BEFORE THE SECRETARY OF HUMAN RESOURCES
OF THE STATE OF KANSAS

Jeanne L. Berg, Petitioner, v. Unified School District 336, Holton Special Education Coop, Respondent.	)	CASE NO. 72-CAE-2-1996

ORDER

NOW, on this 8th day of February, 1996, the parties' Motions for Summary Judgment and Respondent's Motion to Dismiss in the above-captioned prohibited practice petition come on for consideration by the Presiding Officer, Susan L. Hazlett. Petitioner filed a Motion for Summary Judgment by and through her counsel, Jeannine D. Herron, on December 15, 1995. Respondent filed a Motion to Dismiss and Motion for Summary Judgment by and through their counsel, Donna L. Whiteman, on December 20, 1995. Further, the parties filed Agreed Upon Stipulations on February 8, 1996.

FINDINGS OF FACT

The Petitioner teacher, Jeanne L. Berg ("Berg"), and the Respondent, Unified School District No. 336, Holton Special Education Cooperative (the "District"), have jointly stipulated to some of the facts in this case. As both parties have also filed Motions for Summary Judgment, both parties are, in essence, contending and admitting that there are no genuine issues remaining as to any material facts. The agreed upon stipulations are as follows:

1. Mark Wilson, Director of Special Education Services for the Holton Special Education Cooperative issued a written letter of reprimand to Jeanne

Berg, Petitioner on August 28, 1995.

2. Jeanne Berg responded in writing to the letter of reprimand addressing additional issues and filed notice of a formal grievance on September 6, 1995, pursuant to the negotiated agreement procedures.

3. While exercising the grievance procedures, Jeanne Berg filed a Prohibited Practice Complaint on September 18 and refiled on September 28, 1995, over the Respondent's issuance of the letter of reprimand.

4. The parties are at Level III of the Negotiated Grievance Procedure and have agreed the Level III grievance decision will be issued within seven (7) days following receipt of the decision issued by the Department of Human Resources on whether the issuance of a letter of reprimand is a prohibited practice.

5. Holton Unified School District No. 336 is a school district duly organized pursuant to Article 6 Section 5 of the Kansas Constitution and pursuant to K.S.A. Chapter 72 and is also the sponsoring district for the Special Education Cooperative pursuant to Chapter 72.

6. Jeanne L. Berg is currently a school psychologist for the Holton Unified School District where she has been so employed since July, 1992.

7. Under the Professional Negotiations Act (K.S.A. 72-5413, *et seq.*) the Holton-NEA is the duly recognized exclusive representative for all full-time and part-time teachers and certified employees including school psychologists of U.S.D. 336.

8. The Holton School District Board of Education and the Holton-NEA entered into a collectively-bargained negotiated agreement for the 1995-1996 school year.

MOTION TO DISMISS

The Respondent makes the following arguments in support of their Motion to Dismiss the prohibited practice complaint filed against them by Berg:

I. Petitioner's prohibited practice complaint fails to state a claim upon which relief can be

granted.

The District's major contention appears to be that the issuance of a letter of reprimand does not qualify as, or meet the statutory definition of, a prohibited practice nor does it rise to a cause of action for which relief can be granted as set forth in K.S.A. 72-5430(a), (b) or (c). In support of their argument, the District emphasizes the language contained in K.S.A. 72-5430(a), which states "The commission of any prohibited practice as defined in this section, among other actions, *shall constitute evidence of bad faith in professional negotiations*." [Emphasis added]. The District's argument appears to hinge upon their contention that the parties were not currently involved in the formal negotiation process and, therefore, any act by the District was not a prohibited practice. According to the District's interpretation of the Professional Negotiations Act, even if the District's actions fell within the definition of a prohibited practice under K.S.A. 72-5430(b), Berg has no relief under the law.

