

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Russell County Teachers Association)
Petitioner)
)
)
v.)
)
)
Unified School District No. 407,)
Russell County, Kansas)
Respondent)
_____)

Case No. 72-UD-1-1998⁹

INITIAL ORDER

The unit determination petition was heard by Katharine O’Keefe, presiding officer on February 3, 2000.

The Petitioner, Russell County Teachers Association (hereinafter referred to as the Association) appeared by and through counsel, Gene F. Anderson. Witnesses on behalf of the Petitioner were Lori Maier, Janet Schmidtberger, Don Dagenhart and Asher Bob White. The Respondent, Unified School District No. 407, Russell County, Kansas (hereinafter referred to as the Board) appeared by and through counsel, Dennis R. Davidson. Witnesses on behalf of the Respondent were Don Dagenhart and David Couch.

ISSUES PRESENTED

1. Does the bargaining unit identified in the parties 1997-1999 Collective Bargaining Agreement include the two school district nurses?
 - a) Are the two Russell nurses “professional employees” as defined by K.S.A. 72-5413(c)?

72-UD-1-1999

2. In 1998, did the Board unilaterally modify the makeup of the existing bargaining unit by hiring the two Russell nurses as "classified employees" instead of "certified employees".

a) If the Board did unilaterally change the existing bargaining unit, should the nurses be compensated for economic losses if they were improperly treated as "classified" rather than "certified" professional employees?

FINDINGS OF FACT

1. The Petitioner, the Association, is the exclusive bargaining agent for the professional employees of USD #407. The Respondent, the Board, is the duly elected Board of Education of Unified School District #407, Russell, Kansas. (Resp. Ex. #5)

2. On October 12, 1970, the Board passed the following resolution:

"That pursuant to the laws of Kansas, 1970 Chapter 284, the Russell County Education Association of Unified School District No. 407, Russell County, Kansas, is hereby recognized as the exclusive representative of all class room teachers and other professional employees, except administrative employees of said school district, described in said application for recognition. (Resp. Ex. #5)

3. Since 1970, the Board and the Association have renegotiated the Master Collective Bargaining Agreement (hereinafter referred to as CBA) approximately every two years. (Transcript at 54 &55)

4. After recognizing the Association as the bargaining unit, the Board considered "certified professional employees" as members of the bargaining unit. The Board deems "certified professional employees" to include classroom teachers, school counselors, school librarians and school psychologists. (Transcript at 53) The aforesaid positions require a teaching certificate from the Kansas Board of Education. (Transcript at 53) The Board considers all other employees as

“classified employees”. “Classified employees” are not members of the bargaining unit.

5. “Classified employees” are treated differently than “certified professional employees” in several ways, including pay and benefits. While “certified employees” salaries are based on the salary schedule included in the Collective Bargaining Agreement, “classified employees” are not. Specifically, the “certified professional employees” receive all of the benefits and protections of the CBA entered in to by the Board and the Association, but the “classified employees” have only individual contracts with the Board and they are not covered by the CBA.

6. In February of 1978, the Board filed a Department of Human Resources Form #DHR1002 with the Public Employee Relations Board which described the bargaining unit as “all certified teachers, excluding administrators”. (Resp. Ex. #7)

7. School nurses employed by U.S.D. #407 are not required to hold a teaching certificate. (Pet. Ex. #2)

8. In 1984, the parties ratified a CBA for the 1984-1986 term. In the CBA, the parties defined the the term “teacher” as:

“Any certificated, professional employee in the bargaining unit, and not to include administrators.” (Resp. Ex. #2 at 34)

9. Either in 1984 or at some point prior, the Board hired at least one school nurse, Ms. Haberer as a “classified employee”. Sometime thereafter, the Board hired a Ms. Hall as a second school nurse. Ms. Hall was also hired as a “classified employee”.

10. However for the 1988 school term, the Board re-employed Ms. Haberer and Ms. Hall as “certified employees” and considered them part of the bargaining unit. (Transcript at 50 &51) Both nurses signed “teacher contracts” that were comparable to the contracts given to the classroom

teachers. Both nurses were placed on the salary grid of the parties' CBA and both nurses were given the same rights, privileges and protection that were afforded other members of the bargaining unit. (Transcript at 51)

11. In 1997, the parties signed a new CBA for the 1997-1999 term. The 1997-1999 CBA, defines "Administrator" for the purposes of interpretation as:

"All professional employees, except teachers, who are designated by the Board of Education to be in administrative positions."

The 1997-1998 CBA defines the term "Teacher" for purposes of interpretation as:

"Any certificated, professional employee employed by the District, and not to include administrators." (Res. Ex. #3 at 42.)

