STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

August 11, 1981

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 81-185

Honorable Elwaine F. Pomeroy
State Senator, Eighteenth District
1415 Topeka Avenue
Topeka, Kansas 66612

Re: Schools--Teachers' Contracts--Communications between Professional Employees and the Board of Education

Synopsis: When a board of education creates a public forum dedicated to the expression of views by the general public, said board cannot prohibit professional employees from expressing their views, as such action is inconsistent with the freedom of speech guaranteed by the First Amendment to the United States Constitution. In addition, K.S.A. 72-5415(b) establishes that nothing in the Collective Negotiations Law, K.S.A. 72-5413 et seq., is to be construed to prevent professional employees, individually or collectively, from presenting or making known their positions or proposals or both to a board of education. Thus, it is not an unfair labor practice for a board of education to allow professional employees to present or make known to the board the professional employees' position, proposals or both. Listening to positions or proposals does not constitute negotiation. Cited herein: U.S. Const., Amends. 1, 14; K.S.A. 72-5415, 72-5430.

* * *

Dear Senator Pomeroy:

You seek our opinion as to the legality of a portion of the policies and bylaws of the Board of Education of Unified School District No. 501, Topeka. You explain that the Board has issued a book entitled "Board of Education Policies and Administrative Regulations," and "policy #1030, which also is entitled 'Bylaws of the Board of Education.'" You further state:

"Section III (l)(d) is entitled 'Public Communications - Agenda Items' and provides 'Any patron of the District may comment on any agenda item at this time or following staff presentation when it appears on the agenda if they have completed and properly filed with the Superintendent of Schools or the Board President an Intent to Address the Board card prior to the meeting. Any patron will be limited to one appearance of a two-minute duration before the Board. Neither USD 501 employees in a collective bargaining unit nor their representatives may speak to the Board directly concerning any matters covered by the Collective Negotiations Act or items relating to negotiations at any time.'

"Section III (l)(e) is entitled 'Special Agenda Items' and provides "Patrons of the District wishing to have items placed on the agenda must submit their requests in writing using the Request to Appear on Agenda card available from the Clerk of the Board, 624 SW 24th Street, 233-0313. Requests must be received by the Clerk of the Board at least eight days before the Board meeting. Neither USD 501 employees in a collective bargaining unit nor their representatives may speak to the Board directly concerning any matters covered by the Collective Negotiations Act or items relating to negotiations at any time. The requests will be reviewed by the Superintendent of Schools and the President of the Board. They will cooperatively develop a proposed board agenda. Submission of a request does not guarantee the item will be placed upon the agenda."

"Section III (l)(i) is entitled 'Public Communications - Items Not on the Agenda' and provides 'Allegations against individual employees must be presented in writing to the Superintendent and must be signed by the individual or organization submitting the comments. Such matters will not be discussed at public Board Meetings. Patrons may speak to the Board on other items of concern providing they have completed an Intent to Address the Board card and properly filed it with the Superintendent of Schools or the President of the Board prior to the meeting. The patron will be limited to one appearance of a two-minute duration. Neither USD 501 employees in a collective bargaining unit nor their representatives may speak to the Board directly concerning any matters covered by the Collective Negotiations Act or items relating to negotiations at any time.'" (Emphasis added.)

You ask whether a school board legally can prohibit its employees from addressing the board at a public meeting in the manner quoted above, or does such a school board policy or bylaw violate either the First Amendment to the United States Constitution or the provisions of K.S.A. 72-5415(b)?

The First Amendment to the United States Constitution, in part, provides: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peacefully to assemble . . . ."

The Fourteenth Amendment to the United States Constitution, in part, provides: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." (Emphasis added.)

The United States Supreme Court has held repeatedly that the First Amendment's guarantee of freedom of speech is made applicable to the states by the due process clause of the Fourteenth Amendment. See, e.g., Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); and Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1972), reh. den. 414 U.S. 881, 94 S.Ct. 26, 38 L.Ed.2d 128 (1973).

The United States Supreme Court also has held the First Amendment protects the right of an individual to speak freely, to advocate ideas, and to associate with others. It also protects the right of associations to engage in advocacy on behalf of their members. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979), and the cases cited therein at 441 U.S. 464, 60 L.Ed.2d at 362.

However, the United States Supreme Court has recognized "there is no constitutional duty to bargain collectively with an exclusive bargaining agent." (Emphasis added.) Smith v. Arkansas State Highway Employees, supra, 441 U.S. at 465, footnote number 2, citing with approval Hanover Township Federation of Teachers v. Hanover Community School Corp., 457 F.2d 456 (7th Cir. 1972). In Smith, supra, the Court said:

> "[T]he First Amendment is not a substitute for the national labor relations laws. As the Court of Appeals for the Seventh Circuit recognized in Hanover Township Federation of Teachers v. Hanover Community School Corp., 457 F.2d 456 (1972), the fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices, were federal statutory law applicable, hardly establishes that such procedures violate the Constitution." (Emphasis added.) 441 U.S. at 464.

