

and 17th by Van Thompson and Ed Lind. Van Thompson polled members by telephone and in person. Ed lind polled members in person on campus. (Tr. P.17, L. 8-13) Between 15 and 17 members of the 25 in the bargaining unit were polled with no "Yes" votes. (Tr. P. 18, L. 9-25). Petitioner stopped polling after a majority of the membership rejected the proposalso not all members of the bargaining unit were polled.

8. As part of the polling process Petitioner did not distribute the Respondent's proposal package to the members of the bargaining unit. (Tr. P. 103, L. 1-2) During the one-on-one polling the primary issue for discussion was the financial proposals with little or no discussion of the other proposals included in the package. (Tr. P. 40-41, 43-45, 70, 81-82) Petitioner did not believe it was necessary to review or discuss the whole package with each member because approximately two-thirds of the items had been tentatively agreed to during the 1988 negotiations and the faculty members were familiar with them. (Tr. P. 69, L. 21 - P. 70, L. 8)

9. Respondent was not consulted as to the method of polling the members of the bargaining unit or when the polling would be conducted (Tr. P. 63, L. 12-18) nor did it participate in the polling process. Respondent was

not aware that the one-on-one poll had been conducted until informed of the results and even then did not demand a new poll to be conducted in a different manner.

10. At a May 31, 1989 meeting between Don Benjamin and John Masterson, Masterson became aware the Respondent's proposal had been rejected by the membership. (Tr. P. 104, L. 12-17) They discussed the method employed by Petitioner to obtain the vote of the membership (Tr. P. 103, L. 8-13) and the fact that the members of the bargaining unit had not been made aware of the entire contents of the proposal nor received a copy of it. (Tr. P. 99, L. 1-3) During the meeting Masterson sought approval from Benjamin to send the May 15th proposal package to the members of the bargaining unit. Although being aware Masterson was soliciting his approval to send the package, Benjamin neither gave his approval nor objected. (Tr. P. 120, L. 1-9) By the end of the meeting Benjamin knew or should have known that if he did not object Masterson would send copies to the members of the bargaining unit that day. (Tr. P. 161, L. 7-15) The package was sent to all faculty members on May 31st and received on June 1st or 2nd. (Petitioner's Ex. 3)

11. With the exception of the cover letter, Petitioner's Ex. 3, the proposal sent to the members of the bargaining unit was the same proposal submitted to Petitioner's negotiating team on May 15th. (Tr. P. 5, L. 5-8) Nothing new or different had been included in the package. (Tr. p. 71, L. 24 - P. 72, L. 6) Petitioner did not object to the contents of the package. They objected only to Respondent having sent it. (Tr. P. 72, L. 21-22)

12. The cover letter to the faculty, Petitioner's Ex. 3, accompanying the proposal was entirely factual in nature. It contained no threats of reprisal or force, or promise of benefit or denigrated the negotiating team or Petitioner nor encouraged members of the bargaining unit to abandon Petitioner and negotiate for better terms directly with Respondent. The letter did not indicate that the proposal was the same proposal rejected by the bargaining unit pursuant to the May 16th and 17th poll.

13. Respondent distributed the May 15th proposal to the members of the bargaining unit to make sure they were aware of the College's position. (Tr. P. 197, L. 9-14) It was not their intent to intimidate, coerce or discriminate against any member of the bargaining unit by mailing the proposal. (Tr. P. 198, L. 1-9)

14. After receipt of the proposal, no member of the bargaining unit pressured Petitioner's negotiating team to accept Respondent's proposal. (Tr. P. 89, L. 1-12) No member of the bargaining unit expressed the opinion they felt coerced, restrained or discriminated against as a result of having received the proposal package. (Tr. P. 89) Petitioner's negotiating team was not constrained as tp the items they could negotiate or the extent of negotiation on any item. (Tr. P. 111-114) Two members of the bargaining unit and two members of the negotiating team indicated confusion concerning the status of negotiations following the distribution of the proposal but that confusion was addressed and ended by the June 8th negotiation session. (Tr. P. 115, L. 3-14)

15. The parties were at impasse after the June 8th negotiating session. (Tr. P. 159, L. 19) With the assistance of the Federal Mediation Service the parties were able to reach accord on a Master Agreement for 1989/90-1990/91.

Conclusions of Law and Opinion

It is Petitioner's contention Respondent, by sending copies of the May 15th proposal directly to the faculty members committed a prohibited practice as set forth in K.S.A. 72-5430(b)(1),(5) and (6). The statute provides, in pertinent part:

> "(a) The commission of any prohibited practice, as defined in this section . . . shall constitute bad faith in professional negotiation.
>
> "(b) It shall be prohibited practice for a board of education . . . willfully to:
>
> (1) Interfere with, restrain or coerce professional employees in the exercise of rights granted in K.S.A. 72-5414;
> . . . .
>
> (5) refuse to negotiate in good faith with representatives of recognized professional 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. 72-05415 . . . ."