12. In 1998, Ms. Harberer and Ms. Hall resigned their positions as school nurses. The Board hired two new nurses, Ms. Maier and Ms. Schmidtberger as "classified employees". Transcript at 51 & 52) Both are licensed registered nurses. (Pet. Ex. 3, 4, 5 and 6). Ms. Maier has a bachelors degree in nursing. Ms. Schmidtberger does not have a bachelors degree but is a licensed registered nurse.

13. Both Ms. Maier and Ms. Schmidtberger signed one year contracts in 1998. (Resp. Ex. #'s 10 and 11). The contracts indicate that the two women would perform the job duties as described in the school nurse job description. The Board considered the two women as "classified employees".

14. Among some of the duties listed in the district's nurse job description are:

- Serves as health advocate for the pupil.
- Encourages, coordinates, and participates in programs of health education through individual pupil/parent consultation and classroom participation.
- Keeps the Board of Education and administration aware of changes in health related policies and the Nurse Practice Act regulations; facilitates the implementation of Board of Education health related policies.

- Assists county and state health and safety inspectors in the ongoing environmental surveillance of school buildings and playgrounds; recommends appropriate structural/environmental alterations to accommodate individuals with disabilities.
- Designs and implements within approved and funded procedures, a comprehensive health appraisal and screening program.
- Counsels with pupils, parents and school personnel concerning health needs and health concerns of pupils.
- Participates as a member of the Student Assistance Team(s). Assesses and interprets pupil health status and as indicated, plans, provides and monitors related health services.
- Maintains Kansas *professional* (emphasis added) registered nurse (RN) licensure and all appropriate certifications.
- Participates in district wide preschool screenings, at-risk screenings, Head Start screenings, and kindergarten wellness screenings.
- Recommends and implements Board of Education policies and procedures regarding district-wide compliance with state and federal blood borne pathogens mandates.
(Pet. Ex. #2)

15. Both nurses wish to become members of the bargaining unit, and there is no other local unit of which they could become members.

CONCLUSIONS OF LAW

1. Does the bargaining unit identified in the parties 1997-1999 Collective Bargaining Agreement include the two school district nurses?

K.S.A. 72-5414 states in part: “. . . Professional employees shall have the right to form, join or assist professional employees’ organizations, to participate in professional negotiations with boards of education through representatives of their own choosing for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service.”

K.A.R. 49-24-4 states:

“Petitions for unit determination may be filed by a board of education, professional employee organization, or a professional employee(s). In the event a board of education has recognized a professional employee organization, unit determination or clarification questions shall be governed by the memorandum of agreement unless

the secretary determines that the agreement is unclear or that the agreement is silent with regard to the positions in question.”

In 1970, the Russell Board of Education did recognize the Petitioner as a professional employee organization and as such, the bargaining representative for the unit. The Association argues that Ms. Maier and Ms. Schmidtberger were hired and are being treated as classified employees when in fact, should have been hired as a certified or “professional employees” and as such, be included in the bargaining unit. The Board argues that the two nurses are not “professional” employees and therefore, are not part of the bargaining unit. The parties’ CBA’s, (whether considering 1970, 1984 or 1997) does not specifically address whether school nurses are to be considered members of the bargaining unit. Thus, the issue is one of unit clarification. As stated in K.A.R. 49-24-4, when there is a unit determination or clarification question, the parties’ CBA controls unless the agreement is unclear or is silent on the matter. The parties’ CBA does not enunciate which positions were specifically included in the bargaining unit and which were excluded. (According to testimony, a document is missing which specifically outlined member positions at one time.) Thus, K.A.R. 49-24-4 grants authority to the Secretary to clarify the bargaining unit.

When the Board resolved in 1970 to recognize the Russell County Education Association as the exclusive bargaining representative, they defined the unit as “all class room teachers and *other professional employees* (emphasis added) except administrative employees of said school district”. If the Board only wanted to include classroom teachers or only employees that were certificated by the state board of education, it would reason that they would have expressly stated as such in the recognition. The text, “other professional employees” leads one to rationally conclude that there are

or may be other employees employed by the Board, who perform work in a "professional occupation" who are not considered "classroom teachers". The foregoing analysis leads one to the next question of whether school nurses are "professional employees".

2. (a) Are the two Russell nurses "professional employees" as defined by K.S.A. 72-5413(c)?

K.S.A. 72-5413(c) states:

"Professional employee" means any person employed by a board of education in a position which requires a certificate issued by the state board of education *or* (emphasis added) employed by a board of education in a professional, educational or instructional capacity, but shall not mean any such person who is an administrative employee."

