

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD  
STATE OF KANSAS

CITY OF WICHITA, KANSAS )

Petitioner, )

vs. )

Case No. 75-UCA-1-1994 )

FRATERNAL ORDER OF POLICE, )  
LODGE NO. 5, )

Respondent. )

**INITIAL ORDER**

ON the 15th, 16th, and 17th days of November and the 14th day of December, 1994, the above-captioned matter came on for hearing pursuant to K.S.A. 75-4327(c) and K.S.A. 77-523 before presiding officer Monty R. Bertelli.

**APPEARANCES**

PETITIONER: Appeared by Carl L. Wagner,  
Office of the City Attorney, 13th Flr.  
City of Wichita, Kansas  
455 North Main  
Wichita, Kansas 67202

RESPONDENT: Appeared by Steve A.J. Bukaty  
Blake & Uhlig, P.A.  
475 New Brotherhood Bldg.  
753 State Avenue  
Kansas City, Kansas 66101

**ISSUES PRESENTED FOR REVIEW**

The parties have stipulated that the following issues be submitted to the presiding officer for determination:

1. WHETHER THE POSITION OF SERGEANT SHOULD BE EXCLUDED FROM THE BARGAINING UNIT REPRESENTED BY THE FRATERNAL ORDER OF POLICE PURSUANT TO K.S.A. 75-5327(e) OR K.S.A. 75-4322(b) AS A "SUPERVISORY EMPLOYEE."

75-UCA-1-1994

2. WHETHER THE POSITION OF BAT VAN OPERATOR SHOULD BE EXCLUDED FROM THE BARGAINING UNIT REPRESENTED BY THE FRATERNAL ORDER OF POLICE PURSUANT TO K.S.A. 75-5327(e), i.e. LACK OF COMMUNITY OF INTEREST."

### **SYLLABUS**

1. **UNIT DETERMINATION - *Appropriate Unit - Test.*** The determination of appropriateness requires a three step inquiry:
  - 1). Does the job classification meet the definition of "public employee";
  - 2). Does the job classification share a sufficient community of interest with the other classifications proposed for the unit?
  - 3). Is the individual in the job classification excludable from the unit pursuant to one of the exclusionary categories set forth in K.S.A. 75-4322(a) ?
2. **UNIT DETERMINATION - *Appropriate Unit - Community of interest.*** PERB's primary concern is to group together only those employees who have substantial mutual interests in wages, hours and other conditions of employment. In making a unit determination, PERB will weigh the similarities and differences with respect to wages, hours and other conditions of employment among the members of the proposed unit, rather than relying solely on traditional job classifications.
3. **UNIT DETERMINATION - *Exclusions - Burden of proof.*** The burden of proving that an individual should be excluded as a supervisor rests on the party alleging that supervisory status. Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, supervisory status has not been established, at least on the basis of those indicia.
4. **STATUTORY INTERPRETATION - *Definitions - Reference to established case law from other jurisdictions.*** By adopting the federal definition of supervisor in the PEERA definition of "supervisory employee," it can be inferred that the Kansas legislature signified its intention that certain well-established principles developed in federal cases for determining who are supervisory employees under the National Labor Relations Act should be applied under our statute.

5. **UNIT DETERMINATION - Exclusions - Supervisors - title position carries.** The title a position carries has little bearing on whether it is supervisory. It is the function rather than the label which is significant. The burden of proving that an individual should be excluded as a supervisor rests on
6. **UNIT DETERMINATION - Exclusions - Supervisors - When established** The supervisory functions performed by the individual must so ally the employee with management as to establish a differentiation between them and the other employees in the unit. For supervisory status to exist this identification must be substantial.
7. **UNIT DETERMINATION - Exclusions - Supervisors - Use of independent judgment.** Where supervisory functions are being performed by an employee, K.S.A. 75-4322(b) expressly insists that a supervisor 1) have authority, 2) to use independent judgment, 3) in performing such supervisory functions, 4) in the interest of management. These requirements are conjunctive.
8. **UNIT DETERMINATION - Exclusions - Supervisors - Independent judgement required.** An employee is not a supervisor if he or she has the power to exercise, or effectively recommend the exercise of listed supervisory functions, unless this power is accompanied by authority to use independent judgment in determining how in the interest of management it will be exercised. Authority to perform one of the enumerated functions is not supervisory if the responsibility is routine or clerical.
9. **UNIT DETERMINATION - Exclusions - Supervisors - Substitution for superviosr.** The primary consideration is whether the substitution is on a regular or substantial basis or whether it involves only infrequent and isolated occurrences. Temporary service as a supervisor does not make a rank-and-file employee a supervisor. An employee may be disqualified only if his temporary service as a supervisor is a regular and substantial part of his job which cannot be "sharply demarcated" from his rank-and-file duties.
10. **UNIT DETERMINATION - Exclusions - Supervisors - Effective recommendation - Definition.** An "effective recommendation" is one which under normal policy and circumstances, is made at the chief executive level or below and is adopted by higher authority without independent review or de novo consideration as a matter of course.
11. **UNIT CLARIFICATION - When Appropriate.** Generally, a unit clarification petition is appropriate in the following circumstances: (A) where there is a dispute over the unit

placement of employees within a particular job classification; (B) where there has been an "accretion" to the work force; and (C) where a labor organization or employer seeks a reorganization of the existing structure of a bargaining unit.

12. **UNIT CLARIFICATION - *When Appropriate - "Accretion"*.** An "accretion" is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity.
13. **UNIT CLARIFICATION - *When Appropriate - When election is required*.** Even when the group to be accreted has sufficient community of interest with the existing unit and is not an identifiable, distinct segment, there are two circumstances under which the NLRB will not accret the unrepresented employees without giving them a chance to express their representational desires; 1) the unrepresented group sought to be accreted numerically overshadows the existing unit, or 2) when the job classifications of the unrepresented group have been historically excluded from the bargaining unit by the parties
14. **UNIT CLARIFICATION - *When Appropriate - Armour-Globe election purpose*.** In an Armour-Globe election, the issue at stake is not who the employee representative shall be, but precisely who shall be represented with a vote for the employee organization indicates that the employee desires to be represented as part of the existing unit.
15. **UNIT CLARIFICATION - *Added Employees - When terms of existing agreement apply*.** The employer cannot unilaterally extend the terms of an existing contract to job classifications added to the bargaining unit during the term of the contract. And until negotiations are concluded, the terms and conditions enjoyed by the employees in question when they were unrepresented apply.
16. **UNIT CLARIFICATION - *Added Employees - How treated during term of existing agreement*.** Following the election to include additional employees in a bargaining unit covered by an existing memorandum of agreement, the public employer becomes obligated to engage in good faith bargaining as to the appropriate contractual terms to be applied to this new group of employees. The new employees added to the existing bargaining unit are treated as a separate unit for the period of time until the expiration of the existing memorandum of agreement, and thereafter as a part of the existing bargaining unit.

17. **UNIT CLARIFICATION - When Appropriate - "Accretion" - Test.** The test for determining whether a job classification can be accreted to an existing bargaining unit without need for an election, and be covered by an existing memorandum of agreement without need for new negotiations, is as follows:
- 1). Has the petition or request been timely filed;
  - 2). Do the job classifications share a community of interest with the employees in the existing bargaining unit;
  - 3). Do the job classifications constitute an identifiable, distinct segment of employees so as to constitute a separate appropriate bargaining unit;
  - 4). Does the number of employees in the job classifications to be added when compared to the number of employees presently in the existing bargaining unit raise a question of representation; and
  - 5). Have the job classifications been historically excluded from the bargaining unit.
18. **STATUTORY INTERPRETATION - Definitions - Test of be applied.** Because the PEERA does not provide a definition for "uniform police employee", the task of ascribing meaning to the term falls to the PERB. One must turn to the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, which is, by considering the reason and spirit of it; or the cause which moved the legislator to enact it.
19. **UNIT DETERMINATION - Appropriate Unit - Definition - "uniform police employee".** The term "uniform police employee" should be read to include only those employees of an organized civil force for maintaining public order, preventing and detecting crime and enforcing the laws.
20. **UNIT DETERMINATION - Amending Existing Unit - Burden of proof.** K.S.A. 75-4327(c) speaks only to the designation by PERB of an "appropriate unit." The statutory language does not require the Board define the only appropriate unit or the most appropriate unit, only that the unit be "appropriate." Such is the standard to be applied in the initial determination of an "appropriate" employee unit. However, once a unit determination has been made and an employee unit established by order of the Board, a petition seeking to amend the unit by adding or removing classifications has the burden of proof to establish the proposed unit is "more appropriate" than the

existing unit. This is especially true once an exclusive employee representative has been certified for the unit.

## **FINDINGS OF FACT<sup>1</sup>**

### ***Generally***

1. Petitioner, City of Wichita, Kansas ("City"), is a "public agency or employer," as defined by K.S.A. 75-4322(f), which has voted to be covered by the Kansas Public Employer-Employee Relations Act in accordance with K.S.A. 75-4321(c). (Petition and Answer).
2. Respondent, Fraternal Order of Police ("FOP") is an "employee organization" as defined by K.S.A. 75-4322(i). It is the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for certain municipal employees of the City of Wichita, Kansas ("City") in the Wichita Police Department ("WPD") including police officers. (Petition and Answer).
3. Service Employees Union ("SEU") is an "employee organization" as defined by K.S.A. 75-4322(i). It is the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for certain other municipal employees of the City of Wichita, Kansas in the Wichita Police Department, including the BAT Van Operators. (Tr.p. 69-70, 86). The SEU waived its right to participate in the hearing process. (Tr.p. 69-70, 86).
4. The Wichita Police Department is a paramilitary organization with a structured chain of command. (Tr.p. 40, 220-221). The present chain of command is as follows:
  1. Chief of Police
  2. Deputy Chiefs
  3. Police Majors
  4. Police Captains
  5. Police Lieutenants
  6. Police Sergeants
  7. Police Detectives, Investigators and Examiners

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<sup>1</sup> "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). As 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."

