

**BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS**

State of Kansas, Department of Corrections,)
 Petitioner,)
)
v.)
)
Kansas Organization of State Employees (KOSE))
 Respondent)

Case No. 75-UCA-1-2009

ORDER ON RESPONDENT'S MOTION TO DISMISS

NOW, on this 7th day of May, 2009, Respondent's Motion to Dismiss came on for consideration before Douglas A. Hager, in his capacity as presiding officer for the Public Employee Relations Board (hereinafter "PERB").

APPEARANCES

The Petitioner, Kansas Organization of State Employees, (KOSE), appears through counsel, Rebecca Proctor and James R. "Dick" Waers, Blake & Uhlig, P.A. Appearing as counsel for the Respondent, State of Kansas, Department of Corrections, (KDOC), is Fred W. Phelps, Jr.

PROCEEDINGS

On July 31, 2008, a *Petition for Clarification or Amendment of Appropriate Unit* was filed with PERB by KDOC. The petition seeks to remove Corrections Specialist I's from Unit 6, Protective Services Unit because of alleged supervisory or confidential status of these positions. Following the Presiding Officer's approval of KOSE's request for an extension of time to file its answer, PERB received same on September 12, 2008.

A telephonic prehearing conference was held on October 21, 2008. Administrative inadvertence lead to the parties' responses to prehearing questionnaires being returned to PERB on or about November 26, 2008. The October 21 prehearing conference was therefore continued to December 3, 2008. At that conference the following deadlines were established: December 10, 2008 - Amended Petition due from KDOC; December 22, 2008 - Answer to Amended Petition due from KOSE; January 16, 2009 - Initial witness and exhibits lists due; April 10, 2009 - Discovery to be completed; and May 11, 2009 - Dispositive motions due. See *Prehearing Conference Order dated December 19, 2008*.

An *Amended Petition for Clarification or Amendment of Appropriate Unit* was filed by Petitioner, KDOC, on December 10, 2008. The *Amended Petition* seeks to also remove the position classifications of Corrections Counselor II's from Unit 6, Protective Services Unit because of the supervisory or confidential responsibilities alleged to be assigned to these positions. Respondent's *Answer to KDOC's Petition for Clarification or Amendment of Appropriate Unit* was submitted to PERB on December 18, 2008.

On December 18, 2008, Respondent filed its *Kansas Organization of State Employees' (KOSE's) Motion to Dismiss* the Petitioner's amended Petition for Clarification or Amendment of Appropriate Unit. Petitioner filed its *Response to KOSE's Motion to Dismiss* on December 23, 2008.

CONCLUSIONS AND DISCUSSION

Standards for Determination

In its *Response to KOSE's Motion to Dismiss* at p. 1, Petitioner asserts that "[a]s the [Motion to Dismiss] presents materials outside the pleadings, it should be considered as a motion

for summary judgment.” (citing to *Bell v. Kan. City*, 268 Kan. 208, 212, 213, 992 P.2d 1233 (1999)).

Petitioner notes that the Kansas Court of Appeals recently addressed both motions to dismiss and motions for summary judgment in *Underhill v. Thompson*, 2007 Kan. App. LEXIS 579 (2007) in the following manner:

“Under K.S.A. 60-212(b)(6), if matters outside the pleading are presented and not excluded by the court, a motion to dismiss will be treated as one for summary judgment. *Davidson v. Denning*, 259 Kan. 659, 666-67., 914 P.2d 936 (1996).

“ ‘ “Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.” [Citation omitted.] [Citations omitted.]” State ex rel. Stovall v. Reliance Ins. Co., 278 Kan. 777, 788, 107 P.3d 1219 (2005). Id. pages 2-3.

Response to KOSE's Motion to Dismiss, pp. 2-3.

The question of whether the positions in question are supervisory or confidential positions that should be excluded from Unit 6, Protective Services Unit presents materials which are outside the pleadings. Therefore, Respondent's Motion to Dismiss will be treated as a Motion for Summary Judgment. The burden of proof on a party seeking summary judgment is a strict one. *Kerns By and Through Kerns v. G.A C, Inc.*, 255 Kan. 264, 875 P.2d 949 (1994). This tribunal must resolve all facts and inferences that may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 756 P.2d 416 (1988). The party opposing summary judgment, however,

must come forward with facts to support its claim, that is, with evidence to establish a dispute as to a material fact. *Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 661 P.2d 348 (1983); *Busch v. City of Augusta*, 9 K.A.2d 119, 123, 674 P.2d 1054 (1983).

The Parties' Positions

The conclusion section of the Respondent's *Motion to Dismiss* summarizes the position of KOSE by asserting that:

"KDOC's action to change the composition of Unit 6 after a unit determination Petition and final PERB Order have found the unit appropriate and after a Memorandum of Agreement has been negotiated is disruptive to the bargaining relationship and contrary to the underlying purposes of PEERA. KDOC's petition should be dismissed and KDOC should be barred from filing further Unit Clarification petitions during the life of the current Memorandum of Agreement."