The Kansas Supreme Court held in *NEA-Wichita v. U.S.D. No. 259*, 234 Kan. 512 (1983), citing *Dodge City Nat'l Education Ass'n v. U.S.D. No. 443*, 6 Kan.App.2d 810, *rev. denied* 230 Kan. 817 (1981), that:

> After a negotiated agreement has been reached between the exclusive representative of professional employees and a board of education pursuant to K.S.A. 72-5413 *et seq.*, then *during the time that agreement is in force*, the board, acting unilaterally, may not make changes in items which are 'mandatorily negotiable,' but which were not noticed for negotiation by either party and which were neither discussed during negotiations nor included within the resulting agreement. [Emphasis added]

Both, public policy and the foregoing Supreme Court ruling, support the conclusion that the Kansas legislature did not intend K.S.A. 72-5430(a) to limit regulation of prohibited practices

to actions occuring only during the formal negotiation, meet and confer, process. If that were so, parties could simply wait until formal negotiations had ended, an agreement had been reached and ratified, and then commit any wrongful act desired. If a school board makes a unilateral change in a mandatorily negotiable item, it has failed to negotiate that item in good faith; it *should* be negotiated at the next opportunity before making any changes. Furthermore, Respondent has not cited any authority contrary to *NEA-Wichita* in support of their theory.

As it is clear that a prohibited practice contemplated by K.S.A. 72-5430(b) can occur even when there are currently no formal negotiations in progress, the question of whether or not a letter of reprimand falls within the definition of a prohibited practice is a matter of law to be determined by the presiding officer and is not a basis for a dismissal on the pleadings.

II. The Petitioner does not have standing to file a complaint under K.S.A. 5430(b)(5).

In support of this argument, the District cites the case of *Diane Marie Taylor v. Unified School District No. 501*, Kansas Department of Human Resources Case No. 72-CAE-2-1981, which initially found the complainant, as an individual, had no standing to file a complaint under K.S.A. 5430(b)(5) inasmuch as those violations could only be brought by the exclusive representative of the employer. However, the *Diane Marie Taylor* case was subsequently reviewed by the District Court and remanded to the Department of Human Resources, after holding that both the professional employee and the recognized professional employees' organization could bring a prohibited practice claim pursuant to K.S.A. 5430(b)(5). *See Diane Marie Taylor*, December 9, 1986, Order in Case No. 72-CAE-2-1981. As a result, Berg does

have standing to file the instant case.

III. Issuing a letter of reprimand is not an action which has denied or interfered with the employee's rights, pursuant to K.S.A. 72-5414, to participate in professional negotiations with a representative of the employee's choosing.

Again, the District contends that formal negotiations were not in progress and, therefore, Dr. Berg was never prohibited from participating in them or from participating in the professional employee association. As stated above, formal negotiations do not have to be in progress for prohibited practices to occur. This argument, therefore, is without merit and, further, is not a basis for a dismissal on the pleadings.

IV. Petitioner's prohibited practice complaint merits dismissal as it fails to meet the statutory requirement of a 'willful act.'

Whether or not the District acted willfully in issuing the letter of reprimand to Berg is a matter of law to be determined by the presiding officer, and is not a basis for a dismissal on the pleadings.

V. The employee's prohibited practice complaint does not state any claim under which relief can be granted as issuing a letter of reprimand has been an administrative practice retained by the employer and acquiesced to by the Holton-NEA.

Whether or not the letter of reprimand was a unilateral change in a mandatorily negotiable item or whether it was a custom and practice of the District is a matter of law to be determined by the presiding officer, and is not a basis for a dismissal on the pleadings.

VI. The employee has failed to exhaust her existing administrative remedies.

The exclusive remedy for a party aggrieved by the action of a school board exercising a

quasi-judicial function is an appeal to the District Court. *See Francis v. U.S.D. No. 457,* 19 Kan.App.2d 476, 871 P.2d 1297 (1994). In filing the prohibited practice petition with the Department of Human Resources, Berg has not filed an appeal to a decision made during the grievance procedure. Rather, she has filed a separate claim with the state agency specifically empowered with the authority to oversee the professional negotiations between teachers and public school boards and having the specific authority to consider the Petitioner's complaint. *See NEA-Fort Scott v. U.S.D. No. 234,* 225 Kan. 607 (1979). As the Shawnee County District Court stated in *Diane Marie Taylor v. Unified School District No. 501, Topeka, Kansas,* District Court Case No. 81CV1137,

> Diane Taylor claimed her contract was violated by the Board's anti-nepotism policy and she also alleged that the policy was a prohibited practice. These claims can be distinguished. Although the arbitrator ruled on the Board policy in order to make a finding of whether or not the contract was breached, an arbitrator is not given the power to rule on whether the Board policy is a prohibited practice under K.S.A. 72-5430. The power is given to the Secretary of Human Resources under K.S.A. 72-5430(a).