8. Police Officers
  9. Police Recruits (Ex.1, 17).
5. Prior to 1992, the WPD operated without the rank position of Sergeant. Street supervision was done by Lieutenants, who were not in a bargaining unit nor represented for collective bargaining purposes by the Fraternal Order of Police ("FOP"). (Tr.p. 262, 265, 424-425). In 1989, the City commissioned the International Association of Chiefs of Police ("IACP") for a study of its police department and practices. (Tr.p. 256-57). The study recommended the City move toward civilianizing certain commissioned positions in the WPD, creating new positions; and developing new job descriptions. (Tr.p. 257). The IACP further concluded the police department needed more "supervisors," and recommended the Sergeant rank be re-created and utilized to provide that supervision. (Tr.p. 53-54, 258-60; Ex. 24).
  6. In response to the IACP study, the Sergeant rank was re-created. The City's intent, in re-creating the Sergeant position was to 1) increase field supervision; 2) have a street supervisor available to give instructional guidance to officers, and to take command of crime scenes; and 3) to have the Sergeant involved in the promotional and disciplinary process. (Tr.p. 262-63).

### **Patrol Sergeants**

#### **a. Duties and Responsibilities**

7. The WPD is comprised of two patrol divisions, geographically divided into Patrol East and Patrol West. (Tr.p. 26). Each division has three "watches" or shifts, based upon the hours of the day. (Tr.p. 26). A Captain is generally assigned to oversee each watch as the "watch commander," although that function can be fulfilled by a Lieutenant. (Tr.p. 26). Each watch has three Sergeants. (Tr.p. 26-28). Under each Sergeant are from thirty-three (33) to forty-seven (47) police officers. (Tr.p. 28-29).
8. As noted in F.F. #4, above, Sergeants are below Lieutenants in the overall rank structure, but it is the Sergeant who is in charge of the everyday minute-to-minute operation of patrol officers on the street. (Tr.p. 32).
9. The City's job description of the Sergeant position refers to the classification as a "front line working supervisor." (City Ex. 3), with the "task assignment of making sure police officers are doing what they're suppose to be doing." (Tr.p.

- 31). The Sergeant's function is to observe, supervise, and instruct police officers in the performance of their duties. (Tr.p. 205, 397; Ex. 3). There is no textbook to which the Sergeant can refer to learn his job. Most of how a Sergeant responds in a particular situation is based on the Sergeant's knowledge and experience, (Tr.p. 642-43, 647-48, 658); his technical expertise. (Tr.p. 204). While the command staff of the WPD considers its Sergeants to be supervisors, (Tr.p. 54, 228), a Sergeant is generally considered a senior office or "police leader," by both the Sergeants and those police officers under them. (Tr.p. 371).
10. Sergeants arrive 1/2 hour earlier than patrol officers, and will put in forty-two and one-half hours per week versus the normal forty hours for patrol officers. (Tr.p. 361, 410). Prior to each shift, the Sergeant will assess the line-up for the day; assign officers to a particular car and specific beat on each shift, (Tr.p. 33); perform daily roll call; disseminate information to the patrol officers, discuss any job related problems, and review orders or directives coming down the chain of command; supervise civilian personnel; review the daily reports of patrol officers, (Tr.p. 31, 33, 38); and complete "OR" paperwork. This takes approximately 25-30% of a Sergeant's time. (Tr.p. 363). The other 70-75% of the Sergeant's time is spent out on the street. (Tr.p. 374, 405, 529).
11. Sergeant Cocking testified that the primary responsibility of a Sergeant is always that of an patrol officer. (Tr.p. 363). To that end, Sergeants are expected to perform all the same duties as police officers. (Tr.p. 146, 440). While they may not respond to every call where an officer is present, they spend the bulk of their time on the street with the patrol officers. Sergeant Cocking testified that 70 to 75 percent of his time is spent on the street. (Tr.p. 374). By contrast, Lieutenants, Captains and Deputy Chiefs do not regularly respond to calls on the street. (Tr.p. 124-25, 442).
12. Sergeants, like the patrol officers in the proposed FOP bargaining unit, are non-exempt employees pursuant to the Fair Labor Standards Act. They receive overtime, as do patrol officers, detectives, and traffic safety officers. (Tr.p. 106-07). By comparison, Captains, Deputy Chiefs and the Police Chief are exempt from the overtime provisions of the FLSA. (Tr.p. 161, 428). Sergeants are subject to the Department Policy and Procedures Manual, as are the other members of the bargaining unit. They receive the same benefits as other members of the unit. Sergeants work a regular schedule, on the same shift system as the officers. By contrast, captains



work an irregular schedule without set hours. (Tr.p. 416). Sergeants also wear uniforms identical to those the patrol officers wear, (Tr.p. 143), while Commanders generally do not wear uniforms. (Tr.p. 442). Sergeants drive a marked WPD vehicle the same as a patrol officer. While on patrol, the sergeant is responsible for taking calls for service given out through the 911 radio dispatch; can make arrests and write tickets; and do the same tasks as the patrol officers. (Tr.p. 363). They are also charged with the security and safety of the citizens, as well as performing service types of calls. (Tr.p. 29).

**b. Assumes duties in absence of superior**

13. A Sergeant can, in the absence of a Lieutenant, make out schedules, assign days off, approve time off for sick and emergency leave, and approve holiday time off. (Tr.p. 204, 225, 412). All of the foregoing are contingent upon the Sergeant assuring that minimum staffing requirements are met. (Tr.p. 206; Ex. 32).

**c. Authority to Reward, Hire, Lay-off, and Recall.**

14. Sergeants may not deliver a commendation independently but may recommend that an officer receive a commendation. (Tr.p. 227-28, 321). Sergeants have no authority to hire or effectively recommend that an employee be hired. (Tr.p. 120, 420). There is no direct, independent ability of the Sergeants to hire Department personnel, (Tr.p. 347) final hiring decisions are made by the Chief of Police. (Tr.p. 110, 332).
15. Sergeants do not have the authority to layoff or effectively recommend an employee be laid off, or to recall them following a layoff. (Tr.p. 112, 117, 120, 420).
16. Sergeants do not approve vacation days or overtime. (Tr.p. 411). In the event an officer works overtime, a Sergeant can only acknowledge that the officer was present, and then a higher ranking commander must actually approve the overtime payment. (Tr.p. 411). Similarly, sergeants have no authority to regularly grant time off. (Tr.p. 52).

**d. Authority to Transfer**

17. Sergeants have no power to transfer an employee to a different patrol or a different shift unilaterally, and may only offer input or recommendations concerning requested transfers. (Tr.p. 53, 110, 223). A Sergeant can initiate requested transfers, and the concurrence of the Sergeant is one thing

that is looked for before final approval of a transfer is given. (Tr.p. 223-24; Ex. 32).

**e. Authority to Promotion**

18. The promotion process in the WPD is a rather complicated affair. Before being offered a promotion, officers go through a written examination, oral interviews, have their personnel files and commentary service reports reviewed, as well as their performance evaluations. (Tr.p. 51-52). The Sergeant's only input into the promotion process is that they conduct the initial written evaluations of patrol officers on their shift which are one of the factors given consideration in the promotional process. (Tr.p. 42, 52, 160, 169, 197, 213, 264). These evaluations are weighted only 10% overall in the criteria for a promotion, (Tr.p. 200), and have little impact upon promotions unless really high or really low. (Tr.p. 466, 487).
19. As the evaluations go up through the chain of command, they can be modified by superiors, and must be approved at each level before the evaluation is given to the patrol officer. At each level, changes and additions can be made, (Tr.p. 368-70), and only after signed off on at each level in the chain of command does the Sergeant have the responsibility to discuss the evaluations with the officer involved. (Tr.p. 400; Ex. 30).

**f. Authority to Assign**

20. A sergeant will assign officers to beats and vehicles during each particular shift. (Tr.p. 33). A Sergeant has the power to change such beat assignments, when manpower needs so dictate. (Tr.p. 365). If an officer calls in sick, a Sergeant has the responsibility to juggle the beat line-up and to make accommodations. (Tr.p. 383).

**g. Authority to Discipline**

21. A Sergeant has the ability to recommend and initiate discipline. (Tr.p. 43, 213). A Sergeant's ability to unilaterally discipline subordinate employees is limited to informal, oral reprimands and tickler cards. (Tr.p. 48, 113, 114, 217, 366). A tickler card is a record of a disciplinary problem of a minor nature, which is placed on an officer's personnel card. This can be done without any approval from superiors. (Tr.p. 60, 219). A Sergeant can also issue a verbal reprimand to an officer, again without the approval of his or her superiors. (Tr.p. 48, 113, 219). The record

indicates senior patrol officers do the same type of verbal reprimands to junior officers when performance is not as expected. (Tr.p. 366).