To parse the statute, there is a disjunctive particle in the text which lends the definition of whether one is a "professional employee" to two possible scenarios. One may either be certified by the Kansas Board of Education or one may be *employed* by a board of education in a "professional, educational, or instructional capacity". There is no dispute that the two nurses are not certified by the Kansas State Board of Education. The Board's argument that the word "professional" was meant only to include teachers is nonsensical. The words "professional, educational or instructional capacity" come after the disjunctive particle "or". As such, the analysis extends to the second prong of the statute as to whether the two nurses are employed in a "professional, educational, or instructional" capacity.

As cited in the Petitioner's brief, in *Colby Community College Faculty Alliance v. Colby Community College*, Case No. 72-UCA-4-1992, the Secretary of Human Resources defined "professional employee" as:

- 1) Whose work is predominately intellectual and varied as opposed to routine mental,

manual, mechanical, or physical work; involves consistent exercise of discretion and judgment; requires knowledge of an advance type in a field of science or learning, customarily acquired by prolonged study in an institution of higher learning.

2) Who has completed courses of prolonged studies as described in paragraph (1); and is performing work under the supervision of a professional person in order to qualify as professional employees as defined in paragraph (1); or

3) Attorneys-at-law or any other person who is registered by the board of registration or other public body established for such purposes under the laws of this state.

When one applies the above definition of a "professional employee" to the Board's job description of a school nurse, the skills used by the nurses to perform their jobs lead one to reasonably conclude that they perform "professional" work. Assessing individual health concerns, (sometimes in emergency situations) as well as implementing general health policy for the Board and the state of Kansas is not a rote job. A school nurse is required to use her background education and expertise in the medical field to perform the work. Certainly, the duties outlined in the nurse job description involve intellectual judgment as opposed to mindless repetition. The argument is furthered by the fact that the nurses are not directly supervised by a physician during their daily activities. The student, parent and/or teacher is largely dependent on a school nurse's individual judgment as to the diagnosis and prognosis of a particular student.

Furthermore, the job requires one to be licensed under the State Board of Nursing. Regardless of whether Ms. Schmidtberger obtained a college degree, RN's today must have some type of college degree. (The presiding officer is aware that Ms. Schmidtberger's license is equivalent to one who receives a nursing degree from a four year university.) The minimum educational requirement to be a licensed RN has been raised over the past 10 to 15 years. In other words, the Nursing Board and the state of Kansas has deemed that the field is of such expertise that

one cannot obtain an RN license unless one attends a higher institution of learning. Moreover, a school nurse must be licensed by the state Board of Nursing. The issuance of licenses and the requirements set by state boards is to insure that individuals who administer to public needs are qualified to do so primarily by education. Occupations that require licensure, whether it be attorneys, physicians, accountants etc. are almost always considered "professional" occupations depending on the level of expertise needed. Administering general health care to hundreds of children requires a high level of expertise.

K.S.A. 65-1113(d) defines the practice of nursing as:

(1) "The practice of professional nursing . . . means the process in which substantial specialized knowledge derived from the biological, physical and behavioral sciences is applied to the care, diagnosis, treatment, counsel and health teaching of persons who are experiencing changes in the normal health processes or who require assistance in the maintenance of health or the prevention or management of illness, injury or infirmity. . ."

The above statute defines the occupation of nursing as "professional nursing". Such verbiage indicates that the health care industry and the state legislature view registered nurses as "professional". Moreover, the Board's own job description states that a school nurse must "maintain Kansas *professional* registered nurse (RN) licensure and all appropriate certifications". It is odd that the Board requires a school nurse to maintain a "professional" licensure but attempts to discount the "professional" aspect when excluding a school nurse from the bargaining unit.

Moreover, K.S.A. 72-5413(c) in part, defines professional employee as one that is employed by a board of education in a "professional", "educational" or "instructional" capacity. Excluding the analysis of whether the nurses perform "professional" duties, the nurses, undisputably, educate and instruct students, teachers and parents. The Board, in their own nurse job description, uses the

phrases for school nurses as: “assesses”, “develops” and “implements” health care plans for pupils; “designs” and “implements” a comprehensive health appraisal and screening program; actively participates as a “resource person in health education curriculum”. Such phrases describe one who “educates” or “instructs”. The “professional” statutory analysis, in the presiding officer’s opinion, is almost secondary. Whether their job is defined by K.S.A. 72-5413(c) or K.S.A. 65-1113(d), or by the Board’s own job description, or their actual duties, the nurses perform professional work in every sense of the word. Thus, under K.S.A. 72-5414 and the parties 1997-1999 CBA, Ms. Maier and Ms. Schmidtberger as school nurses, should have been included as members of the bargaining unit.

2. In 1998, did the Board unilaterally modify the makeup of the existing bargaining unit by hiring the two Russell nurses as “classified employees” instead of “certified employees”?

