

STATE OF KANSAS
PUBLIC EMPLOYEES RELATIONS BOARD

National Association of)
Government Employees,)
Local R14-145,)
Petitioner,)
vs.) Case No. 75-CAE-18-1988
State of Kansas, Department of)
Social and Rehabilitation)
Sevices, Parsons State Hospital)
and Training Center,)
Respondent.)

ORDER

COMES NOW on this 19th day of April, 1989,
the above-captioned matter for consideration by the Public
Employee Relations Board.

APPERANCES

PETITIONER: Appeared through Mr. Brent J. James, Business
Agent, National Association of Government
Employees.

RESPONDENT: Appeared through Ms. Linda Jane Kelley, Attorney
at Law, Kansas Department of Social and
Rehabilitation Services.

PROCEDURES BEFORE THE BOARD

1. Complaint filed by Petitioner on April 5, 1988.
2. Complaint submitted to Respondent for Answer on April 5,
1988.
3. Respondent's Answer received on April 12, 1988.

4. Respondent's Answer submitted to Petitioner on April 13, 1988.

5. Request for pre-hearing dates submitted to Petitioner on May 4, 1988.

6. Procedures for submission of case on stipulated facts and briefs communicated to parties on June 15, 1988.

7. Proposed stipulations of fact received from Petitioner on July 11, 1988.

8. Request for response to proposed stipulations of fact sent to Respondent on August 17, 1988.

9. Stipulated facts received jointly from parties on August 22, 1988.

10. Brief of Petitioner received September 29, 1988.

11. Brief of Respondent received October 12, 1988.

12. Rebuttal briefs requested to be filed no later than October 21, 1988 but no rebuttal brief submitted by either party.

STIPULATED FACTS

The parties agreed to the following stipulation of facts:

1. Parsons State Hospital and Training Center is a public agency as that term is defined by K.S.A. 75-4322.

2. The National Association of Government Employees, Local R14-145, SEIU, AFL-CIO, is an employee organization as that term is defined by K.S.A. 75-4322.

3. On or about the 23rd day of April, 1987, NAGE Local R14-145 was certified as the exclusive representative for all employees holding permanent, probationary, conditional,

part-time, and intermittent appointments with the Hospital; except for all elected and management officials, all professionals, confidential and supervisory employees, and all employees who are appointed on a temporary, student and emergency basis.

4. Mr. James Comer was and has been at all times herein President of NAGE Local R14-145.

5. On December 9, 1987, and in January of 1988, Mr. Comer requested the names and addresses of all persons in the appropriate unit for the purposes of communicating with members of the bargaining unit on matters of representation.

6. The Hospital has provided the names of members of the appropriate unit to the Union but has not provided the Union with the home addresses of those members.

7. Complainant filed this complaint with the Kansas Public Employee Relations Board on or about April 5, 1988.

8. This complaint is properly before the Public Employee Relations Board for a decision.

CONCLUSIONS OF LAW AND DISCUSSION

The instant case comes before the Board as an alleged violation of K.S.A. 75-4333(b)(6) which states:

"It shall be a prohibited practice for a public employer or its designated representative willfully to:

* * *

6) Deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328".

K.S.A. 75-4328 states:

"A public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit

involved in meet and confer proceedings and in the settlement of grievances, and also shall extend the right to unchallenged representation status, consistent with subsection (d) of K.S.A. 75-4327, during the twelve (12) months following the date of certification or formal recognition."

It is the allegation of Petitioner that the employer's refusal to provide the recognized employee organization with the addresses of the employees in the bargaining unit is a denial of the rights to which a certified or formally recognized employee organization is entitled.

It is the Respondent's position that the act does not require the employer to provide the recognized employee organization with addresses and further that the Respondent is prohibited from the release of the employee's address.

The issue to be resolved is the competing interests of the obligation of the certified employee organization to represent the employees of the bargaining unit pursuant to 75-4321 et seq. and the employee to privacy pursuant to K.S.A. 45-215 et seq.

In 1984, the Kansas legislature enacted the Kansas Open Records Act, K.S.A. 45-215 et seq. and declared the public policy of the state to be "...that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy." While the general policy of the State of Kansas favors disclosure of all public records, the legislation provided thirty-five exemptions. The applicable exemption to this case is K.S.A. 45-221(a)(4) which states:

"Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

" (4) Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such."

The Kansas appellate courts have not addressed this question so it is necessary to look to federal caselaw and the decisions of other states for guidance.

The Freedom Of Information Act (FOIA), 5 U.S.C. 552, requires disclosure of all government records to the public except those specifically exempted by 5 U.S.C. 552(b). The exemption similar to K.S.A. 45-221(a)(4) is 5 U.S.C. 552(b)(6) which provides that the FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

In defining the limits of the exemptions the U.S. Supreme Court applied a balancing test weighing the privacy interest of the individual against the public's right to know, Department of the Air Force v. Rose, 425 U.S. 352, 96 S.Ct 1592, 48 L. Ed 2d 11 (1976). The Supreme Court accepted the reasoning of the Court of Appeals that the policy of FOIA is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny", and that the legislature could exempt information from public disclosure, and stated "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."

