BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
OF THE STATE OF KANSAS

CARPENTERS' DISTRICT COUNCIL OF KANSAS CITY & VICINITY, Petitioner, vs. WYANDOTTE COUNTY, KANSAS, Respondent.	)	Case No. 75-UDC-5-1992

INITIAL ORDER

ON June 30 and July 1, 1993 the above-captioned unit determination and certification petition came on for formal hearing pursuant to K.S.A. 75-4327(c) and K.S.A. 77-517 before presiding officer Monty R. Bertelli.

APPEARANCES

Petitioner: Appeared by Steve A.J. Bukaty
BLAKE & UHLIG, P.A.
475 New Brotherhood Bldg.
753 State Avenue
Kansas City, Kansas 66101.

Respondent: Appeared by Daniel B. Denk
McANANY, VAN CLEAVE & PHILLIPS, P.A.
707 Minnesota Ave., 4th Floor
P.O. Box 1300
Kansas City, Kansas 66117

ISSUE PRESENTED FOR DETERMINATION

1. WHETHER, PURSUANT TO K.S.A. 75-4321(c), THE GOVERNING BODY OF A PUBLIC EMPLOYER CAN VOTE TO COME UNDER THE JURISDICTION OF THE PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT FOR ONLY ONE EMPLOYEE UNIT BUT NOT FOR ITS REMAINING PUBLIC EMPLOYEES.

   A. WHAT WAS THE EFFECT OF THE PASSAGE OF WYANDOTTE COUNTY RESOLUTIONS 2615 AND 2616.

75-UDC-5-1992

SYLLABUS

1. **LOCAL OPTION PROVISION** - Nature of Option. The *"local option"* provided by K.S.A. 75-4321(c) is the option of the public employer to decide whether it wishes to be covered by PEERA, and not the option for the employer to determine which individual employee units will be covered.

FINDINGS OF FACT[1]

1. Petitioner, the Carpenters' District Council of Kansas City & Vicinity,("Carpenters") is an "employee organization" as defined by K.S.A 75-4322(i). It is seeking to become the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for all carpenters employed by Respondent, Wyandotte County, Kansas ("County").

2. Respondent, Wyandotte County, Kansas, is a duly organized and existing county of the State of Kansas and therefore a "public agency or employer", as defined by K.S.A. 75-4322(f), with numerous employees performing duties under various administrative departments.

3. Prior to December, 1988 the Wyandotte County Commission ("Commission") had not elected to bring the county government under the provisions of the Kansas Public Employer-Employee Relations Act ("PEERA")as provided by K.S.A. 75-4321(c).

4. According to the Commission Minutes, on October 27, 1988, the Fraternal Order of Police, Lodge #40 ("F.O.P."), appeared, through Wyandotte County Deputy Sheriff Rick Whitby, before the Wyandotte County Commissioners. The purpose of the appearance was to inform the Commissioners that the Board of Directors of the Kansas State Fraternal Order of Police had accepted the Wyandotte County Fraternal Order of Police Lodge as Lodge #40. In

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[1] "Failure of an administrative law judge to detail completely all conflicts in evidence does not mean . . . that this conflicting evidence was not considered. Further, the absence of a statement of resolution of a conflict in specific testimony, or of an analysis of such testimony, does not mean that such did not occur." Stanley Oil Company, Inc., 213 NLRB 219, 221, 87 LRRM 1668 (1974). At the Supreme Court stated in NLRB v. Pittsburg Steamship Company, 337 U.S. 656, 659, 24 LRRM 2177 (1949), "[Total] rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

addition Deputy Whitby requested the County Commission recognize the FOP as a Lodge within the Sheriff's Department, and grant it permission to have dues deducted from F.O.P. member salaries. Whitby was requested by the Commissioners to submit their petition to the County Counselor for review. (Respondent's Exhibit Q and R).

5. At the regular meeting of the Board of County Commissioners of Wyandotte County on November 17, 1988, the Commission Minutes indicate certain members of the F.O.P. Lodge #40 appeared and Commissioner Scherzer moved the F.O.P. meet with Associate County Counselor, Laskowski, submit their documents to him, and that Laskowski consult with the County Auditor concerning problems associated with payroll deductions. Laskowski was to report his findings and recommendations to the Commission at its next regular meeting. (Respondent Ex. R).

