STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS RIOS CLASSIFIED EMPLOYEE ASSOCIATION, Charging Party, v. LOS RIOS COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. S-CE-1053 S-CE-1075 PERB Decision No. 670 June 2, 1988

Appearances; Kathy Felch, Attorney, for Los Rios Classified Employee Association; Susanne M. Shelley, Attorney, for Los Rios Community College District.

Before Hesse, Chairperson; Porter and Shank, Members

DECISION

SHANK, Member: Los Rios Classified Employee Association (Charging Party, Union or Association) appeals the dismissal of the unfair labor practices charges filed against Los Rios Community College District (hereafter Respondent or District) to the Public Employment Relations Board (Board or PERB).[1]

Charging Party filed unfair labor practice charges with the Board on December 15, 1986 and March 2, 1987 alleging that Respondent failed to provide it with copies of the "Position

[1]Two separate charges were filed and heard on 3/30/87 and 4/21/87. The parties have stipulated to consolidate both cases for decision.

Control Report" (PCR) and by conditioning delivery of the PCR upon Charging Party's advance payment of an "excessive and burdensome fee," in violation of Government Code section 3543.5[2], and, derivatively, 3543 and 3543.1.

Ann Lynch, Association president, testified that she first observed the PCR in a hallway at the district office outside of a locked storage room where salvage paper is stored. The PCR contains information about every nonfaculty position in the District including whether or not the position is filled or vacant, the identity of the employee in the position, job classification, budgeted salary for the position, amount of salary expended to date, and the social security number of the employee occupying the position.

2The Educational Employment Relations Act (EERA) is codified at Government Code sections 3540, et seq. Section 3543.5 states in pertinent part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

By letter dated December 8, 1986 the Association requested that the District provide it with certain PCR's and further stated that the District had not responded to its verbal request made three weeks earlier. Jimmy Mraule, director of classified personnel, responded by letter dated December 8, 1986 stating that the requested PCR's were available for inspection at a mutually convenient time, that the Union could make its own copies at ten cents per page and that an advance charge based on actual cost to the District would be required for an additional computer run.

On December 12, 1986, Mraule rescinded the offer made in his December 8, 1986 letter based on the ground that the requested PCR's contained "confidential information regarding names and social security numbers." The letter also indicated that these facts were not known by Mraule at the time he responded to the Association's December 8, 1986 request.

Charging Party repeated its request for specific PCR's, by letter dated January 21, 1987, advising that the reports were necessary for preparation of the 1987-1988 negotiations regarding contract re-openers.

On January 30, 1987, the District responded by expressing its concern over the fact that the requested reports contained names and social security numbers of employees both within and outside the bargaining unit. The District outlined the various

costs associated with providing the requested reports without the social security numbers and further indicated that said costs are payable in advance.[3]

There is nothing in the record to suggest that any further communication between the parties took place prior to the filing of the unfair labor practice charges.

DISCUSSION

LOCATION OF PCR/WAIVER

The Association excepts to the ALJ's finding that Lynch first observed the PCR in the recycled paper storage bin and asserts that the PCR was discarded in a public hallway and, therefore, the District waived its right not to release the report in its current form. Charging Party asserts that, assuming the PCR contains confidential information (social

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3The District proposed to charge $613.73 to copy the 1985-86 year-end PCR and manually delete the social security numbers. The District proposed to charge $860.53 to modify its computer program to enable it to print future copies of the report without social security numbers at a cost of $202.40 per copy. The PCR is divided into five volumes and consists of approximately 2,500 pages of legal size computer print-out paper.

The PCR is produced once every four months with a single copy interim report printed twice each month. A final year-end report is produced annually.

security numbers), the District, by leaving the document in a public hallway, waived its right to assert confidentiality.[4]

There is nothing in the record to indicate that the PCR was first observed by Lynch in the recycled paper storage bin. However, Lynch's testimony that she saw the PCR in the District hallway outside a locked door where salvage paper is normally stored, is uncontroverted. Therefore, we do not endorse the ALJ's finding of fact with regard to Lynch's initial observation of the PCR.

The courts and the National Labor Relations Board (NLRB) have repeatedly held that evidence of a party's intention to waive a statutory right must be "clear and unmistakeable" to be credited. Metropolitan Edison Co. v. NLRB (1983) 460 U.S. 693, 708 [75 L.Ed.2d 387, 103 S.Ct. 1467]. Under well-established

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[4]Charging Party cites Government Code section 6254.5 in support of its contention. Government Code section 6254.5 states, in relevant part:

> Notwithstanding any other provisions of the law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law. For the purposes of this section, before a disclosure of an otherwise exempt public record by a state or local agency to a federal agency, is made, the federal agency shall agree in writing to comply with this chapter. For purposes of this section, "agency" includes a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency, office, or employment.