The essence of Petitioner's complaint is that Respondent bargained in bad faith during professional negotiations by engaging in direct dealing with members of the bargaining unit and bypassing petitioner, the certified representative of the unit. Such bad faith bargaining could constitute a prohibited practice.

Petitioner sets forth three arguments to support its contention that Respondent engaged in bad faith professional negotiations:

> "A. The Board had no right to interfere with the Association's method of polling its members."
>
> "B. The cover letter included with the Board's distribution evidence the Board's bad faith."

> "C. The Board improperly bypassed the bargaining unit representatives by presenting a re-opened, previously reject offer directly to the individual teachers."

All three are based upon the same premise: The Board must receive permission from Petitioner before communicating with bargaining unit members about anything relating to contract negotiations. A failure to seek and obtain such permission being per se bad faith. Such is not the law.

Petitioner correctly states that there is no published Kansas case law determining what constitutes a prohibited practice under K.S.A. 72-5430(b), and further that it is appropriate to look at the National Labor Relations Act (NLRB) for guidance. As the court noted in National Education Association v. Board of Education, 212 Kas. 741, 749, 512 P2d 426 (1973) when called upon to interpret the Professional Negotiations Act,

> "In reaching this conclusion we recognize the differences, noted by the court below, between collective negotiations by public employees and "collective bargaining" as it is established in the private sector, in particular by the National Labor Relations Act. Because of such differences federal decision cannot be regarded as controlling precedent, although some may have value in areas where the language and philosophy of the acts are analogous. See K.S.A. 1972 Supp. 75-4333(c), expressing this policy with respect to the Public Employer-Employee Relations Act."

Petitioner in its brief cites the similarities between K.S.A. 72-5430(b)(1) and (5) and NLRB Sec. 8(a)(1) and (5).

The Professional Negotiations Act does not, on a per se basis, preclude a board of education from communicating, in noncoercive terms, with its professional employees during collective-bargaining negotiations. A board of education has a fundamental right to communicate with its professional employees concerning its position in collective-bargaining negotiations and the course of those negotiations. As concluded by the National Labor Relations Board in Proctor and Gamble Mfg. Co., 160 NLRB 334, 340, 62 LRRM 1617. (1966):

> "The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith."

See also Adolph Coors, Co., 235 NLRB 271, 277, 98 LRRM 1539 (1979) (Employer did not engage in direct dealing with its employees when it sent letters setting forth certain proposed contract terms which had been presented to the union), and Coastside Scavenger Co., 273 NLRB 198, 118 LRRM 1439 (1985) (Employer did not engage in bad faith negotiations when it gave employees document outlining major contract proposals made to the union).

In the instant case the proposal mailed by Respondent to the faculty members was the same proposal that had been submitted to Petitioner's negotiating team on May 15th, with the

approval was given to John Masterson. Silence may give rise to an estoppel where, under the circumstances, there should have been a disclosure. "Where a duty to speak exists, silence is tanamount to dissemination." Bruce v. Smith 204 Kan. 473, 477, 464 P 2d 224 (1970). This rule is designed to promote honesty and fair dealings between persons.

Here Don Benjamin was aware John Masterson was soliciting permission to send the May 15th proposal to the faculty members (Tr. p. 120 L. 7-9) and knew or should have known from the conversation he intended to do so unless an objection was raised. Benjamin at that point had a duty to disclose either his lack of authority to grant permission or his objection to the proposed mailing. His silence could be determined to constitute assent and Petitioner could be barred from denying that it approved nor assented to the action of the Respondent as a basis for this complaint. This issue need not be decided however since it has been determined Respondent did not need permission prior to mailing the proposal to faculty members.

Petitioner next contends the cover letter (Petitioner E. 3) included with the Board's proposal when sent to the faculty was evidence of bad faith. The Board's right to communicate with its professional employees during collective-bargaining negotiations is not unlimited. Any such communication must be undertaken in a noncoercive manner. To establish bad faith on the part of Respondent, Petitioner must show Respondent's direct

There is a contradiction in the testimonies of Don Benjamin and John Masterson as to what was said on May 31st relative to Respondent mailing the May 15th proposal to the faculty members and whether Don Benjamin did or did not give Respondent permission to mail the proposal package. To rectify the contradiction is not important to the determination of this complaint.