These statements of the United States Supreme Court clearly established three points relevant to your inquiry. First, there is no constitutional duty to bargain collectively with an exclusive bargaining agent. If such a duty is imposed, it is pursuant to statutes enacted by Congress or a state legislature. Second, while a public employer, in bypassing the exclusive representative of a collective negotiations unit and dealing directly with the members of the unit, thereby may commit an unfair labor practice, such action does not violate the Constitution. Third, whether an action of an employer constitutes an unfair labor practice depends upon the provisions of the statutes by which the duty to negotiate is imposed.

In Kansas, the duty to negotiate, in good faith, is imposed upon local boards of education by the provisions of the Collective Negotiations Law, K.S.A. 72-5413 et seq. In K.S.A. 72-5430(b), the legislature has prescribed: "It shall be a prohibited practice for a board of education or its designated representative willfully to . . . (6) deny the rights accompanying recognition of a professional employee's organization which are granted in K.S.A. 72-5415."

Subsection (a) of K.S.A. 72-5415 provides:

> "When a representative is designated or selected for the purposes of professional negotiation by the majority of the professional employees in an appropriate negotiating unit, such representative shall be the exclusive representative of all the professional employees in the unit for such purpose." (Emphasis added.)

Thus, under paragraph (6) of K.S.A. 72-5430(b), a board of education understandably is cautious of doing any act which might be perceived as infringing upon the rights granted to a representative under the provisions of K.S.A. 72-5415(a). Clearly, if a board of education attempted to negotiate directly with members of a collective negotiations unit for which a representative had been selected, said board might well be adjudged to have committed a prohibited practice under the provisions of K.S.A. 72-5430(b)(6).

However, subsection (b) of K.S.A. 72-5415 provides:

> "Nothing in this act or in acts amendatory thereof or supplemental thereto shall be construed to prevent professional employees, individually or collectively, from presenting or making known their positions or proposals or both to a board of education, superintendent of schools or other chief executive officer employed by a board of education." (Emphasis added.)

In our judgment, the provisions of subsection (b) of K.S.A. 72-5415 conclusively establish it is not a prohibited practice for a board of education to permit professional employees, individually or collectively, to present or make known to the board of education the professional employees' positions or proposals or both. That is, while, under K.S.A. 725430(b)(6), a board of education should not negotiate directly with the members of a collective negotiations unit, K.S.A. 72-5415(b) makes it clear the board of education may permit professional employees to present or make known to the board the positions or proposals or both of the professional employees.

The policies or bylaws adopted by the Board of Education of Unified School District No. 501 perhaps were adopted as a matter of policy to protect the district against an allegation of violating the provisions of K.S.A. 72-5430(b)(6). However, "the chief arbitrator of public policy in this state, under the constitution, is the legislature." State, ex rel., v. Board of Education, 122 Kan. 701, 707-708 (1927). By enactment of the provisions of subsection (b) of K.S.A. 72-5415, the Kansas Legislature has established that, in this state, it is not a prohibited practice for a board of education to permit professional employees, individually or collectively, to present or make known to the board of education the professional employees' positions or proposals or both.

Regardless of the reason for adoption of the above quoted policies or bylaws of the Board of Education of Unified School District No. 501, however, we are of the opinion that the emphasized portions of those policies or bylaws violate the freedom of speech guaranteed to all citizens of the United States by the First Amendment to the United States Constitution. Through the adoption of the policies or bylaws here under consideration, the Board of Education of Unified School District No. 501 has determined to allow members of the general public to express their views on matters of public interest in connection with the operation of the public schools. The Board has created a public forum dedicated to the expression of views by the general public. Such action is laudable. However, as was said by the United States Supreme Court in Madison Sch. Dist. v. Wisconsin Emp. Comm'rs, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976): "Whatever its duties as an employer, when the Board [of Education] sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech. [Citation omitted.]" 441 U.S. at 176.

The fact that teachers do not lose their status as patrons of a school district merely because they accept employment with the school district is clearly established by the United States Supreme Court's ruling in Madison Sch. Dist. v. Wisconsin Emp. Comm., supra, and other decisions of that Court in which

it has been held that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), quoted in Madison Sch. Dist. v. Wisconsin Emp. Comm'rs, 429 U.S. 167, 175, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976). See also Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); and Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952).

In addition, the Kansas Legislature has established, under the provisions of K.S.A. 72-5415(b), that membership in a collective negotiating unit does not preclude a professional employee from making his or her positions or proposals or both known to the board of education by whom he or she is employed.

Therefore, we are of the opinion that when a board of education creates a public forum dedicated to the expression of views by the general public, said board cannot prohibit professional employees from expressing their views, as such action is inconsistent with the freedom of speech guaranteed by the First Amendment to the United States Constitution. In addition, K.S.A. 72-5415(b) establishes that nothing in the Collective Negotiations Law, K.S.A. 72-5413 et seq., is to be construed to prevent professional employees, individually or collectively, from presenting or making known their positions or proposals or both to a board of education. Thus, it is not an unfair labor practice for a board of education to allow professional employees to present or make known to the board the professional employees' position, proposals or both. Listening to positions or proposals does not constitute "negotiation."

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Rodney J. Bieker

Rodney J. Bieker
Assistant Attorney General

RTS:BJS:RJB:jm