Board precedent a finding of waiver will be made only upon "clear and unmistakeable" language or conduct. Modesto City Schools and High School District (1985) PERB Decision No. 479; Davis Unified School District, et al. (1980) PERB Decision No. 116; Amador Valley Joint Union High School District (1978) PERB Decision No. 74. Moreover, a waiver should be express, and a mere inference, no matter how strong, should be insufficient. Los Angeles Community College District (1982) PERB Decision No. 252, citing, NLRB v. Perkins Machine (1st Cir. 1964) 326 F.2d 488 [55 LRRM 2204]; and see American Telephone and Telegraph Co. (1980) 250 NLRB 47.

While the District was arguably careless in failing to lock the PCR in the room designated to store recycled paper, we are not convinced that such action standing alone constitutes a disclosure "to any member of the public" within the meaning of Government Code section 6254.5. We believe that some other type of affirmative conduct is required to support a finding of disclosure to the public of confidential material. (See Black Panther Party v. Kehoe (1974) 42 C.A.3d 645, 655-657, hg. den.) Therefore, we find that the District did not waive its right to keep the report confidential in its current form.

SOCIAL SECURITY NUMBERS

The Association excepts to the ALJ's finding that the PCR contains social security numbers. The Association maintains that the ALJ's conclusion is not supported by the record for

the following reasons: the PCR does not specifically identify the series of numbers below each employee's name as a social security number; Louise Davatz, director of business services, could not recite from memory the social security number of an employee randomly selected from the PCR on cross-examination; and Davatz[1] testimony is based on hearsay.

While it is true that the social security numbers are not designated as such in the PCR, the series of numbers are identical to those of a social security number and are illustrated immediately below the employee's name. Davatz[1] inability to recite the social security number of a randomly selected employee does not detract from the credibility of her testimony. Finally, Charging Party's assertion that Davatz' testimony is based on hearsay is totally without foundation.

The ALJ relies on the uncontroverted testimony of Louise Davatz in concluding that the PCR contains the social security number for each employee. It is well established that the Board may defer to the ALJ's finding of fact with regard to credibility determinations after a review of the entire record. (Santa Clara Unified School District (1980) PERB Decision No. 104a.)

Therefore, we affirm the ALJ's finding of fact that the PCR contains the social security numbers of the individual employees listed therein.

ENTITLEMENT TO NONBARGAINING UNIT INFORMATION

The Association excepts to the ALJ's conclusion that the Union made no showing of entitlement to nonunit information, notwithstanding the dispute concerning social security numbers.

The issue before the Board does not require us to decide the general sufficiency of the union's showing of entitlement to nonbargaining unit information. The District has agreed to provide the requested information after the social security numbers for nonbargaining unit employees have been deleted. Since the Union has expressed no interest in social security numbers, the ALJ's conclusion appears to be little more than dicta.

TIMELINESS OF DISTRICT'S RESPONSE TO ASSOCIATION'S REQUEST

The Association excepts to the ALJ's finding of fact that the District "immediately" began looking for ways to accommodate its request for copies of the PCR.

Lynch testified that the Association orally requested copies of the PCR "early on," at the bargaining table, and repeated its request by letter dated December 8, 1986 (in which reference was made to a request made three weeks earlier). The District responded by letter dated December 8, 1986, indicating that the requested information would be made available for copying at a mutually convenient time. On December 12, 1986 the District, in a follow-up letter, apologized for overlooking

the fact that the PCR contained social security numbers for nonbargaining unit employees and rescinded its December 8, 1986 letter. Lynch testified that collective bargaining negotiations were concluded on January 9, 1987.

On January 21, 1987 the Association again requested the District to provide it with a copy of the PCR. The District responded on January 30, 1987 by documenting the costs of producing the requested information with the social security numbers either manually deleted or deleted by computer program modification.-[5] The January 30, 1987 letter further indicated that costs were payable in advance. There is no evidence that any further communication took place between the parties.

Since "immediate" is defined as "without delay" or "instant" (Websters New World Dict. (2d College Ed. 1982) p. 702), and there is no evidence in the record to indicate the District attempted to delay in responding to the Association, we affirm the ALJ.

Good Faith Bargaining

Charging Party excepts to the ALJ's conclusion of law that the District did not fail to bargain in good faith. The

[5]The record indicates that certain District employees were asked to estimate time, resources, and materials required to provide the Association with copies of the PCR with social security numbers of nonunit employees deleted.

exception is based upon the Union's contention that the District refused to provide necessary and relevant information in a timely manner.

Generally, the Association is entitled to all information that is necessary and relevant to discharging its duty to represent unit employees. Trustees of the California State University (1987) PERB Decision No. 613-H. An employer's refusal to provide such information evidences bad faith bargaining unless the employer can demonstrate adequate reasons why it cannot supply the information. Stockton Unified School District (1980) PERB Decision No. 143. However, the Association is not entitled to demand receipt of the information in a particular form. Emeryville Research Center (9th Cir., 1971) 441 F.2d 880, 887 [77 LRRM 2043]; Soule Glass and Glazing Co. v. NLRB (1st Cir., 1981) 652 F.2d 1055 [107 LRRM 2781, 2806], denying enf. in part to 246 NLRB 792, (1979) [102 LRRM 1693].

