BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

OF THE STATE OF KANSAS

Kansas University Police Officers Association, Timothy Cochran, and Cecil Leonard, Petitioners, vs. University of Kansas Police Department, Respondent/Employer,	)	CASE NO: 75-CAE-13-1989

RECOMMENDED ORDER AND DECISION

I. APPEARANCES

Steve A. J. Bukaty attorney with Blake and Uhlig, 475 New Brotherhood Building, 753 State Avenue, Kansas 66101, for Petitioner.

Mary D. Prewitt, Assistant General Counsel, University of Kansas, 202 Strong Hall, Lawrence, Kansas 66045, for Respondent.

II. ISSUE

Respondent's Motion to Dismiss concerns the issues of jurisdiction, res judicata and collateral estoppel. Respondent argues the PERB Board lacks jurisdiction as Petitioners have had a full hearing before the Civil Service Board concerning the same issues, subject matter, and seeking the same relief. Respondent argues that Neunzig vs. Seaman USD 435 239 KAN 654 (1986) (hereinafter Neunzig) and/or the principles of collateral estoppel and issue preclusion requires this agency to dismiss the action.

Petitioner's reply that the facts of Neunzig and collateral estoppel - issue preclusion, are inapplicable and they may have hearings in front of two state boards.

III. PROCEEDINGS BEFORE THE BOARD

1. The petition was filed March 24, 1989. The petition alleged that Respondent dismissed Petitioners because they filed a petition (75-UDC-6-1988) and grievances, and gave information and testimony under the Public Employee-Employer Act; and because they had formed and chosen to be represented by a employee organization. (The PERB Board held an extensive unit determination hearing and determined an appropriate unit in 75-UDC-6-1988 on September 21, 1988.)

Petitioners allege that on September 27th and 28th, 1988, the Respondent interrogated them in an attempt to interfere with, intimidate or coerce employees who exercised their protected rights under K.S.A. 75-4324.

Petitioners seek reinstatement of Leonard and Cochran, and a cease and desist order.

2. On April 3, 1989, the Respondent answered and moved to dismiss the claim. The Respondent admitted it conducted interrogations, but specifically denied any attempt to interfere, intimidate or coerce the employees in the exercise of rights under K.S.A. 75-4324 and denied any intent to dominate or interfere in the existence of the administration of the Kansas University Police Officers Association (hereinafter KUPOA).

3. The Petitioners submitted a brief opposing Respondent's Motion to Dismiss dated April 27, 1989.

4. Respondent submitted a reply brief dated June 23, 1989.

5. The Petitioners filed a reply brief dated July 26, 1989.

6. The Respondent filed a second reply brief on August 7, 1989.

7. The hearing officer has reviewed all the briefs filed by Petitioner and Respondent to date.

8. This hearing officer has reviewed: (a) The transcript of the Civil Service Board and the entire file of record on appeal in the District Court of Shawnee County, Division Eleven, Case No. 89-CV-747; (Except Exhibit 10 which was returned to Respondent.) (b) The March 28, 1989 order of the Civil Service Board; (c) The Order of the Department of Human Resources dated April 12, 1989, concerning whether the Complainants were discharged for misconduct. (An unemployment compensation decision attached to Petitioners brief): (d) The PERB Board's Order concerning unit determination file case 75-CAE-6-1988 in its entirety, and the September 21, 1988 order establishing KUPOA as the bargaining representative.

IV. FINDINGS OF FACTS

1. The Kansas University Police Officers Association is certified by the PERB Board as the bargaining representative for Officers Cochran and Leonard and is an appropriate Petitioner.

2. The Respondent is the appropriate employer within the meaning of K.S.A. 72-5413(b).

3. Officer Leonard has been involved in law enforcement from 1960 through 1988. He started PERB related activity at the KU Campus in November 1987. A PERB petition for recognition was filed in January 1988.

4. In April, 1988 Leonard filed an overtime complaint pursuant to the Fair Labor Standards Act against the University of Kansas.