6. Associate Counselor Laskowski's report and recommendations were not ready for the Commission at its December 8, 1988 meeting. The Commission decided to delay action pending a recommendation from Assistant County Attorney John Duma, and the F.O.P. request was held over to the next meeting (Respondent Ex. R). John Duma served as Assistant County Attorney 1984-90. His duties included providing legal assistance to the County Commissioners (Ex. 7, p. 3-4).

7. At the December 13, 1988 Commission meeting the Commissioner's adopted resolution No. 2615 which read:

> ***"Come now the County Commissioners of Wyandotte County, Kansas on this 13th day of December, 1988.***
>
> ***Whereas, a group known as the Fraternal Order of Police has petitioned the Board of County Commissioners as follows:***
>
> ***1. To recognize the existence of the FOP as an organization within the Wyandotte County Sheriff's Department.***
>
> ***2. To approve a payroll deduction plan for employees dues to the FOP lodge.***
>
> ***3. The Board recognized the group as a recognized employee organization pursuant to K.S.A. 75-4323, also known as the Kansas Employee Relations Act.***

Be it resolved this 13th day of December, 1988, that:

1. ***The FOP Lodge #40 is a recognized employee organization pursuant to K.S.A. 75-4327(B). Further, said Lodge may present the County Clerk with an appropriate payroll deduction plan for dues to the Lodge provided each member agreeing to such deduction shall so acknowledge in writing before such deduction is allowed.***

Commissioner Patrick L. Scherzer, Commissioner Joseph Wilhm, Commissioner Clyde Townsend."

8. The Commission minutes for the December 13, 1988 meeting contains the following statement:

> ***"John Duma, Associate County Counselor, said he had looked at their [FOP's] petition, their charter, and the number of members, and since the members represent the majority, and as long as their group is within the county, the county by law must recognize them. He said they still cannot collectively bargain with the county, they must go to the state. Mr. Duma said this is the first step."*** (Tr.p. 46; Ex. L).

9. Duma testified that he had some involvement in drafting Resolutions 2615 and 2616. (Ex. 7, p.4). In so doing, Duma called Topeka and spoke with a representative of the Public Employees Relations Board ("PERB") to inquire specifically what language was needed in a resolution to comply with the statute, presumably K.S.A. 75-4321(c). Resolution 2616 was prepared because certain language was not contained in Resolution 2615 that PERB indicated was necessary to comply with PEERA. The PERB representative then told Dumas exactly what to put in paragraph 2 of Resolution 2616. (Ex. 7, p. 4-6, 8).

10. Resolution 2616 was adopted by the Wyandotte County Commission meeting of December 20, 1988 to clarify resolution 2615. Resolution 2616 provided:

> ***"Come now the County Commissioners of Wyandotte County, Kansas on this 20th day of December, 1988.***
>
> ***Whereas, pursuant to resolution No. 2615, the Board of County Commissioners of Wyandotte County on Tuesday, December 13, 1988, recognized FOP Lodge #40 for the purpose of coming under the Public Employees Relations Act pursuant to K.S.A. 75-4321(c).***

> ***However, it is expressly understood that if FOP Lodge #40 wishes to become the bargaining agent for its bargaining unit, they shall petition the Public Employees Relation Board pursuant to K.S.A. 75-4327(d). This expressly reserves the right of Wyandotte County to make a determination as to the appropriate classifications of individuals within the bargaining unit as well as expressly reserve the rights of employees within the bargaining unit to vote pursuant to the aforementioned statute. Be it resolved.***
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> ***Commissioner Patrick L. Scherzer, Commissioner Joseph Wilhm, Commissioner Clyde Townsend."*** (Petitioner's Ex. 6)

11. According to former Commissioner Townsend, at the time of adopting Resolutions 2615 and 2616, he was not even considering PEERA coverage for all Wyandotte County employees because only the deputies in the Sheriff's Department had petitioned the Commission. (Tr.p. 51-52). There is no language in either resolution that states it was covering employees other than those in the Sheriff's Department. (Tr.p. 53), and there was no discussion at the time of adopting Resolutions 2615 and 2616 of covering other than the Sheriff's deputies. (Tr.p. 53). Townsend testified that at the time of adopting Resolutions 2615 and 2616 he believed the County did vote to bring the County under the provisions of PEERA (Tr.p. 52-53), but only for the one unit recognized by the F.O.P. Lodge #40. (Tr.p. 51, 58, 59). According to Townsend, knowing now the language of the "Local Option" provision, K.S.A. 75-5421(c), he would have voted to bring the whole county under the act. (Tr.p. 56-58).