Rose L.Ed 2d at p.21. The Supreme Court concluded "we find nothing in the wording of Exemption 6 or its legislative history to support the Agency's claim that Congress created a blanket exemption for personnel files". Rose L.Ed 2d at p.27.

Since the Rose decision, several Federal Court of Appeals have had the opportunity to decide whether the government is required to disclose the addresses of its employees to a union.

The Fourth Circuit in U.S. Department of Health and Human Services v. FLRA, 833 F.2d 1129 (4th Cir. 1987) overruled its prior decision in American Federations of Government Employees v. U.S. Department of Health, 712 F. 2d 931 (4th Cir. 1983) and held that disclosure of their address did not interfere with the employee's privacy rights, and would be proper under the Labor-Management Relations Act. U.S. Dept. at p. 1135.

In American Fed of Government Employee, Local 1760 v. FLRA, 786 F.2d 554 (2nd Cir. 1986) the Second Circuit, in addressing the question of whether the union's need for the information outweighs the privacy interest of the employees held that 5 U.S.C. 552(b)(6) does not restrict disclosure of employees address, concluding "...the privacy interest of the average employee in his address is not particularly compelling," Am. Fed at p.557.

The Seventh Circuit in U.S. Dept. of Air Force Scott A.F. Base v. FLRA, 838 F. 2d 229 (7th Cir. 1988) likewise held that the privacy in one's home address was minimal and one's address in most cases is not private.

Finally, the Third Circuit in U.S. Dept of the Navy v. FLRA, 840 F. 2d 1131 (3rd Cir. 1988) held that the disclosure of the name and address of employees was necessary for the union to perform its obligation to fairly represent all members of the bargaining unit. Therefore the public interest in proper representation of bargaining unit members by the union outweigh non-union members' privacy interest in their names and addresses.

While reaching the same conclusion, the Eighth Circuit, in U.S. Dept. of Agriculture v. FLRA, 836 F 2d 1139 (8th Cir. 1988), held that federal employees have privacy right in their home addresses and union were entitled to disclosure of employee's home addresses unless employees requested that employers keep such information confidential.

The states that have considered the issue of disclosure of employee addresses have not adopted the balancing test applied by the federal courts but rather look to whether the employees have a reasonable expectation to the privacy of such information. In State Employees Association v. Dept. of Management and Budget 404 NW 2d 606 (Mich 1987) after a lengthy discussion about the intent of the Federal FOIA 5 U.S.C. 552, the court determined that the Federal FOIA and cases were not controlling stating:

"Moreover, we are not bound by cases interpreting the federal statute because we are interpreting Michigan's FOIA. There are significant differences between the federal and state act which make reliance on the federal cases of limited value, and which supports our rejection of a balancing test in applying Michigan's privacy exemption." State Employee at p.619.

The Michigan Court concluded that addresses were subject to disclosure unless the release of the requested information would be a "clearly unwarranted invasion of an individual's privacy." State Employee at p. 614. Since the Michigan legislature did not define the right of privacy, the Court looked to the principles of privacy developed under the common law and the Michigan constitution and found no infringement of the employee's federal or state constitutional right to privacy in their home addresses.

In Webb v. City of Shreveport (La App, 371 So. 2d 316), the Louisiana court also found that no constitutional right to privacy existed regarding names and addresses. A privilege may exist if there is a reasonable expectation of privacy the disclosure of which might affect the employee's future employment or cause him embarrassment or humiliation, such as personnel evaluation reports. The Court found that neither the city nor its employees have a reasonable expectation of privacy such as to deny disclosure of their name and addresses to a person entitled to invoke the Public Record Law. Webb at p.320.

The Kansas Open Record Act (KORA) can be distinguished from the Federal and other states interpretation of FOIA. The Kansas Act is not worded similar to the Federal Privacy Act and is more specific as to what records are exempt. Additionally, there is no indication that the Kansas legislature intended the use of a balancing test in determining which records are exempted from disclosure. The "reasonable expectation of privacy" test is the appropriate test to be applied to the issue of employee addresses.

The threshold question then is whether the employees of the Parsons State Hospital and Training Center have a reasonable expectation to privacy in their address. There appears to be a right to privacy under the common law or the Kansas Constitution. The Kansas Open Records Act is an affirmative act requiring disclosure, and to apply a strict interpretation to its provisions would be contrary to the policy of the legislation. K.S.A. 45-221(a) only protects the agency from being "required to disclose" certain information. There is no prohibition on the agency from disclosing the information. It is discretionary on the part of the agency. This position is supported by Tew v. Topeka Police and Fire Civil Service Commission, 237 Kan. 96, 104 (1985), wherein the Supreme Court quoted the decision of the trial court:

"Therefore, under the new Kansas Open Records Act, a court may require that a public official provide access to any "public record" not included under one of the Act's thirty-five exemptions while the official is granted the discretion whether he or she wishes to release an exempted record not specifically closed by law."