The record shows that the District was willing to provide the PCR to the Association. However it contends that the social security numbers of nonunit employees must first be deleted. As stated earlier herein, we agree with the ALJ's finding of fact that the District timely responded to the Association's request for information. Therefore, the issue must turn on whether the District's assertion of the confidentiality of the social security numbers of nonbargaining unit employees was proper.

The Board has recognized state and federal court decisions in support of the premise that constitutional rights of personal privacy may limit otherwise lawfully authorized demands for the production of personal information. Modesto City Schools and High School District (1985) PERB Decision No. 479. The U.S. Supreme Court has determined that where a union seeks relevant information about a mandatory subject of bargaining, the disclosure of which may infringe upon constitutionally protected privacy interests, the NLRB must undertake to balance the conflicting rights. Detroit Edison Company v. NLRB (1979) 440 U.S. 301 [100 LRRM 2728].

There is authority in support of recognizing the confidential nature of social security numbers. Section 7 of the Federal Privacy Act of 1974 prohibits federal, state or local agencies from denying rights or benefits to an individual for refusing to disclose his/her social security number unless required by federal statute (P.L. 93-579, section 7 subs. (a)(1), (a)(2); 5 U.S.C, section 552a note). The section further requires any agency requesting disclosure to inform the individual as to whether the disclosure is mandatory or voluntary, pursuant to which statute, and what use will be made of it. (See, California Housing Finance Agency (1981) 64 Ops AG 576, 583-584.) The court in Swisher v. Department of the Air Force (1980) 660 F.2d 369, 495 F.Supp. 377 held that plaintiff was entitled to a copy of the requested Report of

Inquiry; however his motion to compel disclosure of social security numbers listed in the report which identified people other than plaintiff was denied under 5 U.S.C, section 552(b)(6), since release of these "identifying numbers" would "constitute a clearly unwarranted invasion of personal privacy."

Furthermore, where nonexempt materials are not inextricably intertwined with exempt materials, segregation is required to serve the objectives of the Public Records Act (PRA). Northern California Police Practices Project v. Craig (1979) 90 Cal.App.3d 116; 153 Cal.Rptr. 173; Johnson v. Winter (1982) 127 Cal.App.3d 435.

Accordingly, we affirm the ALJ's conclusion that the confidentiality of the social security numbers of nonunit employees was properly asserted by the District. The District's subsequent refusal to provide the PCR in its present form and its offer to delete the social security numbers did not, in and of itself, constitute bad faith bargaining.

OBLIGATION TO BARGAIN OVER COSTS

The Association excepts to the ALJ's conclusion that it was obligated to bargain with the District over the cost of providing the PCR. The Association contends that such a request would be futile, and therefore, it was not obligated to bargain, citing Los Angeles Community College District (1982) PERB Decision No. 252.[6]

[6]LACCD addresses the issue of whether the Association waived its statutory right to negotiate a certain item. The

The District raised bona fide objections to the form of the information requested. The District also countered the Association's demand with reasonable proposals designed to satisfy the needs of the Association and achieve a mutually satisfactory resolution. We think, in this instance, the Association's resort to PERB is premature. While the Association is not required to engage the District in extensive negotiations regarding the content of the disclosure, it cannot instantly put the District to the election of immediately supplying everything demanded or defending against an unfair practice charge. The Association must provide the District with the opportunity to provide the requested information on mutually satisfactory terms. Good faith is required on both sides. See, Emeryville Research Center v. NLRB (9th Cir. 1971) 441 F.2d 880 at 885 [77 LRRM 2043]; Soule Glass and Glazing Co. v. NLRB (1st Cir. 1981) 652 F.2d 1055 [107 LRRM 2781, 2806], denying enf. in part to 246 NLRB 792, (1979) [102 LRRM 1693].

The District determined the costs of removing the social security numbers of nonunit employees based upon information from the support staff directly involved in producing the PCR. The ALJ found that such costs were reasonable. If the employer

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case does not support the contention that the Association is not obligated to request bargaining when it can demonstrate that to do so would be futile. Even so, there is no evidence which would imply that bargaining over the costs of the PCR would have been futile.

has demonstrated substantial costs involved in compiling the information in the precise form at the intervals requested by the Union, the parties must bargain in good faith as to who shall bear such costs. Queen Anne Record Sales dba Tower Books (1984) 273 NLRB 671 [118 LRRM 1113], enfd, (CA 9, 1985) 772 F.2d 913 [121 LRRM 2048]. While we recognize that the Association did not request deletion of the social security numbers, the District's assertion of confidentiality was proper and therefore resulted in additional costs. There is no evidence that the District was unwilling to meet with the Association to discuss costs. The record does not indicate that Charging Party made any effort to negotiate the costs of supplying the PCR prior to filing the instant unfair practice charge. Therefore, we affirm the ALJ's conclusion that the Association was under the obligation to make a request to bargain over the costs of providing the PCR.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is hereby ORDERED that the proposed decision of the hearing officer on the charges filed by the Los Rios Classified Employees Association is AFFIRMED, as modified herein.

The alleged violation of section 3543.5(c) which refers to the District's failure to bargain in good faith is hereby DISMISSED.

Chairperson Hesse and Member Porter joined in this Decision.