12. Former commissioner Scherzer testified at the time of adopting Resolutions 2615 and 2616 it was his belief the Commission made the decision to bring Wyandotte County under the Kansas Public Employer-Employee Relations Act (PEERA). (Tr.p. 39-40). He testified that the Commission had no intention to exclude any group of employees from having the opportunity to organize pursuant to PEERA. (Tr.p. 40). On cross-examination Mr. Scherzer admitted during the time he was on the County Commission, Resolutions 2615 and 2616 were the only resolutions enacted relating to employees organizing or PEERA, and that it did not by majority vote pass any resolution making a specific finding that Wyandotte County had

elected to come under PEERA for all its employees. (Tr.p. 44-45.

13. Associate County Counselor John Duma testified in deposition form that according to the practice of the Commission at that time, if they intended to exclude anyone affected by a Commission resolution, such exclusion would have been expressly contained in the resolution, especially in the case of a clarification resolution. (Ex. 7, p. 7-8).

14. No other Wyandotte County employee group requested recognition under PEERA until the instant petition was filed by the Carpenters. (Files of the Board).

15. On January 11, 1989 the F.O.P. filed with the Kansas Public Employee Relations Board a petition for unit determination and certification, Case No. 75-UDC-2-1989. (Files of the Board). The petition states in paragraph 8:

> ***"Attached are two (2) Resolutions [2615 and 2616] adopted by unanimous vote of the Wyandotte County Commissioners electing to bring the public employer under the provisions of the Act."***

16. Sheriff Owen Sully filed an Answer to the petition on January 26, 1992 which did not deny the allegations contained in paragraph 8, or assert as a defense to the petition that Wyandotte County had not voted to be covered by PEERA as required by K.S.A. 75-5421(c). (Tr.p. 69; Ex. 3). A stipulation as to the composition of the employee unit was filed April 12, 1989. (Tr.p. 69; Ex. 2). A notice of the intended unit certification election was posted around June 10, 1989. (Tr.p. 68; Ex. 4). The election was conducted by the Public Employee Relations Board on June 22. 1989, and the FOP was certified by the Board as the employee representative pursuant to the "Public Employee Relations Act". (Tr.p. 69-70; Ex. 4; Records of the Board). The county never objected to the election on the grounds that it was not covered by PEERA. (Tr.p. 70).

17. The F.O.P. and Wyandotte County and the Sheriff's Department entered into negotiations which resulted in a Memorandum of Agreement covering the years 1991, 1992 and 1993. (Tr.p. 527-28; Ex. 18). The negotiating team for

the employer included the county Personnel Director, Dennis Dumovick, and the county's legal counsel, Dan Denk. (Tr.p. 527). The Recognition section of the Memorandum of Agreement, Article 1, states, in pertinent part, as follows:

> ***"Wyandotte County, Kansas (hereinafter the "County") and the Sheriff's Department of the County (hereinafter the "Department") recognize and acknowledge the Fraternal Order of Police, Lodge #40 (hereinafter the "Lodge") as the exclusive bargaining representative for all Wyandotte County Sheriff's deputies below the rank of Sergeant and for all 911 Dispatchers employed by the Department for the purpose of negotiating collectively with the County and Department pursuant to the Public Employer-Employee Relations Act of the State of Kansas, with respect to conditions of employment, as defined by that Act."***

18. The County Commission ratified the Memorandum of Agreement between the F.O.P. and Wyandotte County and the Sheriff's Department. (Ex. 18).

19. The parties have stipulated that the positions alleged to be appropriate for inclusion in the employee bargaining unit proposed by the Carpenters should be in the bargaining unit, i.e. all carpenters employed by the County.