From the testimony of both Van Thompson and Don Benjamin, Petitioner's polling was completed by May 31st and no meeting or further polling was planned. Both men believed Respondent's proposal had been rejected as a result of the May 16 - 17 poll. Such being the case, the mailing of the proposal on May 31st could not have interfered with the Petitioner's method of polling, since no polling was conducted after May 17th. There is nothing in the record indicating Respondent demanded or requested a new poll be taken or a different polling method be used after the proposal package was received by the faculty.

Whether permission was or was not given is also not a factor because, as set forth above, Respondent has a fundamental right to communicate with its professional employees concerning its position in collective-bargaining negotiations. Respondent was not required to seek approval prior to sending the proposal so Don Benjamin's response is immaterial.

However, even if Don Benjamin did, as he testified, neither give his approval nor object to the proposal being sent, (Tr. p. 120 L. 10-19) Petitioner may be estopped from denying that

exception of the cover letter, Petitioner's exhibit 3. (Tr p. 22, L 5-8). Nothing new or different had been included in the proposalpackage sent to the members of the bargaining unit. (Tr. P. 71, L. 24 - P. 72, L.6) The intent of the Board in sending the proposal package was "to simply make sure that all members were aware of what the College's position was as of May 15th". (Tr. P. 197, L 9-14). This activity alone does not establish bad faith on the part of Respondent.

Petitioner asserts Respondent interfered with the method selected by the negotiating team to poll the bargaining unit membership concerning Respondent's May 15th proposal. Apparently, this interference was in the form of mailing the proposal to the faculty members. There is no evidence in the record indicating Respondent interfered with the one-on-one polling conducted by Van Thompson and Ed Lind from May 15th to May 31st. The record indicates that Respondent was of the belief, from discussions at the May 15th meeting the bargaining unit would meet within 10 days to review and vote on the Board's proposal (Tr. P. 155, L.25 - P. 156, L. 23). Petitioner's negotiating team decided after the May 15th negotiating session to poll the members individually rather than have a meeting (Tr. p. 16, L. 23 - P. 17, L. 13) and the polling was completed by Mar 17th. (Tr. P. 110, L. 4-16) Respondent had neither the knowledge nor time to interfere with that process.

communication with members of the bargaining unit contained a threat of reprisal or force or promise of benefit or denigrated the negotiating team or Petitioner or encouraged bargaining unit members to abandon the certified representative and negotiate for better terms directly with Respondent. Petitioner failed to meet that burden.

The cover letter states as follows:

"TO: ACCC Faculty

FROM: John Masterson

SUBJ: Board Proposal

DATE: May 31, 1989

> Enclosed is the Board's proposal for a two year package (1989/90-1990/91).
>
> This was presented to the Allen County Community College-NEA Negotiating Team on May 15, 1989."

The cover letter was entirely factual in nature. Petitioner admits same in its brief. The letter contains no threats or promises. There was no suggestion that the employees should abandon their certified representative and negotiate for better terms directly with Respondent. Neither the cover letter addressed to the faculty, Petitioner's exhibit 3, nor the cover memo to the members of the negotiating team attached to the proposal, Petitioner's exhibit 4, can be characterized as "coercive". As Van Thompson testified the Petitioner did not object to the materials that were mailed by Respondent on May 31st (Tr. P.72, L. 21) since the faculty was already aware of

two-thirds of its proposals (Tr. P. 70, L.1-8), the remaining financial items in issue were discussed as part of the poll (Tr. P. 70, L. 17-20) and the members could have received or reviewed a copy of the proposal from Petitioner if desired. (Tr. p.35, L. 14-18). The only objection the Petitioner had concerning the mailing of the proposal was in the procedure followed by Respondent. (Tr. p. 72, L. 2-22).

Petitioner contends in its brief that it is not what is included in the cover letter that is objectionable but rather what is omitted; that the teachers had rejected the same proposal. From this Petitioner seeks to infer on intent to confuse members of the bargaining unit and denigate the negotiating team. No other evidence in the record supports this position. Petitioner produced no evidence that following the mailing of the May 15th proposal Respondent began negotiations with individual faculty members or another employee organization. The testimony reveals no evidence that professional employees were restrained, coerced or discriminated against by Respondent through distribution of the proposal.

There is testimony of confusion on the part of approximately four faculty members, two fo which were negotiating team members, concerning the status of negotiations following receipt of the May 15th proposal on June 1 and 2,but no evidence that such confusion interfered with, restrained, coerced or discriminated against the professional employees. In fact, receiving the

proposal package may have assisted faculty members because, as Don Benjamin testified, they became involved or had an idea of the negotiation process which they might not otherwise have received. (Tr. P.122, L. 16-20). According to the testimony of John Masterson the intent of mailing the proposal was simply to make sure all members of the bargaining unit were aware of the entire proposal (Tr. P 197, L. 9-14), and there was never the intent to coerce, intimidate or discriminate against any member of the bargaining unit. (Tr. p. 197, L. 24 - P. 198, L. 11) Any confusion was eliminated by the time of the June 8th negotiation session. Without more than speculation and supposition to contradict it, the language of the cover letter must speak for itself. That language does not transform an otherwise permissible communication into bad faith negotiations.