Respondent has challenged the Department of Labor's decision concerning the Fair Labor Standards Act. (See Transcript Civil Service Board p. 258-265; p. 332-342)

5. Officer Cochran has been a KU police officer from July 18, 1985 and was chairman and organizer for KUPOA.

6. Leonard and Cochran were filing "grievances" against the Respondent in August 1988. They were organizers and leaders of KUPOA. KUPOA had the knowledge of all relevant facts presented to the CSB by and through its organizers.

7. On September 21, 1988 the PERB Board issued a decision ordering the appropriate unit of police personnel within the University of Kansas Police Department to include Police Officers, Detectives, Security Officers I's, and to exclude Police Sergeants, Security Officers III's, Communications Operators I's, II's and III's, and all other classifications not included above.

8. From approximately 11:30 p.m. on September 27, 1988 until the early morning hours of September 28, 1988, Officers Leonard and Cochran were interviewed and interrogated by the administrative

head officers of the KU Police Department (Transcripts of the interrogations are exhibits in 89-CV-747). The questioning involved the issues concerning the Kansas University Police Officers Association, confidential documents being removed from administrative offices and transferred to the press; three t-shirts allegedly stolen by Officer Cochran, the disabling of a command vehicle at the KU Police Department in the Spring of 1988; the improper use of the KU Police Department phones for local and long distance calls; and potential work speedup for selective enforcement of laws against the staff and faculty at KU.

9. Leonard and Cochran were immediately suspended and then dismissed effective October 14, 1988. Prior to their dismissal, they raised the issue of union activity by and through their counsel to university administrators. (See letter of Ola Fletcher dated October 14, 1988)

10. Leonard and Cochran timely appealed to the Civil Service Board seeking reinstatement and back pay. They also timely appealed to the Kansas Department of Human Resources seeking unemployment benefits.

11. On February 6, 1989 the Kansas Department of Human Resources conducted a hearing to determine whether the Claimants were discharged from employment for misconduct in connection with work. This was a unemployment insurance case. The same issues mentioned in Findings of Fact #8 were reported in the decision dated April 12, 1989. The referee found the employees had not been

discharged for misconduct in connection with work and accordingly were not to be disqualified for benefits under the provisions K.S.A. 44-706. (See appeals of Leonard and Cochran Appeal No. 811349-JC-310 and 811619-JC-310 both hearings held February 6, 1989.)

12. On February 7 and February 8, 1989, the Civil Service Board conducted a full hearing in regard to all the issues set forth in Findings of Fact #8. The KUPOA was not a party of that action. Leonard and Cochran were represented by counsel, and presented their factual and legal claims based in part on anti-union animus.

13. The claims included anti-union animus by the Respondent, denial of the allegations of theft and misappropriating of confidential material, interdepartmental friction by the complaining witnesses (Rosenheim and Johnson); disparate treatment of a complaining witness (Johnson); plus legal objections to a statement taken by KU counsel without notice on cross examination by Petitioners counsel; and disparate treatment of a witness who improperly used KU phones.

14. The Claimants filed this specific action before the PERB Board on March 22, 1989.

15. The Civil Service Board issued its order March 28, 1989. The Human Resources unemployment order was dated April 12, 1989.

16. On March 28, 1989, The Civil Service Board issued its decision upholding the action taken by Respondent, a portion of which reads:

> "based on the testimony, the board felt Officer Cochran stole the t-shirt in question, and then Officers Cochran and Leonard jointly removed and released the confidential investigative file. The board felt the above activity constituted gross misconduct on the part of the appellants and justified their dismissal from the University Police Officer positions."

17. The District Court of Shawnee County, Kansas, Division Eleven, the Honorable Matthew J. Dowd in Case No. 89-CV-747 upheld the Civil Service Board (hereinafter CSB) decision by Memorandum of Decision dated August 25, 1989. The Court held:

> "the investigating officer and board had substantial evidence of serious misconduct upon the part of Leonard and Cochran, and based their decision on this activity and that decision should not disturbed by the District Court herein. The procedure notices, hearings and so forth conducted by the state agency herein were proper, legal and appropriate and should not be disturbed on appeal. On the state of the record herein the court could not find that the actions of the state agency herein were arbitrary, unreasonable or capricious, or anywise unlegal to the extent that they should be set aside. Their actions there affirmed and the appeal is denied."