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE 1

WHETHER, PURSUANT TO K.S.A. 75-4321(c), THE GOVERNING BODY OF A PUBLIC EMPLOYER CAN VOTE TO COME UNDER THE JURISDICTION OF THE PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT FOR ONLY ONE EMPLOYEE UNIT BUT NOT FOR ITS REMAINING PUBLIC EMPLOYEES.

Local Option Provision

The Carpenter's District Council of Kansas City & Vicinity ("Carpenters") filed its Unit Determination and Certification

petition alleging the Wyandotte County Commission ("Commission"), through resolutions 2615 and 2616, elected to be covered by the Kansas Public Employer-Employee Relations Act ("PEERA"). The Commission argues the Public Employee Relations Board ("Board") lacked jurisdiction to entertain the petition, alternately, because (1) the resolutions brought Wyandotte County under PEERA only for those employees in the Sheriff's Department represented by the Fraternal Order Of Police, Lodge #40 ("FOP"), or (2) the resolutions were insufficient to bring Wyandotte County under PEERA for any purpose or group of employees.

The controlling statute is K.S.A. 75-5421(c) which provides:

> *"The governing body of any public employer, other than the state and its agencies, by a majority vote of all the members may elect to bring such public employer under the provisions of this act, and upon such election the public employer and its employees shall be bound by its provisions from the date of such election. Once an election has been made to bring the public employer under the provisions of this act it continues in effect unless rescinded by a majority vote of all members of the governing body. No vote to rescind shall take effect until the termination of the next complete budget year following such vote."*

It apparently is the Commission's position that this *"local option"* provision of PEERA, unique to the state of Kansas, allows the election to be made on an employee unit by employee unit basis. The Carpenters argue that the *"local option"* provision requires an *"all or nothing"* election, i.e. once an election is made to come under the Act, all Wyandotte County employees are covered.

[1] A careful reading of K.S.A. 75-4321(c) reveals the Commission's position to be without merit. The statute's wording unequivocally states that the election is "*to bring such public employer under the provisions of this act.*" Clearly, the "*local option*" is the option of the public employer to decide whether it wishes to be covered by PEERA, and not the option for the employer to determine which individual employee units will be covered. No mention is made of bringing an individual employee unit or organization under the Act. The only reference to public employees in K.S.A. 75-4321(c) is to provide that once an election is made "*the public employer and its employees shall be bound by its provisions from the date of such election.*" For purposes of K.S.A. 75-4321(C), the election by a governing body brings that public agency, and all its employees, under PEERA, and does not allow selective coverage of employee units.

Resolutions 2615 and 2616

The Commission next argues that if it is determined that the local option provision of K.S.A. 75-4321(c) is an "*all or nothing*" statute, then it must be concluded that the Commission never intended the vote to cover all county employees, therefore Resolutions 2615 and 2616 are insufficient to bring the County under PEERA. Support for this position, the Commission maintains,

is found in the wording of the resolutions and the intent of the commissioners at the time of adopting the resolutions.

The obscure wording of Resolutions 2615 and 2616 and the conflicting testimony by the former Commissioners as to the intent of the Commission at the time of adopting the resolutions makes reliance upon any single piece of evidence impractical. It is necessary, therefore to view the evidence as a whole to determine the intent of the Commission relative to coverage of the County by PEERA.

Conclusively, the adoption of Resolutions 2615 and 2616 was intended to do more than just recognize *"F.O.P. Lodge #40 as a recognized employee organization under the Act [PEERA]"* as the Commission argues. If *"recognition"* was the reason for adopting both resolutions, no purpose can be found for adopting the clarifying Resolution 2616 for Resolution 2615 specifically states *"The Board recognized the group [F.O.P.] as a recognized employee organization"* and further provides:

> *"Be it resolved this 13th day of December 1988, that:*
>
> *1. The FOP Lodge #40 is a recognized employee organization pursuant to K.S.A. 75-4323. . . ."*