Petitioner's third argument is that once the May 15th proposal was rejected it could not thereafter be accepted by the bargaining unit, therefore the distribution of the May 15th proposal to the faculty constituted a new offer. Since that new offer was not first submitted to the negotiating team but sent instead to the faculty, Respondent was engaged in direct dealing with the professional employees and bypassing Petitioner, the certified representative. This argument is also without merit.

As stated above, the Board has a fundamental right to inform employees of the status of negotiations and proposals previously made to the certified representative. Proctor and Gamble Mfg.

Co., supra. The distribution of the May 15th proposal, previously offered to and rejected by the unit membership falls within this protected communication and is not to be considered a new offer. See PPG Industries Inc., 172 NLRB 61, 69 LRRM 1271 (1968) (Employer letter to employees outlining employee's proposal sent after offer was submitted to union and rejected was not bad faith).

There is nothing in the record which would prove or even show Respondent intended to alter the bargaining relationship of the parties by the mailing or that it was undertaken as part of a strategy to frustrate the bargaining process or otherwise avoid bargaining obligations under the Act. To the contrary, Respondent continued to negotiate with Petitioner and in July reached accord with Petitioner on a Master Agreement.

CONCLUSION

The underlying purpose of the Professional Negotiations Act is to encourage good relationships between a board of education and its professional employees. Liberal - NEA v. Bd. of Education, 211 Kan. 219, 232, 505 P. 2d 651 (1973). The goal of the PNA law has always been to create a favorable climate in which a healthy and stable bargaining process can be established and maintained. Free and open discussion by all parties to the collective-bargaining process affords the best chance for successful conclusion of negotiations and creates the most

favorable climate for successful bargaining. Employees ought to be fully informed as to all issues relevant to collective bargaining negotiations and the parties' position as to those issues.

A board of education has a fundamental right to communicate with professional employees in a noncoercive manner during collective-bargaining negotiations as to its proposals and the course of negotiations. The board is not required to watch passively and rely upon the certified representative to accurately and fairly present both sides of the issues to the bargaining unit membership. A board which communicates without threat of reprisal or force or promise of benefit does not per se violate the requirement of good faith bargaining.

There is nothing in Respondent's communications here which indicate it was undertaken in a coercive manner. There was no evidence Respondent sought to achieve the elimination of the certified representative or otherwise alter the bargaining relationship. There is nothing which indicates an effort by Respondent to bargain directly with the professional employees or to invite them to abandon Petitioner to negotiate better terms directly from Respondent. The May 15th proposal was submitted to Petitioner's negotiating team and only distributed to the faculty after it was learned Petitioner had not done so as part of its poll. The record indicates Respondent mailed the proposal for the sole purpose to make sure all of the bargaining unit members

were aware of the College's May 15th proposal. There was no intent to coerce, intimidate or discriminate against any unit member. Don Benjamin agreed that by receiving the proposal, faculty members became involved in or had an idea of the negotiation process they might not otherwise have received. There was no evidence presented by Petitioner to contradict or refute their evidence.

After May 31st Respondent continued to negotiate with Petitioner and ultimately agreed to a contract. Accordingly, Respondent did not engage in direct dealing or bypass Petitioner in the negotiation process through its May 31st distribution of the May 15th proposal to the bargaining unit membership, and therefore did not violate K.S.A. 72-5430(b)(1)(5) and/or (6). There being no violation, Respondent committed no prohibited practice as alleged by Petitioner.

O R D E R

IT IS THEREFORE ORDERED, that Petitioner's complaint be dismissed this 23rd day of April, 1990, in Topeka, Kansas.

The parties are advised this is an initial order of the presiding officer and becomes a final order of the Secretary of the Department of Human Resources unless a petition for review is filed with the Secretary in accordance with K.S.A. 77-527.

Monty R. Bertelli
Acting Senior Labor Conciliator
Employment Standards & Labor Relations
1430 Topeka Blvd. - 3rd Floor
Topeka, KS 66612-1853

CERTIFICATE OF SERVICE

I, Sharon Tunsall, Secretary III for the Department of Human Resources, hereby certify that on the 23rd day of April, 1990, a true and accurate copy or the above and foregoing Initial Order was deposited in the U.S. Mail, first class, postage prepaid, addressed to:

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