22. Additionally, a Sergeant can initiate a written reprimand to an officer, but all written forms of discipline must be reviewed, investigated and approved by higher ranking officers, (Tr.p. 86-87, 219), who will make their own independent investigations to confirm the circumstances of a potential disciplinary matter. (Tr.p. 32, 43, 72-77, 219, 264, 387, 434). The recommendations of a sergeant is frequently changed by higher ranking officers. (Tr.p. 434). Other members of the bargaining unit can also initiate disciplinary action on fellow patrol officers. For example, any patrol officer can initiate a write-up of another officer, and the report would be investigated appropriately by higher ranking officers. (Tr.p. 372, 406).
23. Once a disciplinary matter is reported, activity which could result in major disciplinary action, such as suspension, demotion, or discharge, are referred to the Internal Affairs Section of the police department for investigation. If Internal Affairs concludes that an officer has acted inappropriately, the Chief of Police has the final authority in regard to suspensions and demotions; terminations require the approval of the City Manager. (Tr.p. 51, 113, 160, 263, 337, 404). The City Manager is the only person vested with the authority to fire employees. (Tr.p. 51). According to the City, while Sergeants do not have the final authority to suspend an officer, their recommendations are given "a lot of weight" and "serious consideration." (Tr.p. 220). However, Sergeant Cocking testified that he was not confident that his disciplinary recommendations would be accepted, and stated that quite frequently they are changed as they go up the chain of command. (Tr.p. 434).
24. Finally, a Sergeant has the authority, where the situation calls, to take an officer off duty until the action is reviewed. (Tr.p. 176, 226, 264). While a Sergeant may momentarily suspend an officer if the officer is observed committing a serious infraction of Department rules or policy, the Chief of Police would have to review and approve any final action. (Tr.p. 48, 177).

**h. Authority to Direct (Control of a Crime Scene)**

25. Sergeants take preliminary charge of, and direct the work of patrol officers at crime scenes. The way in which a Sergeant

directs the work of subordinates at a crime scene include the following:

- a. The Sergeant makes sure the scene is covered, and can call in additional personnel to do so. (Tr.p. 38-39).
  - b. The Sergeant controls ingress to and egress from the crime scene. (Tr.p. 40).
26. Regarding the supervisory authority of a Sergeant at a crime scene:
- a. There is no substitute for experience when making decisions, (Tr.p. 636);
  - b. An officer cannot be taught in class everything he needs to know about every situation that might arise, (Tr.p. 637);
  - c. Every situation which arises at a crime scene cannot be covered in a police manual, (Tr.p. 637);
  - d. No routine policy can be formulated that will cover every determination of probable cause; such determinations need to be based upon the evidence and the officer's experience, (Tr.p. 638);
  - e. Knowledge of the evidence which is important at a crime scene cannot be taught exclusively through books or addressed through standard operating procedures, (Tr.p. 638-39);
  - f. What witnesses that might be important at a crime scene cannot be taught exclusively through books or addressed standard operating procedures, (Tr.p. 639); and
  - g. The actual interview of witnesses at a crime scene depends on skills learned through experience and cannot be covered by books, policies or standard operating procedures, (Tr.p. 640-641).

**i. Authority to Adjust Grievances**

27. There was no grievance procedure in the Memorandum of Agreement between the City and the FOP which expired in 1993. The Police Department utilized the City grievance policy, which is applicable to all employees, (City Ex. 47). The Sergeant is expected to provide the first response to a police officer's grievance. (Tr.p. 17, 44, 227; Ex. 3). While Sergeants have some ability to adjust grievances informally between patrol officers, this authority is limited to a verbal counseling. (Tr.p. 178, 192). A Sergeant does not have the authority to resolve grievances based upon the memorandum of

agreement. (Tr.p. 119). For example, if an officer has a dispute about whether overtime was properly assigned or paid, the officer's Sergeant would have no ability to remedy that grievance independently. (Tr.p. 179).

**j. Recommendations Regarding Unit Placement of Sergeants**

28. The City opposes the inclusion of the Sergeant positions in the bargaining unit for the following reasons:
- a. The Sergeants are viewed as a part of the police management team. (Tr.p. 55).
  - b. The Sergeants are expected to have a broad perspective about all the issues surrounding the department, and may need to carry out policies that the rank and file do not like. (Tr.p. 228-29).
  - c. The potential exists for conflicts between Sergeants and police officers especially over disciplinary matters, and possibility of union retaliation. (Tr.p. 266-59).

**k. Practice in the Industry**

29. At the hearing, officers from both the Kansas City and Topeka police departments testified that the job duties of the sergeants in their departments were nearly identical to those in Wichita. (Tr.p. 588, 606, 622). Sergeants in those police departments are included in the bargaining unit composed of patrol officers. Kansas City, Kansas Sergeant Jerry Sipes and Topeka Sergeant Kenneth Gorman testified that no conflict has developed due to Sergeants being included in those bargaining units even when occasionally be called on to enforce certain terms of the memorandum of agreement to fellow patrol officers. (Tr.p. 553-555, 627).

**The Internal Affairs Sergeant**

30. In addition to those Sergeants who supervise police officers out on the street, the Wichita Police Department has a Sergeant who works in its Internal Affairs Section. Internal Affairs is the section which investigates complaints that have been made against police officers. (Tr.p. 336). The general tenure of an officer in the Internal Affairs Section is two to three years. (Tr.p. 340). The division is comprised of three officers; a Lieutenant, a Sergeant, and a Detective. (Tr.p. 338). The position presently being held by a Sergeant was previously filled by a Lieutenant. (Tr.p. 339). According to the city, it considers Internal Affairs to have two

supervisors, the Lieutenant and Sergeant, and one worker, the Detective. (Tr.p. 346).

31. The Internal Affairs division investigates approximately 400 cases per year of which the Sergeant and Detective handle 75%. (Tr. p. 349-50). All officers in the Internal Affairs Section conduct investigations into alleged officer misconduct. (Tr.p. 338). The Lieutenant assigns cases between the Sergeant and Detective, (Tr.p. 352), who do exactly the same investigative work. (Tr.p. 346).
32. The Sergeant in Internal Affairs is involved in the interview process when screening applicants for an Internal Affairs position, and participates in making recommendations on such to the Chief of Police. (Tr.p. 342-43). Performance appraisals on the Internal Affairs Detective are prepared by the Sergeant, who would also be the officer to give the Detective any oral or written reprimands. (Tr.p. 343). The Sergeant reviews the reports of the Detective for accuracy and completeness, and then sends them on to the Lieutenant for further review. The Sergeant can approve vacation and other leave for the Detective, and overtime. (Tr.p. 341-42, 344). The Sergeant spends only 10% of the his duty time supervising the Detective. (Tr.p. 344, 350).
33. The Sergeant in internal affairs does not have the authority to:
  - a. Promote;
  - b. Hire;
  - c. Transfer;
  - d. Suspend;
  - e. Layoff
  - f. Recall from layoff; or
  - g. Discharge patrol officers. (Tr.p. 347).
34. The Internal Affairs Sergeant assumes the responsibilities of the Lieutenant in his absence, however the Lieutenant is not absent on a regular basis. The Lieutenant's absence is limited to approximately 4 weeks per year for vacation. (Tr.p. 352, 341).

#### **BAT Van Operators**

35. "BAT" stands for Breath Alcohol Testing. (Tr.p. 77). BAT Van Operators are support people for the police officer positions. When the Police officer stops a driver for suspicion of being

- under the influence of alcohol or drugs, they call for the BAT van. The BAT Van Operator administers the breathalyzer test, and will, where appropriate, transfer the suspect to the Sedgwick County jail for booking. (Tr.p. 78). Jail personnel do the actual paperwork relating to the arrest. (Tr.p. 231, 277). When not responding to DUI calls, BAT Van Operators also used their vehicles as a paddy wagon to transport unruly prisoners, who may damage a patrol car or injure a patrol officer. (Tr.p. 91, 444, 451, 508).
36. The BAT Van Operator position is officially designated a Service Officer I(B). (Tr.p. 134, 449; Ex. 10), and was created six or seven years ago. (Tr.p. 133). The above duties of the BAT Van Operators have not changed since the position was created. (Tr.p. 450, 515). There are approximately eight BAT Van Operators. (Tr.p. 448). BAT Van Operators are in the Traffic Division with police officers, traffic safety officers, and parking control checkers. They are all supervised by the same Lieutenants. (Tr.p. 455-56). The position of BAT Van Operator is presently in a bargaining unit represented by the Service Employees Union.
37. The BAT Van Operator is not certified nor commissioned as a law enforcement officer. (Tr.p. 78-81, 100-101, 231, 278, 453). A certified officer would be an individual who has successfully completed law enforcement training at a recognized state training academy. The training takes approximately 780 hours with an additional 14 weeks of field training officer orientation. (Tr.p. 80-81). WPD patrol officers are required to complete this training. In contrast, BAT Van Operators receive approximately 60 days of on-the-job training, and are only certified by the state as operators of the breathalyzer. That training takes approximately 6 days. (Tr.p. 80-81).
38. A certified officer becomes commissioned when employed by a commissioning authority, e.g. a municipality. An individual wanting to become a patrol officer must go through a psychological check, physical agility test, physical examination, drug test, and a extensive background check. (Tr.p. 82-83). BAT Van Operators are not subject to physical agility tests, psychological evaluation, or as extensive background check. (Tr.p. 83).
39. There is considerable and frequent interaction between BAT Van Operators and members of the FOP bargaining unit. Ninety percent of a BAT Van Operator's time is spent in direct contact with patrol officers, (Tr.p. 447-462), while only 10% of a Parking Control Checker's time is in contact with patrol

officers. (Tr.p. 446,447, 484). BAT Van Operators do not regularly interact with Parking Control Clerks. (Tr.p. 458).