The District Court Decision has not been appealed.

V. DISCUSSION AND DECISION

A. Collateral Estoppel - Issue Preclusion

Based on the entire record, and for the legal and factual reasons set forth below, this hearing officer has decided to grant Respondent's Motion on the grounds of both res judicata and collateral estoppel, or issue preclusion.

The doctrine of collateral estoppel - issue preclusion is applicable when the issues of ultimate fact have been determined. The issues of ultimate fact cannot again be litigated by the parties in a future suit. The prerequisites include: (1) a prior judgement on the merits which determined the rights and liabilities on the issue, based on ultimate facts disclosed by the pleading and judgement; (2) the parties are the same or in privity; and (3) the issue was actually determined and was necessary to support the judgement. Williams vs. Evans, 220 KAN. 394, 552 P2d 876 (1976); Jackson Track Group, by and through Jackson Jordan Inc. vs. Mid States Port Authority 242 KAN 683, 690-91; 751 P2d 122 (KAN. 1988). The prerequisites are discussed below.

Prerequisite #1: Was the ultimate issue decided before the CSB the same issue plead before the PERB Board? This officer finds that the ultimate issue of "Were Leonard and Cochran properly dismissed by their employer?" was decided before the CSB.

The CSB held Leonard and Cochran were properly dismissed, and stated its ultimate finding clearly and concisely.

"Cochran stole University t-shirts; Leonard and Cochran jointly removed and released confidential (employer) investigative files" (To the Topeka Capitol Journal). [See Finding of Fact #16.]

The parties litigated the issue, including all their respective facts occurring before and after the September 27, 1988 interrogations. (CSB entire transcript, Findings of Fact #12 and #13).

Prerequisite #2: The parties are not identical in both actions however I find them to be in legal privity. KUPOA was not a party to the Civil Service Board case. However, Leonard and Cochran were the president, chairman and organizers of KUPOA (Findings of Fact #6).

The interest of KUPOA before the CSB was inextricably intertwined with the subject matter of the individual Petitioners.

The decision of the CSB determined whether KUPOA would retain its leadership. Just as a member of a union is sometimes in privity with the union, Lyman vs. Billy Rose Exposition Spectacles 39 N.Y.S. 2d 752, 755; or a stockholder maybe in privity with his corporation, People ex rel. Palmen vs. Central Mut. Ins. Co. of Chicago 39 N.E. 2d 400, 408; or a mother and child in an estate action may be in privity, Carter vs. City of Emporia 815 F 28 617 (KAN. 1987); I conclude as a matter of law that KUPOA was in privity with its organizers before the CSB.

Prerequisite #3: Was the issue actually determined, and necessary to support the decision?

In this action the determination was particularly necessary, because an anti-union animus claim is primarily concerned with the motive for the alleged discriminatory action. The anti-union animus cases are based on an employers pretext, or mixed motive for his action. See The Developing Labor Law 2d Edition, Vol. 1, Chp. 7. p. 188-195.

An anti-union animus claim is based on discriminatory conduct motivated by union animus. But the employer retains the right to take disciplinary action for good cause. Accordingly the animus claim fails after the CSB found good cause. The CSB findings supported the employers good cause, and the PERB Board should decline jurisdiction because the ultimate facts have been previously decided.

The good cause for the dismissal, was the theft of t-shirts, and the removal and release of confidential files. The CSB could have determined the investigation was a pretext, or that Leonard and Cochran did not commit the acts, or some other finding. However, the Board made findings of gross misconduct. The findings of gross misconduct constitute good cause, and allow the employer to discipline the individual Petitioners.

The PERB Board would have to overturn, or at least look behind, the CSB findings of gross misconduct and hold them erroneous to allow Petitioners to prevail in this action.

The Petitioners' PERB claim asks the question, "May Respondent investigate theft of property and the removal and release of confidential files?" and the clear answer is, "Yes".