Although there is some dispute of fact between the parties as to whether school nurses were considered “certified employees” as opposed to “classified employees” prior to 1988, there is no dispute that from 1988 through 1998, the Board included the two school nurses as “certified employees” and included them as members of the bargaining unit. Clearly for ten years, the Board recognized the bargaining unit to include school nurses. Both parties openly accepted the bargaining unit as such and the two school nurses were given the same rights and privileges as other members of the bargaining unit. There was no evidence either way to indicate whether the parties actively negotiated the issue in 1987. Regardless, for the Board to arbitrarily hire new school nurses as “classified employees” and not inform or even discuss the issue with the Association is a unilateral change of the bargaining unit. In other words, a position that was ordinarily included in the unit for

ten years was suddenly ousted by the Board without fair notice or required negotiation. If the Board wanted to change the makeup of the bargaining unit, they were required to wait until the parties met again to negotiate the issue for the upcoming CBA.

The Board argues that since they unilaterally included the two school nurses as members of the bargaining unit in 1988, they have the authority to exclude them as member of the unit in 1998. Such reasoning is illogical. Certainly the Board agrees that defining the bargaining unit is a permissive topic of negotiation and as such, must be placed on the table if they want to change the unit. Although the evidence is murky as to why the Board suddenly included the nurses as members of the unit in 1988, the issue at that time, should have been negotiated or at least noticed for negotiation. The Board had a minimum duty to at least give notice to the Association that they were hiring new nurses but excluding them from the unit.

2. (a) Should the nurses be compensated for economic losses if they were improperly treated as classified rather than certified professional employees?

K.S.A. 72-5420 states in part: “. . .the secretary shall decide. . . wether the unit appropriate for the purposes of professional negotiation shall consist of all persons employed by the board of education who are engaged in teaching or performing other duties of an education nature, or some subdivision thereof. . .”

When Ms. Maier and Ms. Schmidtberger signed two yearly contracts in 1998 and 1999, they were informed what their salaries and benefits would be. Neither woman suffered economic loss because the Board unilaterally changed the bargaining unit. Both women agreed to work for the salary agreed upon in their individual contracts. Although the Board may have unlawfully changed the bargaining unit, the Board did not breach a contract with either Ms. Maier and Ms. Schmidtberger.

Regardless, as cited by the Respondent in their brief, the presiding officer knows of no statutory provision in a unit clarification case that allows an award of monetary damages. Under K.S.A. 72-5420 and K.A.R. 49-24-4, the Secretary only has authority to clarify the bargaining unit upon receipt of petition.

ORDER

IT IS THEREFORE ADJUDGED AND DECREED

1. (a) The two school district nurses, Ms. Maier and Ms. Schmidtberger, are professional employees under K.S.A. 72-5413(c) and as such, are members of the Russell County Teachers Association bargaining unit.

2. The Board did unilaterally modify the makeup of the existing bargaining unit when they hired the two Russell nurses as "classified employees" instead of "certified employees".

3. (a) Although the two school nurses should have been hired as "certified employees" and thus, placed on the bargaining unit's salary grid, the Secretary under K.S.A. 72-5420 and K.A.R. 49-24-4, has no authority in a unit clarification case to award back pay or restitution to the nurses.

IT IS SO ORDERED, this 22nd day of March, 2001.

Katharine O'Keefe
Katharine S. O'Keefe, Presiding Officer
Labor Relations Section
Kansas Department of Human Resources
1430 SW Topeka Blvd.
Topeka, KS 66612

NOTICE OF RIGHT TO REVIEW

This Initial Order is the official notice of the presiding officer's decision in this case. The Initial Order will become final pursuant to K.S.A. 77-530 unless reviewed by the Secretary, either on his own motion, or at the request of a party pursuant to K.S.A. 77-527. Any party seeking review of this Order must file a Petition for Review with the Secretary at the Labor Relations Office, 1430 SW Topeka Blvd., Topeka, Kansas 66612, within fifteen (15) days from the date of service, plus three (3) days for mailing.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 2001, a true and correct copy of the above and foregoing Initial Order was deposited in the U.S. Mail, first class, postage pre-paid, addressed to the following:

Gene F. Anderson
ANDERSON & WICHMAN
1400 Main - P. O. Box 1700
Hays, KS 67601
Attorney for the Petitioner

Dennis R. Davidson
THOMPSON, ARTHUR & DAVIDSON
525 Main - P. O. Box 111
Russell, KS 67665
Attorney for USD 407 - Russell, KS

AND IN BUILDING MAIL on 22nd day of March, 2001, to
Secretary Richard E. Beyer
Kansas Department of Human Resources
401 Topeka Blvd.
Topeka, KS 66612


Sharon L. Tunstall, Office Manager