40. BAT Van Operators wear uniforms identical to that worn by patrol officers. (Tr.p. 445-46, 452, 508). Other similarities between patrol officers and BAT Van Operators include the following:
  - a. Both are called on to transport persons suspected of drug use for testing at a medical facility. (Tr.p. 139).
  - b. Both may be called upon to testify in court. (Tr.p. 290).
  - c. Both may be involved in a physical confrontation with a suspect.
  - d. BAT Van Operators are evaluated on the same form as patrol officers. (Tr.p. 298).
  - e. BAT Van Operators are supervised by Lieutenants, just like traffic safety officers. (Tr.p. 90, 98, 297, 299).
  - f. BAT Van Operators are compensated hourly and work regular shifts, the same as traffic safety officers and patrol officers. (Tr.p. 139, 299, 457).
41. BAT Van Operators are considered part of the Department's traffic Division, as are traffic safety officers. (Tr.p. 455). They drive a van marked with the City of Wichita Police Department logo, no different than the markings on the vehicles driven by traffic safety officers and by the patrol officers. (Tr.p. 140, 143, 284, 456). The BAT Van Operators wear a uniform identical to traffic safety officers, who are included in the FOP bargaining unit. They carry handcuffs, mace and a baton, just as a patrol officer. (Tr.p. 141, 291). Neither the BAT Van Operators nor the Traffic safety officers are commissioned, certified officers, (Tr.p. 156, 166, 453), and both lack the authority to arrest. (Tr.p. 231, 451).
42. BAT van operators do not patrol any particular part of the City, and do not respond to calls like other police officers. (Tr.p. 91, 278). Once at the scene of an automobile stop, they do not participate in the investigation of the scene, nor do they interview witnesses. (Tr.p. 82, 279, 453). Unlike police officers, BAT Van Operators do not have the power to make traffic stops. (Tr.p. 82, 231, 278). They do not have the authority to make arrests. (Tr.p. 81, 231, 278). They do not have the authority to issue citations. (Tr.p. 81, 278).
43. BAT Van Operators want to become members of the FOP bargaining unit. (Tr.p. 448). Joe Kelly, a municipal court warrant



officer and officer of the Service Employees Union Local 513, also testified that the Service Employees Union, which currently represents the BAT van drivers, believes that because of the nature of the duties of the BAT Van Operators, the position should be included in the bargaining unit represented by the FOP. (Tr.p. 511).

### ISSUE 1

**WHETHER THE POSITION OF SERGEANT SHOULD BE EXCLUDED FROM THE BARGAINING UNIT REPRESENTED BY THE FRATERNAL ORDER OF POLICE PURSUANT TO K.S.A. 75-5327(e) OR K.S.A. 75-4322(b) AS A "SUPERVISORY EMPLOYEE."**

K.S.A. 75-4324 gives "public employees" the right to form, join or assist professional organizations and to participate in professional negotiations with public employees. This process is commenced by the designation of job classifications to be grouped together to form a bargaining unit, K.S.A. 75-4327(b). Pursuant to K.S.A. 75-4327(c), in each case where the question of unit composition is at issue, the Public Employee Relations Board ("PERB") is to decide an "appropriate" unit. The source of the PERB's authority to determine the scope of the proper unit is founded in K.S.A. 75-4327(c).<sup>2</sup> It has been a long-standing rule of unit determination in the public sector that there is nothing which requires the bargaining unit approved be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be an appropriate unit. United Rubber Workers Local Union

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<sup>2</sup> K.S.A. 75-4327(c) provides:

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

851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); Teamsters Local Union #955 v. Wyandotte County, Kansas, Case No. 75-UDC-3-1992 (August 5, 1993), See e.g. Colby Community College Faculty Alliance v. Colby Community College, Case No. 72-UCA-4-1992 (November, 1993); Friendly Ice Cream Corp., 110 LRRM 1401 (1982), enforced 705 F.2d 570 (CA 1, 1983).

[1] The determination of appropriateness requires a three step inquiry:

- 1). Does the job classification meet the definition of "public employee";
- 2). Does the job classification share a sufficient community of interest with the other classifications proposed for the unit?
- 3). Is the individual in the job classification excludable from the unit pursuant to one of the exclusionary categories set forth in K.S.A. 75-4322(a) ?

Only after a position has successfully satisfied each prong of this test is it appropriate to include the position in the bargaining unit. Consequently, a complete understanding of what is meant by "public employee", "community of interest" and "supervisory employee" is essential to proper application of the test in this case.

#### ***1. Definition of "Public Employee"***

K.S.A. 75-4322(a) defines "public employee" to mean:

"any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees."

It may be assumed that a person not in one of the five excluded categories is a "public employee" within the meaning of the Public Employer-Employee Relations Act ("PEERA") if he/she works for a public employer. There is no question that the City of Wichita is a "public agency"<sup>3</sup> or that a Sergeant is a "person employed by a public agency," and neither party offered an argument to the contrary. Therefore, a person in the position of a Sergeant qualifies as a "public employee."

## 2. Community of Interest

"Community of interest" is not susceptible to precise definition or to mechanical application. Morris, The Developing Labor Law, Ch. 11, p. 417 (2 ed. 1989). In fact, the 1969 Report of the Advisory Commission on Intergovernmental Relations refers to the test as a "somewhat elusive concept." ACIR Report at p. 74. The legislature, however, has provided some guidance in K.S.A. 75-4327(e) to assist with making a unit determination:

"Any group of public employees considering the formation of an employee organization for formal recognition, any public employer considering recognition of an employee organization on its own volition and the board, in investigating questions at the request of the parties as specified in this section, shall take into consideration, along with other relevant factors: (1) The principle of efficient administration of government; (2) the existence of a community of interest among employees; (3) the history and extent of employee organization; (4) geographical location; the effects of overfragmentation and the splintering of a work organization; the provisions of K.S.A. 75-4325; and the recommendations of the parties involved."

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<sup>3</sup> K.S.A. 75-4322(f) defines "public agency" or "public employer" as "every governmental subdivision, including any county, township, city, school district, special district, board, commission, or instrumentality or other similar unit whose governing body exercises similar governmental powers, and the state of Kansas and its state agencies."

This list of factors is further supplemented by K.A.R. 84-2-

6(a)(2):

"In considering whether a unit is appropriate, the provisions of K.S.A. 75-4327(e) and whether the proposed unit of the public employees is a distinct and homogeneous group, without significant problems which can be adjusted without regard to other public employees of the public employer shall be considered by the board or presiding officer, and the relationship of the proposed unit to the total organizational pattern of the public employer may be considered by the board or presiding officer. Neither the extent to which public employees have been organized by an employee organization nor the desires of a particular group of public employees to be represented separately or by a particular employee organization shall be controlling on the question of whether a proposed unit is appropriate."

[2] Because of the number of factual considerations that must be taken into account in deciding upon an appropriate bargaining unit, the PERB has not found it possible to enunciate a clear test.

PERB has adopted a short-hand statement for the determination of any bargaining unit as follows: "The [PERB's] primary concern is to group together only those employees who have substantial mutual interests in wages, hours and other conditions of employment." See also United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See also Kalamazoo Paper Box Corp., 1950 NLRB Ann.Rep. 39 (1951). Commonly referred to as the community of interests doctrine, it stands for the proposition that in making a unit determination, the PERB will weigh the similarities and differences with respect to wages, hours and other conditions of employment among the members of the proposed unit, rather than relying solely on traditional job

classifications.<sup>4</sup> United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See Speedway Petroleum, 116 LRRM 1101 (1984).

PERB approaches the community of interests determination using a case-by-case analysis, and is given considerable discretion in making a decision. While it is not necessary that all of the following elements be present, they are the "touchstones" frequently considered in determining whether inclusion of a classification in a unit is appropriate: 1) common supervision of employees; 2) functional integration of operations and job duties; 3) similar skills, training and qualifications; 4) interchangeability and contact between employees; 5) similar work situations; 6) common wages and benefits; 7) payment of wages; 8) working hours; 9) regularity of work (full-time, part-time, temporary, seasonal); and 10) geographic proximity. United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); Teamsters Local Union #955 v. Wyandotte County, Kansas, Case No. 75-UDC-3-1992 (August 5, 1993); See Kramer, Fundamentals of Labor Law Under the National Labor Relations Act, p. 163 (1993).

While these are the most frequently cited factors, they are not exclusive, and no single factor or group of factors is

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<sup>4</sup> Note that it is the employees' rather than the employer's community of interests that is controlling. Thus, in General Dynamics Corp., 87 LRRM 1705 (1974), the Board's determination was based on the functions of the employees rather than their project assignments or the operations as a whole.

controlling. The weight to be assigned each factor is within the sole discretion of the PERB. United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); Kansas Association of Public Employees v. Depart. of S.R.S, Rainbow Mental Health Facility, Case No. 75-UCA-6-1990 (February 4, 1991); See e.g. Colby Community College Faculty Alliance v. Colby Community College, Case No. 72-UCA-4-1992 (November, 1993). As stated in Friendly Ice Cream Corp., 110 LRRM 1401 (1982), enforced, 705 F.2d 570, 576 (1st Cir. 1983), and quoted with approval in Kansas Association of Public Employees v. Depart. of S.R.S, Rainbow Mental Health Facility, Case No. 75-UCA-6-1990 (February 4, 1991):

"In determining whether a group of employees constitutes an appropriate bargaining unit, the NLRB is not bound to follow any rigid rule. Since each unit determination is dependent on factual variations, the Board is free to decide each case on an ad-hoc basis."

In comparing the positions of Patrol Sergeant, Internal Affairs Sergeant, and patrol officer, the record shows that the employees have similar skills, training, qualifications, and regularity of contact; they work on the same shift with substantially the same responsibilities, under similar work situations, and in a common geographical area; are paid in the same manner and have common benefits; have the same grievance procedure; and common supervision through the command structure of the WPD. \here is substantial evidence to support the conclusion that a community of interest exists between the positions of Patrol

Sergeant, Internal Affairs Sergeant, and the patrol officers in the F.O.P. bargaining unit.