The Petitioner is not, therefore, required to exhaust her administrative remedies prior to filing a petition for a prohibited practice with the Kansas Department of Human Resources.

Based on the above, the Respondent's Motion to Dismiss should be denied.

MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is granted only when there are no genuine issues as to any material fact, and the moving party is entitled to judgment as a matter of law. *See* K.S.A. 60-256. Although the Respondent states on page five of their Motion to Dismiss, "Even though there is a dispute over the facts surrounding the issuance of the letters of reprimand, ..." both parties have,

in essence, acquieced to the conclusion that there are no genuine issues of any material fact remaining by filing their respective motions for summary judgment. Therefore, the following issue is considered:

Whether Respondent has negotiated in bad faith and committed a prohibited practice pursuant to K.S.A. 72-5430(b)(5) by making a unilateral change in a mandatorily negotiable item in the negotiated agreement in effect for school year 1995-1996.

K.S.A. 72-5430(a) provides that the commission of any prohibited practice as defined by K.S.A. 72-5430(b) constitutes "evidence of bad faith in professional negotiation." K.S.A. 72-5430(b)(5) defines a prohibited practice as a refusal "to negotiate in good faith with representatives of recognized professional employees' organizations as required in K.S.A. 72-5423 and amendments thereto."

It is an uncontroverted fact, in this matter, that the collectively bargained, negotiated agreement in effect for the school year 1995-1996 does not provide for the issuance of letters of reprimand to teachers. *See* Respondent's Motion to Dismiss and Motion for Summary Judgment, page 9, and Petitioner's Motion for Summary Judgment. It is also uncontroverted that the District did, in fact, issue a letter of reprimand to the Petitioner by way of Mark Wilson, the Director of Special Education of the Holton Special Education Cooperative on August 28, 1995, and have it placed in her personnel or grievance file. *See* Respondent's Motion to Dismiss and Motion for Summary Judgment, Att. A, B; and Petitioner's Motion for Summary Judgment. The questions remaining, therefore, are whether the issuing of a letter of reprimand is a disciplinary or employee appraisal procedure; whether the issuing of a letter of reprimand and placing it in the employee's personnel or grievance file was a unilateral change in the terms and conditions of

employment included in the parties' negotiated agreement or whether it is allowed as an administrative custom and practice retained by the District and acquiesced to by the professional employee association; and whether the District's actions were willful.

I. Is the issuing of a letter of reprimand a disciplinary or employee appraisal procedure?

K.S.A. 72-5413(l) specifically includes disciplinary procedure and professional employee appraisal procedures among those items that are "terms and conditions of professional service." As such, they are topics that are mandatorily negotiable, and failure to negotiate an item that by its nature is mandatorily negotiable is a prohibited practice under K.S.A. 72-5430. See *U.S.D. No. 352 v. NEA-Goodland*, 246 Kan. 173, 785 P.2d 993 (1990). Petitioner contends that the issuance of a letter of reprimand is a disciplinary or employee appraisal procedure, while Respondent argues that issuing a letter of reprimand is within the right of the District as an administrative practice or district policy. In *Goodland*, the Supreme Court made a distinction between managerial decisions and policies, and the mechanics of implementing such policies. The court held that evaluation *criteria* is a managerial decision and, therefore, not mandatorily negotiable, and evaluation *procedures*, as the mechanics for implementing policies, are mandatorily negotiable. Also see *U.S.D. 501 v. Secretary of Kansas Department of Human Resources,* 235 Kan. 968 (1984).