Obviously something more was intended. That something must have been to bring the County under PEERA by complying with the *"local option"* provision of K.S.A. 75-4321(c). Otherwise, why would Assistant County Attorney Duma find it necessary to contact

the PERB representative in Topeka to inquire as to the adequacy of Resolution 2615? Only after discovering Resolution 2615 did not contain specific language the PERB representative indicated was required to comply with PEERA did Duma determine it necessary to draft Resolution 2616 clarifying what was intended by Resolution 2615. The critical language included in Resolution 2616 is *"for the purpose of coming under the Public Employees Relations Act pursuant to K.S.A. 75-4321(c)."* Since *"recognition"* of the F.O.P was explicitly accomplished in Resolution 2615, the only thing that Resolution 2616 could *"clarify"* was the County's coverage under PEERA. The above quoted language clearly indicates the Commission's awareness of the *"local option"* provision, and its intent to *"[come] under the Public Employees Relations Act pursuant to K.S.A. 75-4321(c)."*

Further evidence can be found in the continued reference to PEERA statutes in both Resolution 2615 and 2616, and in the F.O.P. Memorandum of Agreement. Simple recognition and consensual negotiations could have been undertaken without referencing PEERA. Likewise, the referenced PEERA statutes would have been ineffectual as PERB lacked jurisdiction over the Wyandotte County Sheriff Department and its employees unless the K.S.A. 75-4321(c) *"local option"* had been exercised by the Commission. The PERB could not, and would not, have entertained the F.O.P. unit determination and certification petition had it lacked jurisdiction over Wyandotte

County. The fact that the F.O.P. unit determination and certification petition was filed, the County through the Sheriff answered the petition and stipulated to the composition of the bargaining unit, an election was held, the F.O.P. certified as the employee representative by the PERB, and the parties entered into the meet and confer process and ratified a memorandum of agreement, all pursuant to PEERA, without objection from the County as to PERB jurisdiction, provide additional support for the premise that the County intended to be covered by PEERA through enactment of Resolutions 2615 and 2616. Certainly such conduct is inconsistent with the Commission's now asserted position that the PERB lacks jurisdiction over the County.

There is no question that by Resolutions 2615 and 2616 the Commission exercised its right under K.S.A. 75-4321(c) to extend PEERA coverage to Wyandotte County. The fact that at the time there may have been a misconception on the part of one or more of the County Commissioners as to whether the coverage extended to only the F.O.P. unit or all county employees is not material. As stated above, the *"local option"* provision of K.S.A. 75-4321(c) is an *"all or nothing"* option. When the Commission voted to bring the County under PEERA for purposes of allowing the F.O.P. the opportunity to represent the deputies in the Sheriff's Department, the remainder of the county employees were consequently also covered whether that was intended or not. If the County determines

that it does not wish to be covered by PEERA if such coverage must extend to all county employees, it may exercise the option provided in K.S.A. 75-4321(c) and vote not to be so covered.

ORDER

IT IS HEREBY ADJUDGED that the Kansas Public Employer-Employee Act Local Option provision is an "all or nothing" provision, with the election by the public employer directed only to the question of whether the public employer should be covered by PEERA.

IT IS FURTHER ADJUDGED that the Commission's Resolutions 2615 and 2616, when considered in relation to the record as a whole, are sufficient to bring Wyandotte County under PEERA, and thereby grant jurisdiction to the Public Employee Relations Board to entertain the unit determination and certification petition filed by the Carpenters' District Council of Kansas City and Vicinity.

IT IS THEREFORE ORDERED that, pursuant to the agreement and stipulation of the parties, the following classifications should be placed in the Carpenter's Unit for Wyandotte County, there being no shown statutory violation found in the proposed action:

INCLUDE: All carpenters employed by the County

EXCLUDE: All other classifications.

Dated this 5th day of August, 1993

Monty R. Bertelli, Presiding Officer
Senior Labor Conciliator
Employment Standards & Labor Relations
512 W. 6th Street
Topeka, Kansas 66603
913-296-7475

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on August 24, 1993 addressed to: Public Employee Relations Board, Employment Standards and Labor Relations, 512 West 6th Avenue, Topeka, Kansas 66603.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 6th day of August, 1993, a true and correct copy of the above and foregoing Initial Order was served upon each of he 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:

Petitioner: Steve A.J. Bukaty
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Members of the PERB

Sharon Tunstall