Under the facts and findings of this case, it is not possible for two quasi-judicial bodies to find independent of each other: (1) That Petitioners were dismissed for good cause based on CSB substantiated findings of theft and release of confidential documents, (CSB) and; (2) That the dismissal was based on anti-union animus (PERB).

First, the Kansas Court of Appeals has dismissed claims based on similar claim preclusion facts, in L.R. Foy Constr. Co. vs. Professional Mechanical Contractors 13 K.A. 188 (1989). The Foy case was based on a breach of contract plea and argued in arbitration and tort claims based on the contract which were filed in District Court. While Foy's facts and claims are not identical to Petitioners' issues, the derivative nature of Foy's tort claims are analogous to the derivative nature of Petitioners union - animus claims. Second, the Hearing notes that when Petitioners appeared before the CSB, they did not reserve their rights to have certain issues decided by the PERB Board, as per Jackson, supra.

Finally, this is not a disparate treatment case where several other employees were found to have committed the same gross misconduct and only Petitioners received disparate treatment. If that were the case Petitioners might have been granted a hearing.

VI. OTHER ISSUES

A. The Record

This hearing officer reviewed the entire record available as the transcript was requested by my predecessor, Paul Dickhoff; and case law requires a sufficient review of the prior record to allow findings with a requisite degree of certainty as to the issue presented in the prior hearings. State Farm Fin. & Cus. Co. vs. Century Home Components Inc. 550 P2d 1185, 275 Ore. 97 (Ore 1976).

B. Department of Human Resources Decision

As a matter of law the unemployment hearing is not a sufficient basis to preclude a CSB or PERB finding.

Firstly, the relief sought in the unemployment benefits hearing was substantially different from the relief of reinstatement sought before the CSB or PERB Boards.

Secondly, the Legislature has clearly stated that,

> "the transcript of the unemployment hearing shall not be discoverable or in evidence in any other proceeding, hearing or determination of any kind or nature. ...In no event shall the transcript be deemed a public record." K.S.A. 44-714 (f).

An unemployment compensation claim is not a sufficient basis to argue collateral estoppel to defeat a civil service claim. Matter of Kjos 346 NW 2d 25 (Iowa 1984).

Therefore the unemployment hearing is not a basis to defeat the collateral estoppel - issue preclusion defense based on the CSB's decision.

C. The September 27, September 28 Interviews

1. This officer has reviewed the transcripts of the actual interrogation. The interrogations primarily concerned the investigation of misconduct. The alleged work speed-up, and union confidential strategy conversations are the Petitioners alleged protected activity. Same were not the main emphasis of the interrogation.

The investigating officers' knowledge of the work speed-up obviously came from individuals connected with the KUPOA. Whether the conversations were confidential strategy, or a breach of the employer's policy, was a disputed matter before the CSB.

The CSB did not make findings based on Petitioners' work speed-up plans, and accordingly did not find the plans a breach of the employer's policy.

2. Arguably, this Board could dismiss this action by Leonard and Cochran, but allow KUPOA to proceed, and request a cease and desist order. However, finding of privity heretofore stated, and the result of allowing KUPOA to proceed, prevent such a hearing.

Assuming KUPOA prevailed at a full hearing, the cease and desist order would produce an anomalous result. The Order would have to be drawn extremely narrow in light of the prior findings of theft and release of confidential documents.

D. Neunzig and Primary Qualification

Neunzig was decided on the issues of res judicata.

Neunzig res judicata principles are similar to the instant case, as Leonard and Cochran did not appeal the District Court decision.