### ***3. Supervisory Employee Exclusion***

[3] Because the right to engage in meet and confer negotiations depends on the existence of public employee status, persons who do not have that status are excluded from bargaining units composed of public employees. In any proceeding where the composition of a bargaining unit is at issue under PEERA, the burden of proving that an individual should be excluded pursuant to one of the exclusionary categories of K.S.A. 75-4322(b) rests on the party alleging that exclusionary status. United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); Teamsters Local Union #955 v. Wyandotte County, Kansas, Case No. 75-UDC-3-1992 (September 3, 1993); See also Ohio Masonic Home, 131 LRRM 1289, 1503 (1989). Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, it will be found that supervisory status has not been established, at least on the basis of those indicia. Phelps Community Medical Center, 131 LRRM 113 (1990). The conclusion that one individual within a position is supervisory, does not by itself necessarily mean that all employees within that position will also be held as supervisory. See City of Cedar Falls, Iowa PERB case Nos. 342 and 353 (November 26, 1975).

Of concern here are those public employees in the K.S.A. 75-4321(a) exclusion category of "supervisor." K.S.A. 75-4322(b) defines "supervisory employee" as:

" . . . any individual who normally performs different work from his or her subordinates, having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement. . . ."

[4] Public sector statutory definitions of "supervisory employee", including PEERA's, tend to parallel the definition found in Section 2(11) of the Labor Management Relations Act. Gordin, Wollett and Alleyn, Collective Bargaining in the Public Sector, p. 61 (1979). That federal counterpart reads:

"The term 'supervisor' means any individual having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement."

By adopting the federal definition of supervisor in the PEERA definition of "supervisory employee," it can be inferred that the Kansas legislature signified its intention that certain well-established principles developed in federal cases for determining who are supervisory employees under the NLRA should be applied under our statute.<sup>5</sup>

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<sup>5</sup> Because the definition of supervisory employee in the Kansas statute is taken from the NLRA, it must be presumed our legislature intended what Congress intended by the language employed. See Stromberg Hatchery v. Iowa Employment Security Comm., 33 N.W.2d 498, 500 (Iowa 1948). "[w]here . . . a state legislature adopts a federal statute which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and



The question of supervisory status is "a mixed one of fact and law." United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See NLRB v. Yeshiva University, 444 U.S. 672, 691 (1980). However, as should be evident from the array of criteria within K.S.A. 75-4327(e), the inquiry is predominately factual. It involves a case-by-case approach in which the PERB gives practical application of the statute to the infinite and complex gradations of authority which may exist in professional. As recognized by the court in NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944):

"Every experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities

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the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense." Hubbard v. State, 163 N.W.2d 904, 910-11 (Iowa 1969). As a result, federal court decisions construing the federal statute are illuminating and instructive on the meaning of our statute, although they are neither conclusive nor compulsory. Peasley v. Telecheck of Kansas, Inc., 6 Kan.App.2d 990, 994 (1981) [Case law interpreting federal law after which Kansas law is closely modeled, although not controlling construction of Kansas law, is persuasive]; See also Cassady v. Wheeler, 224 N.W.2d 649, 652 (Iowa 1974).

In 1970, the Kansas legislature was faced with the problem of writing a comprehensive law to cover the question of professional employee collective bargaining. It had the one advantage of being able to draw from the long history of the NLRB as a guide in performing its task. In particular, as it relates to the case under consideration here, the legislature created a definition, very much like the one in the NLRA, of those characteristics which, if possessed by an employee, would disqualify that employee from participation in a bargaining unit.

It is a general rule of law that, where a question of statutory construction is one of novel impression, it is proper to resort to decisions of courts of other states construing statutory language which is identical or of similar import. 73 Am.Jur.2d, Statutes, §116, p. 370; 50 Am.Jur., Statutes, §323; 82 C.J.S., Statutes, §371. Judicial interpretations in other jurisdictions of such language prior to Kansas enactments are entitled to great weight, although neither conclusive nor compulsory. Even subsequent judicial interpretations of identical statutory language in other jurisdictions are entitled to unusual respect and deference and will usually be followed if sound, reasonable, and in harmony with justice and public policy. Cassady v. Wheeler, 224 N.W.2d 649, 652 (Ia. 1974); 2A Sutherland Statutory Construction, §52.02, p. 329-31 (4th ed. 1973); Benton v. Union Pacific R. Co., 430 F.Supp. 1380 (19 ) [ A Kansas statute adopted from another state carries with it the construction placed on it by that state.]; State v. Loudermilk, 208 Kan. 893 (1972).

Where there is no Kansas case law interpreting or applying a specific section of the Kansas Public Employee Relations Act, the decisions of the National Labor Relations Board ("NLRB") and of Federal courts interpreting similar provisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 et seq. (1982), and the decisions of appellate courts of other states interpreting or applying similar provisions under their state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance in interpreting the Kansas PEERA, cf Oakley Education Association v. USD 274, 72-CAE-6-1992, p. 17 (December 16, 1992); See also Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991 wherein the same conclusion has been reached under the Kansas Public Employer-Employee Relations Act.

and needs of the workers for self-organization and collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question of who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board."

The PERB's exercise of discretion should be accepted by reviewing courts if it has "*warrant in the record*" and a "*reasonable basis in law.*" See NLRB v. Broyhill Co., 514 F.2d 655, 658 (CA 8, 1975).

### **Background**

It appears appropriate at this time to review the underlying rationale for the exclusion of supervisors from a bargaining unit. The exclusion of supervisors is predicated upon the maxim "*No man can serve two masters.*" The "*supervisory employee*" exclusion is necessary to avoid a conflict of interest the supervisor may have between his role of union member and that of management representative. Rhyme & Drummer, The Law of Municipal Labor Relations, p. 41. As the Second District Federal Court of Appeals explained the legislative intent behind the exclusion of supervisors in the Taft-Hartley Act of 1947:

"The sponsors feared that unionization of foremen and similar personnel would tend to break down industrial discipline by blurring the traditional distinction between management and labor. It was felt necessary to deny foremen and other supervisory personnel the right of collective bargaining in order to preserve their unqualified loyalty to the interests of their employers, and to prevent the dilution of this loyalty by giving them common interests with the men they were hired to supervise and direct." International Ladies Garment Workers' Union AFL-CIO v. NLRB, 339 F.2d 116, 122 (CA 2, 1964); See also Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653, 661-62 (1974).

The goal of the Taft-Hartley Act was to assure the employer of a loyal and efficient cadre of supervisors and managers independent of the rank-and-file, thereby ensuring that employees who exercise discretionary authority on behalf of the employer do not divide their loyalty between employer and union. NLRB v. Yeshiva University, 103 LRRM 2526 (1980). Congress was concerned that if supervisors were allowed to affiliate with labor organizations that represented the rank-and-file, they might become accountable to the workers, thus interfering with the supervisor's ability to discipline and control the employees in the interest of the employer. See H.R.Rep.No. 245, 80th Cong., 1st Sess., 14 (1974):

"The evidence before the Committee shows clearly that unionized supervisors under the Labor Act is inconsistent with the purpose of the act. . . . It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, . . . they are subject to influence and control by the rank-and-file union, and, instead of their bossing the rank-and-file, the rank-and-file bosses them."

The problems spawned by conflicts of interest when supervisors are also union members and subject to union discipline have been recognized. A union's constitution and by-laws are the measure of the authority conferred upon the organization to discipline, suspend or expel its members. 48 Am.Jur.2d, Labor and Labor Relations, §257, p. 195. A union may impose fines for "misconduct" affecting the union or any of its members. Id. at §258. As noted by the court in NLRB v. Local 2150, International Bro. of Elec. Wkrs, 486 F.2d 602, 607 (CA 7, 1974):

"When the employer has a dispute with the union, and the union disciplines supervisors for performing their supervisory responsibilities on the employer's behalf in that dispute, that discipline 'drive[s] a wedge between [the] supervisor[s] and the Employer' and may reasonably be expected to undermine the loyalty and effectiveness of these supervisors when called upon to act for the company in their representative capacities."

That objective is equally applicable to the public sector.

By the exclusion of supervisors, Congress also sought to protect the rank-and-file employees from being unduly influenced in their selection of leaders by the presence of management representatives in their union. *"If supervisors were members of and active in the union which represents the employees they supervised it could be possible for the supervisors to obtain and retain positions of power in the union by reasons of their authority over their fellow union members while working on the job."* NLRB v. Metropolitan Life Insurance Co., 405 F.2d 1169, 1178 (CA 2, 1968). In its comprehensive report of September 1969, entitled "Labor Management Policies for State and Local Government," the Advisory Commission on Intergovernmental Relations (ACIR), a commission established by Congress, stated:

"From the viewpoint of a union or association, certain objections also can be raised concerning participation by supervisors and other middle-managers in their activities. Supervisory personnel cannot remove themselves entirely from an identification with certain management responsibilities, and this can generate intraunion strife. Their involvement in union or association affairs in effect places management on both sides of the discussion table. State legislation dealing with public labor-management relations, then, should clearly define the types of supervisory and managerial personnel which should not be accorded employee rights." ACIR Report at 95-96.

One additional underlying concept which emerges, whether in the public or private employment sector, is that representatives of

the employer and the employees cannot sit on both sides of the negotiating table. Good faith negotiating requires that there be two parties confronting each other on opposite sides of the table. Obviously both employer and employee organizations need the undivided loyalty of their representatives and their members, if fair and equitable settlement of problems is to be accomplished. Unless the participation is of that calibre, the effectiveness of both parties at the negotiations table would be sharply limited.