Applying the rules from *Goodland* and *U.S.D. 501* to the instant case, the issuance of a letter of reprimand, as opposed to a policy of or the criteria for the action, appears to be a procedure for either an evaluation appraisal of the teacher, or the discipline of the teacher. The

letter of reprimand clearly evaluated certain behavior of the Petitioner as being unacceptable and unprofessional and, further, stated that if the alleged behavior of the Petitioner continued, it would be recommended to the Board that the Petitioner be placed on probation. In fact, the Respondent even refers to the letter of reprimand as a "disciplinary action" on page seven of Respondent's Motion to Dismiss.

Respondent cites *Schultz*, 221 Kan. 351 (1977) in support of their argument that the Kansas Supreme Court has held that letters of reprimand are not mandatorily negotiable. A reading of *Schultz* reveals that the issue in that case was whether or not the complainant had been provided due process when issued a letter of reprimand, after having been given a hearing on the matter. That court did not even address the negotiability of the topic, or management perogatives, simply stating that a board has authority to hire, fire and discipline employees, but due process must be provided.

II. Is the issuing of a letter of reprimand a unilateral change in the terms and conditions of employment addressed in the parties' negotiated agreement or is it an administrative custom and practice retained by the Respondent and acquiesced to by the teacher association?

As noted above, the Supreme Court in *Goodland* held that failure to negotiate an item that by its nature is mandatorily negotiable is a prohibited practice under K.S.A. 72-5430. In addition, the reasoning in Item I, above, has established that the letter of reprimand issued to Berg contained an appraisal of her performance as a school psychologist and also acted as a disciplinary measure; therefore, it is a mandatorily negotiable item as a term and condition of professional service. A negotiated agreement was in force at the time of the issuance of the

letter of reprimand by Mr. Wilson to the Petitioner. In spite of that fact, the District unilaterally made a change in an item which is mandatorily negotiable, contrary to the ruling in *NEA-Wichita.*

Respondent's argument that it is a custom and practice of the District to issue letters of reprimand, and therefore not a prohibited practice, is unpersuasive. First, the Respondent has provided insufficient evidence of a long standing, continuing custom and practice. The only evidence Respondent offers in support of such defense is an affidavit of Jerry Fuqua, Superintendent of U.S.D. 336, which lists a few of the administrative actions taken by the District. The list contains only one other instance of the issuance of a letter of reprimand to an employee, which occurred on February 28, 1995. The rest of the list contains an incident in which an employee was placed on probation in 1990-91; an incident in which an employee concern was addressed and a letter of rebuttal placed in the file in 1992; and an incident in which an employee was placed on a plan of assistance in 1993. Four incidents in five years, only one of which was a letter of reprimand, does not sufficiently prove accepted custom and practice.

Second, the fact that the teacher association never "noticed up" the topic of letters of reprimand for formal negotiations does not mean that the association acquiesed to the usage of the procedure, nor is it relevant as a matter of law, as stated in *NEA-Wichita.* Furthermore, the Court in *NEA-Wichita* specifically held that a board cannot unilaterally make changes while an agreement is in force, even if the items which are mandatorily negotiable were not noticed for negotiations by either party. Finally, the Court in *NEA-Wichita* concurred with the holding in the *Dodge City Nat'l Education Ass'n* case, which stated that a board of education is precluded

from unilaterally making changes in any item which is mandatorily negotiable, without reference to whether or not an established practice exists in a mandatorily negotiable area.

It is conceivable that a board of education could establish a practice in a mandatorily negotiable area without statutory authority to do so. Once someone challenges that practice, however, as has been done by the Petitioner in this matter, the "established practice" can be questioned, scrutinized, and determined to be a prohibited practice.

III. Were Respondent's actions willful?

As Respondent correctly points out, for a prohibited practice to occur, the action must be willfull. The Professional Negotiations Act, however, does not provide a definition of "willful." Both parties have cited United States Supreme Court cases in search of an applicable definition of "willful." The Petitioner contends that "willful is a word of many meanings, its construction often influenced by its context," citing *Screws v. U.S.*, 325 U.S. 91, 65 S.Ct. 1031. Respondent relys upon the narrower definition of "willful" as "reckless disregard for the individual's rights," citing *TransWorld Airlines, Inc. v. Thurston,* 469 U.S. 111, 105 S.Ct. 613 (1985). *Black's Law Dictionary*, 5th ed., defines "willful" as

> proceeding from a conscious motion of the will; voluntary...An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids...