The reasoning of Neunzig is also applicable to the instant case. The Kansas Supreme Court cited Umberfield vs. School District #11, 185 Colo. 165, 522 P2d 730 (1974) at p. 662 of Neunzig in discussing the policy reasons of res judicata. The Colorado Court stated:

> "Because Umberfield had a full adversary hearing before the Teachers Tenure Panel which had the power to determine all his claims of religious discrimination, we hold that the doctrine of *res judicata* operates as a bar to the relitigation of issues which Umberfield raised or could have raised in the hearing before that panel and on judicial review. [Citations omitted.] To hold otherwise could result in an anomalous situation where the same reviewing court would be compelled to affirm opposite results of the two administrative bodies. Assuming credible and conflicting evidence, a school board might dismiss a tenured teacher and a reviewing district court could uphold the dismissal under C.R.S. 1963, 3-16-5. The same district court, in reviewing a subsequently filed proceeding before the Civil Rights Commission, would be bound to uphold a contrary result if supported by substantial evidence. C.R.S. 1963, 80-21-8(6). To avoid this judicial inconsistency, the doctrine of *res judicata* must be applied to the subsequently filed proceedings before the Civil Rights Commission." 185 Colo. at 173-74.

I hold the same policy principles concerning the anomalous result apply to this case.

The CSB had conflicting evidence before it. It could have reinstated Leonard and Cochran. But after the CSB has determined the questions of ultimate fact, the PERB Board may not look behind

their finding and produce a anomalous decision based on the same facts.

The due process procedural safeguards of Neunzig are found to apply to the CSB hearing. Although this officer might disagree with the admission of the Rosenheim statement as meeting due process, I do not have the authority to overturn the CSB decision to admit the statement.

Turning to the primary qualification arguments, I agree with Petitioners' partial reliance of § 83 (3) of the Restatement of Judgments, which states:

> "An adjudicative determination of a claim by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction if the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim."

This officer did not automatically preclude relitigation of Petitioners claim. The determination to grant Respondent's motion was made after a review of the entire record (which included union animus evidence and argument of counsel see T p. 52-53, 72, 137, 162, 178-81, 190, 210, 213, 287, 315,); the findings of the CSB decision, a review of the facts presented to the CSB, a review of the factual bases of union animus claims, pertinent case law, and the derivative nature of union animus claims.

The decision was made only after a review of the facts, law, record and equities of the issue preclusion principles.

This decision is limited to its facts, and does not stand for the principles that any CSB decision automatically precludes a prohibited practice claim before the PERB Board. The decision in this case is based in large part on the CSB's clear and succinct findings of theft and release of confidential documents.

E. Dicta

This case was capably briefed and re-briefed by both counsel. The hearing officer appreciates their efforts in presenting their respective clients.

The facts of this case [i.e. the prior contested UDC hearing, FLSA filing, the alleged political nature of the investigation, filing of grievances by Leonard and Cochran, threats by the Respondent (Tr. 332-42), and timing of the UDC decision of September 21, tied into the investigation interrogation of September 27], viewed in a light most favorable to Petitioners show a prima facie case of union animus, and a prohibited practice. Petitioners case is that the employer retaliated against the organizers (under a pre-text or mixed motive theory) to either aid the employer of the organizers, or control the associations' activities.

However, this officer cannot reweigh the evidence, as only the CSB saw the actual testimony and evaluated same in rendering its decision.

RECOMMENDED ORDER

Based on the Findings of Facts, Conclusion of Law and Discussion of Issues heretofore stated, the Hearing Officer recommends the Motion of Respondent to dismiss this case on the grounds of collateral estoppel and issue preclusion and res judicata should be GRANTED, this 10, day of October, 1989.

Wm. J. Pauzauskie
William J. Pauzauskie, Hearing Officer

CERTIFICATE OF MAILING

I, Sharon Tunstall, Secretary III of the Kansas Department of Human Resources, hereby certify that on the 11th day of October, 1989, a true and correct copy of the above and foregoing Recommended Decision and Order was deposited in the U. S. Mail, first class, postage prepaid, addressed to:

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Mary D. Prewitt
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Sharon Tunstall
Sharon Tunstall

The hearing officer's recommended decision and order are hereby approved and adopted as a final order of the Board.

IT IS SO ORDERED THIS 25th DAY OF October, 1989, BY THE PUBLIC EMPLOYEE RELATIONS BOARD.

Dorothy N. Nichols, Chairman, PERB

Michael C. Cavell, Member, PERB

Lee Ruggles, Member, PERB

Merrill Werts, Member, PERB

Art J. Veach, Member, PERB