Instructive in considering the purposes that underlay the formulation of the federal language defining supervisor is the passage from G.A.F. Corporation v. NLRB, 524 F.2d 402, 404 (CA5 1975) which explains the legislative intent behind that language:

" . . . we must examine the Board's decision to ensure that a reasonable balance is struck between the two labor law policies which clash in this case. On the one hand, the NLRB's decision reflects a concern evident in both its own precedent and in the decisions of this circuit that bargaining units be protected against members whose basic loyalty is necessarily to management. [Cites omitted]. On the other hand, 'the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the act is intended to protect.'"

Accordingly, supervisory status is not to be construed so broadly that persons are denied employee rights which the statute is designed to protect. NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (1974); GAF Corp. v. NLRB, 524 F.2d 492, 495 (CA 5, 1975); Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (CA 7, 1970)[*"the Board has a duty to employees to be alert not to construe supervisory status too broadly"*]. Congress sought to exclude from employee status only those employees who were *"the*

*arms and legs of management in executing labor policies."* NLRB v. Security Guard Service, Inc., 384 F.2d 143, 147 (CA 5, 1967)[Emphasis added]. A statement from the Senate Committee report shows this was the intent of Congress:

"[T]he committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in the act. It has therefore distinguished between straw bosses<sup>6</sup>, leadmen, set-up men and other minor supervisory employees on the one hand, and the supervisor vested with such genuine management prerogatives as to the right to hire or fire, discipline, or make effective recommendations with respect to such action." Sen.Rep.No. 105, on S.1126, 80th Cong., 1st Sess., p.4.

One cannot believe the Kansas legislature meant to do anything less for the Kansas public employee when it passed PEERA. It must be concluded that the PEERA line between those eligible to participate in public bargaining and those not is drawn to exclude those who are representatives of the public employer or any of its supervisory personnel. The expressed policy of the PEERA endorses

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<sup>6</sup> In early logging days under certain conditions straw was spread on mountainous slopes too steep for horses to hold back a sled load of logs. The person who redistributed the straw with a pitchfork before the next load gave the word when the slope was prepared. The teamsters who had greater responsibility were not to proceed until so signalled. Hence, the term 'straw boss.' NLRB v. Swift and Co., 292 F.2d 561, 563 n.2 (CA 1, 1961). Perhaps a modern counterpart would be an attendant at a company parking lot with authority to direct higher-ups in the organization with respect to parking cars. Id.

Robert's Dictionary of Industrial Relations, p. 407 (1966), defines "straw boss" as "[a] gang or group leader, a worker who takes the lead in a group which consists of himself and a small number of other employees. He performs all of the duties of the other workers and his supervisory activities are incidental to his production performance."

"Leadman" is a "term applied usually to the individual who sets the pace for a group or a team working on a particular operation." Roberts', supra, p. 219. A related word is "leaders," a term "occasionally . . . applied to individuals who are hired to establish performance standards, and individuals unions claim are 'speeders' used by employers to increase the rate at which average workers are required to perform." Roberts', supra, p. 218.

The distinguishing characteristic which definitionally links both "straw men" and "leadmen" is their duty to perform the same work being done by their fellow employees, only better.

A "foreman" on the other hand is "generally the first line of management in the operation of the plant or facility. The individual who, in the eyes of the production worker, represents management and authority. He is generally the immediate supervisor of a group of workers and has the responsibility to recommend suspension, discharge or promotion. He also has the direct responsibility for seeing to it that the work is performed and the production schedule met. He carries out management policy on the operating level and acts as an intermediary between the workers and middle management." Roberts', supra, p. 114.

this belief. That policy is to foster harmonious working relationships between public employees and the public employers by allowing the employee to bargain collectively while protecting the rights of the employee in choosing to join or refusing to join the union and its activities. See e.g. Liberal-NEA v. Board of Education, 211 Kan. 219, 232 (1973) City of Davenport v. PERB, 2 PBC ¶ 20,201 (Iowa 1976).

With this background, the analysis of the alleged supervisory status of the employees in the position Sergeant may be undertaken. Here, the Sergeants are assigned to the Patrol and Internal Affairs divisions. They will be examined separately

#### **Title or Designation**

[5] The City cites its designation of the Sergeant position as "supervisory" to support the proposition that it should not be included in the FOP bargaining unit. The title a position carries has little bearing on whether it is supervisory. As stated in NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d 235 (CA4, 1958):

"It is equally clear, however, that the employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title."

It is the function rather than the label which is significant.

United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See also

Phillips v. Kennedy, 542 F.2d 52 (CA 8, 1976); Arizona Public Service Co. v. NLRB, 453 F.2d 228 (CA 9, 1971); Int'l Union of Elec., Radio and Machine Workers v. NLRB; 426 F.2d 1243 (D.C.Cir. 1970). Consequently, the fact that the City may label and refer to the Sergeant positions as "supervisory" is not controlling for purposes of PEERA unit determinations. The positions must actually possess the prescribed statutory supervisory duties and authorities.

### **PATROL SERGEANTS**

#### **Statutory Criteria**

The enumerated functions in the K.S.A. 75-4322(b) definition of "supervisory employee" are listed disjunctively, NLRB v. Elliott-Williams Co., 345 F.2d 460 (CA7, 1965), possession of any one of them may be sufficient to make an employee a supervisor. United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See also NLRB v. Broyhill Co., 514 F.2d 655, 658 (CA 8, 1975). While it has been said that it is the existence of the power and not its exercise which is determinative, See Jas. E. Matthews & Co. v. NLRB, 354 F.2d 432, 434 (CA 8, 1965), what the statute requires is evidence of actual supervisory authority "visibly translated into tangible examples." United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See also Oil, Chemical and Atomic Workers Int. Union v. NLRB, 445



F.2d 237, 243 (D.C.Cir. 1971). The power must exist in reality, not only on paper. Id.; NLRB v. Security Guard Service, Inc., 384 F.2d 143, 149 (CA 5, 1967). As explained in NLRB v. Griggs Equipment, Inc., 307 F.2d 275, 279 (CA5, 1962):

"The concept of supervision has some elasticity, but it must have substance and not be evanescent. Statutory supervision requires some suiting of the action to the words and the words to the action. The supervision must have both conceptual and practical aspects and must be meaningful in respect to the position occupied by the employee. A supervisor may have potential powers, but theoretical or paper power will not suffice. Tables of organization and job descriptions do not vest powers. Some kinship to management, some empathic relationship between employer and employee, must exist before the latter becomes a supervisor for the former."

[6] Stated another way by the NLRB in Detroit College of Business, 132 LRRM 1081, 1083 (1989), the supervisory functions performed by the individual must "so [ally] the individuals with management as to establish a differentiation between them and the other employees in the unit." See also Adelphi University, 79 LRRM 1545 (1972); New York University, 91 LRRM 1165 (1975). The determination of supervisory status depends upon how completely the responsibilities of the position identify the employee with management. For supervisory status to exist this identification must be substantial. United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See also NLRB v. Doctor's Hospital of Medesto, Inc., 489 F.2d 772, 776 (CA 9, 1973); Ross Porta-Plant, Inc. v. NLRB, 404 F.2d 1180, 1182 (CA 5, 1968). Clearly, as stated above, the exclusion from "public employee" status applies only to supervisory personnel who are "the arms and legs of management in executing

labor policies." Id.; Packard Motor Co. v. NLRB, 330 U.S. 485, 494  
(Douglas, J. dissenting, 1947).

To ascertain whether an individual so allies oneself with management as to establish a differentiation from the other employees in the bargaining unit one must examine the factors evidencing supervisory authority present to determine the nature of the individual's alliance with management. Relevant factors to be considered include, but are not limited to, the business of the employer, the duties of the individuals exercising supervisory authority and those of the bargaining unit employees, the particular supervisory functions being exercised, and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to the those of the bargaining unit in which they would be included.

#### **Statutory Authority**

There is no evidence that Patrol Sergeants have authority to hire or effectively recommend hiring. This is done exclusively through civil service. There is also no evidence that Patrol Sergeants have the authority to lay off or recall patrol officers or to effectively recommend such layoff or recall. The Patrol Sergeants do not have the authority to reward a patrol officer. A Patrol Sergeant may recommend another officer for a commendation but there is no evidence as to the effectiveness of such recommendations. The record also shows that any WPD officer can

recommend another officer for commendation which receive the same consideration. The Patrol Sergeants also do not have the authority to unilaterally discharge, transfer or promote a patrol officer. The criteria urged by the City as supporting the conclusion that the Patrol Sergeants are "supervisors" are the authority a) to assign or direct; b) to adjust grievances; c) to effectively recommend discipline; and d) to effectively recommend promotion.

**a. Authority to Assign or Direct**

As indicia of supervisory status the City argues the Patrol Sergeant assigns or directs the work of patrol officers 1) at the police station prior to each shift, 2) on the street during the shift, and 3) at a crime scene. The City produced evidence to show that prior to each shift, the Patrol Sergeant assesses the line-up for the day; assigns officers to a particular car and specific beat on each shift; performs daily roll call; disseminates information to the patrol officers, discusses any job related problems, and reviews orders or directives coming down the chain of command; supervises civilian personnel; reviews the daily reports of patrol officers; and completes "OR" paperwork, (FF 10). On the street, in addition to their primary responsibility as patrol officers, the Patrol Sergeants are to observe, supervise, and instruct police officers on their shifts in the performance of their duties, (FF 9). At crime scenes, Patrol Sergeants take preliminary charge of, and direct the work of patrol officers, (FF 25).