The Kansas Supreme Court in the case of *Weinzirl v. Wells Group, Inc.*, 234 Kan. 1016 (1984) defined the term "willful act" in regard to the Kansas Wage Payment Law, K.S.A. 44-313 *et seq.*, as an act "indicating a design, purpose, or intent on the part of a person to do wrong or cause an injury to another."

The facts in the instant case indicate that the letter of reprimand was signed and issued by the supervisor about whom the Petitioner allegedly made derogatory remarks, possibly creating a questionable motive for issuing the letter. The Respondent's contention that there was no willfullness, noting the three offers made by the Respondent to the Petitioner to retract the letter of reprimand and remove it from her personnel and grievance file, is unpersuasive. Those offers were conditioned upon the Petitioner agreeing not to pursue any other action in any other forum regarding the reprimand letter, actually giving the act the possible appearance of bad faith.

In any event, and in the context of the Professional Negotiations Act, it would be difficult under these circumstances to find that Mr. Wilson's actions were not voluntary or intentional, done with the intent to do, or with disregard for, something the law forbids.

CONCLUSION[1]

It is reasonable to conclude, from the evidence provided and arguments made by both parties, that the Respondent acted in bad faith in professional negotiation and committed a prohibited practice when Mark Wilson issued the letter of reprimand to the Petitioner on August 28, 1995, and placed it in her personnel file. Therefore, the Petitioner's Motion for Summary Judgment should be granted.

ORDER

[1] Although the Petitioner raised the issue of whether or not the Respondent violated the grievance procedure in her initial Petition, she did not raise that issue again in her Motion for Summary Judgment. Therefore, that issue will not be addressed at this time.

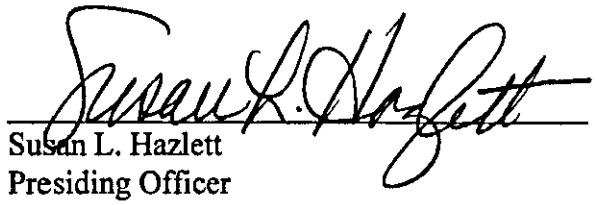
IT IS THEREFORE ORDERED that the Respondent's Motion to Dismiss and Motion for Summary Judgment is hereby denied, and that the Petitioner's Motion for Summary Judgment is hereby granted.

IT IS FURTHER ORDERED that the Unified School District 336 and Holton Special Education Coop expunge from the personnel file and any other school file of Jeanne L. Berg the written reprimand issued August 28, 1995.

IT IS FURTHER ORDERED that the Unified School District 336 and Holton special Education Coop cease and desist from acting in bad faith in professional negotiation and committing any prohibited practice, specifically, from interfering with, restraining or coercing professional employees in the exercise of rights granted in K.S.A. 72-5414, and refusing to negotiate in good faith with representatives of recognized professional employees' organizations as required in K.S.A. 72-5423.

IT IS FURTHER ORDERED that the Respondent reimburse the Petitioner her expenses incurred for legal representation in this matter.

IT IS SO ORDERED THIS 18th day of March, 1996.



Susan L. Hazlett
Presiding Officer
Labor Relations
1430 Topeka Blvd., 3rd Floor
Topeka, Kansas 66612

NOTICE OF RIGHT TO REVIEW

This Order is the official notice of the presiding officer's initial decision in this case. It will become a Final Order fifteen (15) days from the date of service, unless a petition for review pursuant to K.S.A. 77-527 is filed within that time with the Secretary of the Department of Human Resources, Labor Relations Unit, 1430 Topeka Blvd., 3rd Floor, Topeka, Kansas 66612.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of March, 1996, a true and correct copy of the foregoing Order was placed in the U.S. Mail, first class, postage prepaid to the following:

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