See *KOSE's Motion to Dismiss*, p. 4. Facts relating to this assertion are as follows. Statewide Bargaining Unit 6, the Protective Services Unit, as currently defined, was established on April 26, 2007 through the Initial Order of the Presiding Officer in PERB Case No. 75-UD-1-2007 as adopted, in pertinent part, by order of the PERB. Among other job classifications, the Protective Services Unit contains the classifications of Corrections Specialist I and Corrections Counselor II. *Id.*, at p. 1. The classifications of Corrections Specialist I and Corrections Counselor II are listed as part of the Protective Services Unit in Appendix A of the parties' Memorandum of Agreement. See *KOSE's Answer to KDOC's Amended Petition for Clarification or Amendment of Appropriate Unit*, p. 2.

In support of its position, Respondent relies upon a PERB decision in *City of Wichita v. Fraternal Order of Police, Lodge No. 5*, 75-UCA-1-1994 and urges that "[b]oth the National Labor Relations Board (NLRB) and PERB have repeatedly emphasized that a unit clarification petition filed in the middle of a contract term is disruptive to the bargaining relationship and should be rejected." See *KOSE's Motion to Dismiss*, December 18, 2008, p. 2. Respondent

further alleges that, “[i]t is settled that the NLRB will not normally entertain a petition for unit clarification to modify a unit which is clearly defined in the current bargaining agreement during the term of that agreement”. *Id.*, p. 3 (citing to *City of Wichita v. Fraternal Order of Police, Lodge No. 5*, 75-UCA-1-1994 (October 27, 1995) at p. 59).

In its *Response to KOSE's Motion to Dismiss*, Petitioner suggests that *Consolidated Papers, Inc. v. NLRB*, 670 F.2d 754, 757 (7th Cir. 1982), cited in the *Respondent's Motion to Dismiss* at p. 3, is not supportive of Respondent's position because it hinges on the fact that the NLRB had “announced a policy not to entertain unit clarification petitions midway in the term of an existing collective bargaining agreement.” *Response to KOSE's Motion to Dismiss*, pp. 11-12. Petitioner then observes that “[t]here is no such announced policy with PERB. And, insofar as can be determined by this writer, there is not a single reported Kansas appellate court or Kansas federal district court opinion that in any way suggests there are time restrictions on a petition for unit clarification.”¹ *Id.*, p. 12. Petitioner also notes that “[t]he Kansas statute allowing a petition for clarification or amendment of appropriate unit simply does not contain time restrictions.” *Id.*, at 15-16 (citing to K.S.A. 75-4327). The cited statutory provision states that:

“A recognized employee organization shall represent not less than a majority of the employees of an appropriate unit. When a question concerning the designation of an appropriate unit is raised by a public agency, employee organization or by five or more employees, the public employee relations board, at the request of any of the parties, shall investigate such question and, after a hearing in accordance with the provisions of the Kansas administrative procedure

¹ Notice is taken that KOSE filed a petition with PERB on September 12, 2008, to amend two of the state's realigned units. KDOC and the Kansas Department of Administration entered into an agreement with KOSE to add Correctional Industry Manager and Facilities Maintenance Supervisor positions assigned to correctional facilities into the Maintenance, Trades and Technical unit and to remove the Correctional Industrial Manager from Unit 5, Administrative Professional Unit. The resulting PERB orders, 75-UCA-2 and 2a-2009, amending the units were issued on December 31, 2008. The above parties entered into a memorandum of agreement covering these and other statewide realigned units to be effective May 19, 2008 through June 30, 2010.

act, rule on the definition of the appropriate unit in accordance with subsection (e) of this section.”

K.S.A. 75-4327(c). Petitioner also asserts that “KOSE’s heavy . . . reliance on National Labor Relations Board cases seems contrary to recent pronouncements of the Kansas Court of Appeals in *Fort Hays State Univ. v. Hays*, 2008 Kan. App. LEXIS 169 (2008), specifically:

‘To further support its position, PERB encourages us to consider concepts parallel to those in PEERA from the Kansas Professional Negotiations Act, K.S.A. 72-5413 *et seq.* (PNA), and the National Labor Relations Act (NLRA), 29 U.S.C. 16 § 151 (2000) *et seq.*, and authorities construing same. The PNA is a public sector labor law, **but the NLRA is applicable to private employment.** See *City of Wichita v. Public Employee Relations Bd.*, 259 Kan. 628, 633, 913 P.2d 137 (1996).