**1) At the police station**

[7] With respect to the direction of other employees, it is evident that Patrol Sergeants are in a general sense "in charge" of their shifts. The question to be addressed, however, is whether their direction of other employees requires the use of independent judgment or is of a more routine nature. Where supervisory functions are being performed by an employee, K.S.A. 75-4322(b) expressly insists that a supervisor 1) have authority, 2) to use independent judgment, 3) in performing such supervisory functions, 4) in the interest of management. These latter requirements are conjunctive. See International Union of United Brewery v. NLRB, 298 F.2d 297, 303 (1961).

[8] An employee is not a supervisor if he or she has the power to exercise, or effectively recommend the exercise of listed functions but this power is not accompanied by the authority to use independent judgment in determining how in the interest of management it will be exercised. Consequently, authority to perform one of the enumerated functions is not supervisory if the responsibility is routine or clerical. United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See also NLRB v. Wentworth Institute, 515 F.2d 550, 557 (CA 1, 1975); NLRB v. Metropolitan Petroleum Co. of Mass., 506 F.2d 616, 618 (CA 1, 1974).

Assigning employees to work on a routine basis is insufficient to create supervisory status, See e.g. NLRB v. Griegs Equipment

Inc., 307 F.2d 275 (5 Cir. 1962), because it does not require independent judgment within the meaning of the statutory definition. See NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3rd Cir. 1977) (assignment of work on the basis of employee availability held routine); NLRB v. Harmon Industries, Inc., 565 F.2d 1047, 1050 (8th Cir. 1977) (assignment of work on basis of availability of employee time held to be routine); (Precision Fabricators, Inc. v. NLRB, 204 F.2d 567 (2nd Cir. 1953); Doctor's Hospital, 217 NLRB No. 87 (1975) (assignment made either on a first-come basis or on a rotating basis among employees held to be routine). Nor are functions requiring little more than use of common sense. Spector Freight System, Inc., 216 NLRB No. 89 (1975). Finally, an individual who merely serves as a conduit for orders emanating from supervisors acts routinely. See e.g., Screwmate, Inc., 218 NLRB No. 210 (1975); Samuel Liefer, 224 NLRB No. 38 (1976).

**2) On the street**

In NLRB v. Security Guard Service, Inc., 384 F.2d 143, 147 (5th cir. 1967) the court said, "[T]he statutory words 'responsibility to direct' are not weak and jejune but import vigor and potential vitality." The responsibility must be substantial and pervasive enough to make the employee a part of management, not simply a leadman or straw boss. NLRB v. Harmon Industries, Inc., 565 F.2d 1047, 1051 (8th cir. 1977) ("\* \* \* Congress intended that so-called 'straw bosses' were to be included as protected employees \* \* \*").

Leadman are not supervisors where they perform the same work as other employees in the unit and do not formulate or effectuate management policy, Jerry's United Super, 131 LRRM 1064 (1988); any directing of employees is routine and does not require independent judgment, and the responsibility was given based upon a higher level of skill and greater seniority, Sears, Roebuck & Co, 130 LRRM 1212 (1989), Somerset Welding, 130 LRRM 1135 (1988); or the leadman functions as a quality control employee in inspecting the work of others in the same department. Somerset Welding, *id.*

In addition, responsibility can be so proceduralized that it becomes routine and does not involve the exercise of independent judgment. NLRB v. Detroit Edison Co., In all these matters, the department operates under very standardized and routinized procedures. The effect is that the amount of discretion and independent judgment to be exercised by the Patrol Sergeant is minimal. Through its rules and regulations, Department orders, and other training and operations manuals, nearly all practices and procedures of the WPD are prescribed in such detail that these functions are, by any measure, routine and the leadership exercised by a Patrol Sergeant does not require the use of independent judgment in the interest of the employer as contemplated by K.S.A. 75-4322(b).

It appears that the role played by the Patrol Sergeant more nearly parallels the function of the leadman in the industrial sector, holding by definition some responsibility beyond that of

the rank and file employee, but less authority than that of the true supervisor. Teamsters Local Union #955 v. Wyandotte County, Kansas, Case No. 75-UDC-3-1992 (August 5, 1993). The Patrol Sergeant directing and assigning work to the patrol officers is incidental to the application of the Patrol Sergeant's technical or professional know-how to less skilled employees and does not involve the use of independent judgement as a representative of management, or one who shares the power of management, within the meaning of the statutory requirement. NLRB v. Briggs Equip. Int., 307 F.2d 275, 279 (5th Cir. 1962); See also Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151 (7th Cir. 1970); Arizona Public Service Co. v. NLRB, 453 F.2d 228 (9th Cir. 1971); Beth Israel Medical Center, 229 NLRB No. 32 (1977).

**3) At a crime scene**

In the direction of patrol officers at a crime scene, it is equally clear that the direction of this work by the Patrol Sergeant does not require the use of independent judgment as contemplated by the supervisory definition of K.S.A. 75-4322(a). First, at any crime scene, while the Patrol Sergeant is in charge, there are also two other officers of higher rank on duty during the shift, i.e. the Lieutenant and the Captain, who may be consulted or who may overrule the Patrol Sergeant or who may take over control of the crime scene. Second, the decisions to be made by the Patrol Sergeant, (FF 25), while obviously important, are also routine decisions in that Sergeant, as well as most other experienced

patrol officers and detectives, knows from rote training, experience, and standard procedure, the determinations that must be made. In most instances those decisions are not managerial decisions made in the interest of the Employer, but rather are tactical decisions; routine in nature and learned from extensive training and experience. His leadership role rests on his skill and experience rather than on a need for him to be in that position to carry out the City's labor policy.

While the Patrol Sergeant may assign and direct other patrol officers in their daily activities, the evidence does not support a conclusion that such activities require the sufficient use of independent judgment in the interest of the City to ascribe supervisory status. NLRB v. Detroit Edison Co., 537 F.2d 239 (6th Cir. 1976). As the designated leader of the shift, the Patrol Sergeant cannot be said necessarily to be allied in interest more with management than labor. The Patrol Sergeant's direction of patrol officers is done in connection with their law enforcement duties, and does not go beyond into personnel authority which more directly promotes the interest of the employer<sup>7</sup> and which is not motivated by needs at the crime scene or during patrol. As explained in Extendico Professional Care, 117 LRRM 1930 (1984):

"[D]iscretion . . . exercised in accordance with a professional judgment as to the best interests of the patient rather than a

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<sup>7</sup> "Personnel authority which more directly promote the interest of the employer" has been described as authority associated with personnel matters including approving vacation and sick leave, initialing time cards, assigning overtime, or transferring employees.



managerial judgment as to the employer's best interests, . . . is not supervisory under the statute."

The evidence leads to the conclusion that the Patrol Sergeant is employed and compensated primarily for his occupational skill and knowledge rather than his supervisory skills. See Belmont Admin. & Clerical Ass'n, 3 State Laws, CCH Lab.L.Rep., ¶49,999, at p. 40. (The Massachusetts PERB found public employees so situated not supervisors). The record leads to the conclusion that the Patrol Sergeant's authority is consistent with and analogous to that of a leadman rather than a supervisor within the meaning of the statutory definition. Tucson Gas & Elect. Co., 100 LRRM 1489, 1496 (1979). Accordingly, the position will not be excluded as "supervisory" pursuant to K.S.A. 75-4322(a):

**4. Substitution for Supervisor**

In further support of its argument that the Patrol Sergeant assigns and directs the work of the patrol officers, the City points to the fact that the Patrol Sergeant can assume the duties of a Lieutenant in his absence. An employee's regular functions and responsibilities are determinative. Temporary or occasional service as a supervisor is not disqualifying. The test for determining whether a unit should include employees who substitute for supervisors is whether such part-time supervisors spend regular and substantial portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant. N&T Associates, Inc., 116 LRRM 1155 (1984).

"The test of whether a person is a supervisor depends not on what he may have as his responsibilities and authority under occasional or remote circumstances, but what his functions and responsibilities are in the normal course of affairs." Matter of Bough of Naugatuck, Conn.St.Bd. of Labor Rel. Case No. ME-1651, Decision No. 812 (1968).

[9] The primary consideration is whether the substitution is on a regular or substantial basis or whether it involves only infrequent and isolated occurrences. See Lovilia Coal Co., 120 LRRM 1005 (1988). Temporary service as a supervisor does not make a rank-and-file employee a supervisor. NLRB v. Harmon Industries, Inc., 565 F.2d 1047, 1051 (8th Cir. 1977) (performance of supervisory duties while supervisor on vacation); City of Davenport v. Public Emp. Rel. Bd., 264 N.W.2d 307, 315 (IA 1978). An employee may be disqualified "only if his temporary service as a supervisor is a regular and substantial part of his job which cannot be 'sharply demarcated' from his rank-and-file duties." GAF Corp. v. NLRB, 524 F.2d 492, 496 (5th Cir. 1975). The record is void of evidence establishing that fails to support the conclusion that substituting for a Lieutenant is a regular and substantial part of a Patrol Sergeant's job rather than constituting only temporary service.

#### **b. Authority to Adjust Grievances**

The City next contends Patrol Sergeants must be found to be supervisors because they can adjust employee grievances. Adjusting a grievance involves an inquiry into its validity, a determination on the merits, and the taking of corrective action when necessary. See generally, NLRB v. Brown and Sharpe Mfg. Co., 169 F.2d 331, 334

(1st Cir. 1948). There are two separate procedures for handling grievances; the first, most often applicable to disagreements, personality conflicts, and other disputes between employees; and the second, whereby the employee organization seeks redress of alleged violations of the memorandum of agreement. In this latter procedure, the Patrol Sergeants do not participate on behalf of the employer. The City's assertion, therefore, that Patrol Sergeants may adjust grievances relates primarily to their handling of personality clashes between patrol officers on their shift.