Since the employer is able, at its discretion and without consent of the employee, to disclose such information, it cannot be said that the legislature intended to create an exclusive right to privacy to all personnel information or that the employee has a reasonable expectation to privacy in that information. Applying the reasoning of the Webb case, there is nothing about the release of an address which would affect the employee's future

employment or cause him embarrassment or humiliation, and therefore create such expectation. Neither would it constitute a clearly unwarranted invasion on an individual's privacy.

There being no reasonable expectation of privacy on the part of the employee or unwarranted invasion of privacy and given the public interest in the performance of the obligations of a certified employee organization to fairly represent all members of the bargaining unit, the addresses of the employees should be disclosed.

Another issue must be addressed with the release of the information. K.S.A. 45-220(c) provides:

"(c) . . . the agency may require a person requesting the records or information therein to provide written certification that:

* * *

(2) the requester does not intend to, and will not: (A) Use any list of names or addresses . . . for the purpose of selling or offering for sale any property or service to any person listed or to any person who resides at any address listed; or (B) sell, give or otherwise make available to any person any list or names or addresses contained . . . for the purpose of allowing that person to sell or offer for sale any property or service to any person listed or to any person who resides at any address listed."

The language of this section would appear to prohibit the use of the addresses obtained by a certified employee organization for the purpose of solicitation of organization membership as such would constitute the sale of a service. Likewise, it cannot provide the addresses to others for the solicitation of goods and services. There is nothing in the language of K.S.A. 45-201 et seq. which would exempt a certified employee organization from the provisions of the act. Likewise,

since a certified employee organization is required to represent all employees in that unit without reference to membership in the certified employee organization, there is nothing in the requirements of K.S.A. 45-220(c)(2) that would inhibit the organization in its obligation to fairly represent all members of the bargaining unit or from the stated purpose in their petition "to poll the bargaining unit and thus serve their needs."

Therefore, as a prerequisite to release of the requested addresses, the certified employee organization should be required to execute a written certification in accordance with K.S.A. 45-220(c).

IT IS THEREFORE THE RECOMMENDATION OF THE HEARING EXAMINER that the respondent, State of Kansas, Department of Social and Rehabilitation Services, Parsons State Hospital and Training Center, shall within thirty (30) days of the date of this Order provide the names and corresponding addresses of each person in the bargaining unit represented by the National Association of Government Employees, Local R14-145 to Petitioner. The release is conditioned upon execution and delivery of an executed certification in accordance with K.S.A. 45-220(c) to be prepared by Respondent and forwarded to Petitioner within fifteen (15) days of the date of the Board's Order.

IT IS SO RECOMMENDED this 29th day of March, 1989.

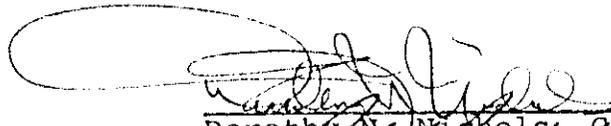


Monty R. Bertelli

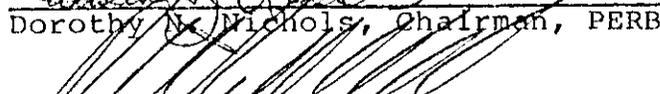
Hearing Examiner

It is the decision of the Public Employees Relations Board that the recommendation of the Hearing Examiner be adopted as the final order of the Board.

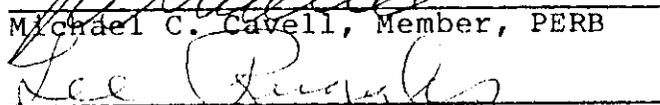
IT IS SO ORDERED THIS 19th DAY OF April, 1989, BY
THE PUBLIC EMPLOYEE RELATIONS BOARD.



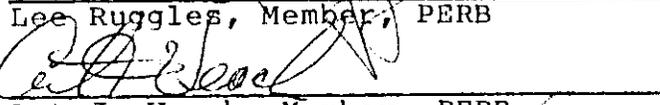
Dorothy N. Nichols, Chairman, PERB



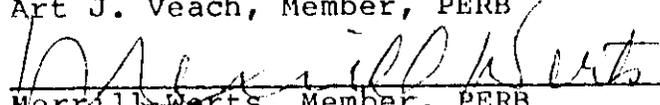
Michael C. Cavell, Member, PERB



Lee Ruggles, Member, PERB



Art J. Veach, Member, PERB



Merrill Werts, Member, PERB