PERB admits that PEERA requires “fundamental distinctions” between private and public employment to be recognized, and states that “no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent.” See K.S.A. 75-4333(e). **Our Supreme Court has been mindful of this restriction and has decided whether to apply NLRA concepts to PEERA depending on the issue presented.** See *City of Wichita*, 259 Kan. at 633-34 (refusing to apply NLRA concepts of single employer and joint employer in deciding whether city was obligated to meet and confer with airport authority safety officers); but see *Kansas Ass'n of Public Employees v. Public Service Employees Union*, 218 Kan. 509, 517, 544 P.2d 1389 (1976) (applying federal NLRA decisions to a PEERA case involving representation elections as a “universally applicable” rule of “fundamental fair play”).’

Response to KOSE’s Motion to Dismiss, pp. 16-17 (bold, underline emphasis in original).

Petitioner also takes note of the *Wallace Murray* principle cited in *City of Wichita v. Fraternal Order of Police, Lodge No. 5*, 75-UCA-1-1994 (October 27, 1995) concerning the NLRB’s reluctance to entertain a petition to modify a unit which is “clearly defined in the current bargaining agreement.” The Petitioner believes there is a basic lack of agreement between the parties on the definition of the unit. Petitioner notes that the May 18, 2008 Memorandum of Agreement covering Unit 6, Protective Services Unit details in Article 1, Section 1 that “supervisory employees” and “confidential employees” as defined in K.S.A. 75-4322 are

excluded from the bargaining units. In Petitioner's view, since the parties' current MOA excludes supervisory and confidential employees, the bargaining unit is not clearly defined in the current bargaining agreement. Thus, even were there a clearly expressed policy of PERB similar to that of the NLRB's *Wallace Murray* principle, it would not apply in this instance.² *Response to KOSE's Motion to Dismiss*, pp. 10-12

To support its position that a difference exists concerning Petitioner's and Respondent's respective position relative to the inclusion of Corrections Specialist I and Corrections Counselor II positions in the Protective Services Unit, Petitioner first points to *Kansas Department of Administration v. AFSCME et al*, Case No. 75-UD-1-2007 implementing a realignment of the units for the state and its agencies. Petitioner notes that this April 26, 2007 Initial Order resulted from recommendations made by Peter L. Pashler's March 1, 2007 "Kansas Report regarding Collective Bargaining" which provided that:

"By statute certain job classifications or positions within a job classification are excluded from bargaining units due to the supervisory, managerial or confidential nature of their duties. KSA 754322(b)&(c). My recommendations on bargaining units above do not include consideration of supervisory or confidential status of particular job classifications. The statute and administrative rules provide for a petition process where this issue can be submitted to an administrative hearing before the PERB."

Response to KOSE's Motion to Dismiss, pp. 6-7. To emphasize this point, Petitioner concludes by stating that:

"the units established by PERB back in 2007 simply did not take into consideration the questions of supervisory or confidential status of the job classifications at issue in this pending amended petition. That was left to the statutory petition process before PERB on a case-by-case basis, when presented. Such is being presented by KDOC in this action."

² It also bears mentioning that there are many other policy considerations inherent in the *Wallace-Murray* principal that are based on factual considerations not present in the instant matter. That discussion is beyond the scope of this Order. However, a careful reading of the prior 1994 PERB decision, as well as the NLRA cases it discusses will demonstrate that assertion.

Id., at pages 7-8.

The presiding officer concurs, generally, with the views expressed by Petitioner. Although the NLRB has adopted the views expressed by the *Wallace Murray* principal, that policy has not been adopted by the PERB and, in any event, it is not applicable to the instant matter. The parties' MOA is not conclusive on the question of bargaining unit description. Under Kansas law, only PERB has the authority to define a PEERA bargaining unit.

And, although the Protective Services Unit established by the prior statewide realignment includes the positions here at issue, Paschler's report that formed the basis for the realignment included the caveat that the possible confidential or supervisory nature of particular individual positions were not considered in reaching his recommendations and further, that such considerations could be addressed, as needed, by resort to the statutory process. This petition seeking access to the statutory process for amending or clarifying a bargaining unit is consistent with that aspect of Paschler's recommendation, the prior realignment of statewide bargaining units and with the Act. In view that the determination of supervisory or confidential status with regard to the composition of a bargaining unit is an inherently fact-intensive process, the motion to dismiss is denied.

Concerns regarding the potential for disruption to an established bargaining relationship are not inconsequential, however, and can be taken into account, if such is deemed an appropriate exercise of the PERB's discretion, in establishing an effective date for changes to the bargaining unit composition, if any, that may result from this unit clarification or amendment process.

CONCLUSION

Based upon a careful review of the pleadings and documents filed in this matter, and after due consideration of the parties' arguments and applicable law, it is the conclusion of the Presiding Officer that Respondent's *Motion to Dismiss* in the above-captioned matters must be, and is hereby, denied for the reasons herein stated.

IT IS SO ORDERED.

DATED this 7th day of May, 2009.



Douglas A. Hager, Presiding Officer
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CERTIFICATE OF SERVICE

I, Sharon Tunstall, Administrative Officer, Kansas Department of Labor, hereby certify that on the 7th day of May, 2009, a true and correct copy of the above and foregoing Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

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