While the term "grievance" is one of uncertain content, with many collective bargaining agreements containing their own definition of grievance, Robert's Dictionary of Industrial Relations, Revised Edition, defines a grievance as "any complaint by an employee or by a union concerning any aspect of the employment relationship." This is functionally similar to the PEERA definition of "grievance" found in K.S.A. 75-4322(u).<sup>8</sup> The key element of this definition is the meaning of the words "employment relationship." Thus, the term "grievance" contemplates a dispute with the employer over the terms and conditions of employment. Hence the authority of a supervisor to adjust grievances in the interest of the public employer, through the use

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<sup>8</sup> K.S.A. 75-4322(u) defines "Grievance" to mean "a statement of dissatisfaction by a public employee, supervisory employee, employee organization, or public employer concerning interpretation of a memorandum of agreement or traditional work practice." As noted, Patrol Sergeants play no part in resolving grievances relating to the memorandum of agreement. Equally clear, the resolution of personality conflicts between patrol officers does not involve traditional work practices.

of independent judgment, contemplates a level of responsibility and authority greater than that exercised in the settling of arguments or disputes between two employees. The resolution of such grievances does not involve the potential adversary relationship between employer and employee generated by complaints of violation of a memorandum of agreement. The handling of these problems by the Patrol Sergeant, largely by "talking them out," is routine and nonsupervisory within the meaning of K.S.A. 75-4322(b). See Cinch Mfg. Corp., 98 NLRB No. 118 (1952). Preliminary efforts by Patrol Sergeants to resolve minor grievances do not make them supervisors. See NLRB v. City Yellow Cab Co., 334 F.2d 575 (6th Cir. 1965).

**c. Authority to Effectively Recommend Discipline**

While admitting that the Patrol Sergeant does not have the authority to discipline a patrol officer other than issuing a verbal reprimand, the city argues that the authority to verbally reprimand combined with the ability to recommend discipline is sufficient to bestow supervisor status to Patrol Sergeants.

With respect to the authority to discipline, it is clear at the outset that in the paramilitary structure of a police department, by virtue of their rank, Patrol Sergeants command the respect of subordinate ranks. Thus, while patrol officers are expected to respect the Patrol Sergeant, the power of the Sergeant to enforce his directions is severely limited. The authority of Patrol Sergeants to discipline patrol officers is limited to a verbal reprimand and the factual reporting of misconduct on tickler

cards. The mere authority to issue verbal reprimands of the kind involved here is too minor a disciplinary function to constitute the contemplated statutory authority. Ohio Masonic Home, 131 LRRM 1289, 1506 (19 ). And, while the tickler cards are placed in an employee's personnel file, the record does not establish that these warnings automatically lead to any further discipline or adverse action against the employee. Likewise, the mere issuing of oral reprimands that do not automatically affect job status or tenure do not constitute supervisory authority. See Beverly Manor Convelescent Centers, 119 LRRM 1222 (1985); Heritage Manor Center, 115 LRRM 1336 (1984). For an employee to be a supervisor based on the authority to discipline, he must have more than the power to issue verbal reprimands; more is necessary than the respect commanded by a leadman or straw boss. Sweeney & Co. v. NLRB, 437 F.2d 1127 (5th Cir. 1971); NLRB v. Sayers Printing Co., 453 F.2d 810 (8th Cir. 1971); NLRB v. Magnesium Casting Co., 427 F.2d 114 (1st Cir. 1970). As the NLRB concluded in Passavant Health Center, 125 LRRM 1275, 1278 (1987):

"where oral and written warnings simply bring to the employer's attention substandard performance by employees without recommendations for further discipline, and an admitted statutory supervisor makes an independent evaluation of the employee's job performance, the role of those delivering the warnings is nothing more than a reporting function."

[10] K.S.A. 75-4322(b) provides that where an employee does not have the authority to unilaterally take the delineated actions, he may still qualify as a supervisor if the employee can "effectively to recommend a preponderance of such actions." An

"effective recommendation" is one which under normal policy and circumstances, is made at the chief executive level or below and is adopted by higher authority without independent review or de novo consideration as a matter of course. City of Davenport v. Pub. Emp. Rel. Bd., 264 N.W.2d 307, 321 (IA 1978). A mere showing that recommendations for action were ultimately followed does not make such recommendations "effective" within the meaning of the statute. This is true where the evidence shows that action is taken only after independent investigation by a person of higher authority.

In the instance where a Patrol Sergeant's verbal reprimand goes unheeded, the power to effectively discipline an employee, by discharge, suspension, or some lesser means, is beyond the authority of the Sergeant. Even to the extent that the Patrol Sergeant might be able to "recommend" discipline, the record as to the effectiveness of that "recommendation" is unclear. The Patrol Sergeant can initiate a "write up", which, as distinguished from a managerial prerogative, is a procedure available to all employees of the WPD without respect to rank, and, according to the testimony, the procedure used to resolve such charges would be identical in either case. In no case would suspension or discharge result without an independent investigation of the circumstances by a superior officer or the Internal Affairs Division. Where an admitted statutory supervisor makes an independent evaluation of the employee's job performance, the role of those delivering the warnings is nothing more than a reporting function. Mt. Ary

Psychiatric Center, 106 LRRM 1071 (1981); Geriatrics, Inc., 90 LRRM 1606 (1978); See Western Union Telegraph Co., 101 LRRM 1408 (1979).

Here any disciplinary action other than verbal reprimand must be approved by a command officer above the rank of Patrol Sergeant, and the authority to discharge lies only with the City Manager. This does not constitute the power to discipline or effectively to recommend discipline. NLRB v. Imperial Bedding Co., 519 F.2d 1073 (5th Cir. 1975).

**d. Authority to Effectively Recommend Promotion**

A Patrol Sergeant does not have the authority to promote a patrol officer. Promotional examinations are given pursuant to established civil service procedures. The Patrol Sergeant's involvement in the promotional process is limited to the annual evaluations prepared for each patrol officer on his shift. The evaluations carry no recommendations for specific personnel action.

This evaluation, along with other commendation reports, is one factor considered in making promotion decisions. The evaluations have only a 10% weighing in the overall promotion determination process and usually only effect a promotion decision if the evaluation is very bad or very good and the officer is borderline for promotion. The Patrol Sergeant is not consulted in making the promotion determinations.

Because the civil service procedures occur subsequent to the Patrol Sergeant's evaluation report and constitute the determinative part of the promotion process, and little weight is

given the Sergeant's evaluation, in no sense could the evaluation be considered an "effective recommendation." See e.g. Davenport Community School District, Iowa PERB Case No. 72 (October 30, 1975). The authority simply to evaluate employees without more is insufficient to find supervisory status. Geriatrics, Inc., 90 LRRM 1606 (1978); Texas Institute for Rehabilitation and Research, 94 LRRM 1513 (1977); See Valley Hospital, 90 LRRM 1411 (1975).

### **INTERNAL AFFAIRS SERGEANT**

#### **Statutory Criteria**

As with the Patrol Sergeants, there is no evidence that the Internal Affairs Sergeant has authority to hire or effectively recommend hiring. Again, this is done exclusively through civil service. There is also no evidence that the Internal Affairs Sergeant has the authority to lay off or recall the detective or to effectively recommend such layoff or recall. The Internal Affairs Sergeant does not have the authority to reward the detective. The Internal Affairs Sergeant may recommend another officer for a commendation but there is no evidence as to the effectiveness of such recommendations. The record also shows that any WPD officer can recommend another officer for commendation which receive the same consideration. The Internal Affairs Sergeant also does not have the authority to unilaterally discharge, transfer or promote the detective. The rationale set forth above for rejecting the



City's arguments that the Patrol Sergeants do not have the authority a) to assign or direct; b) to adjust grievances; c) to effectively recommend discipline; and d) to effectively recommend promotion are equally applicable to the Internal Affairs Sergeant.

The record also shows that there are only three employees in the Internal Affairs Division; a Lieutenant, a Sergeant, and a Detective. There is no question that the Lieutenant qualifies as a "supervisor." If the Sergeant was found also to be a supervisor, employee-supervisor ratio would be extremely low; i.e. 2 to 1. To accept the City's proposition that the Internal Affairs Sergeant is a supervisor, the result would be a disproportionate ratio of supervisors to employees. Such a ratio is not only unrealistic but is generally incompatible with finding of supervisor. Tucson Gas & Elect. Co., 100 LRRM 1489, 1496 (1979); Specter Freight System, Inc., 88 LRRM 1442 (1975). Accordingly, the position will not be excluded as "supervisory" pursuant to K.S.A. 75-4322(a)

#### **Conclusion**

The positions of Patrol Sergeant and Internal Affairs Sergeant do not have the authority to hire or effectively recommend hiring; the authority to lay off or recall the detective or to effectively recommend such layoff or recall; to reward or effectively recommend rewards; or to unilaterally discharge, transfer or promote the detective.

As for the authority to assign or direct and to adjust grievances, the Sergeants authority is routine; is incidental to the application of the Sergeant's technical or professional know-how to less skilled employees and does not involve the use of independent judgement as a representative of management in the interest of the City to ascribe supervisory status within the meaning of K.S.A. 75-4322(b). The role played by the Patrol Sergeants and Internal Affairs Sergeant more nearly parallels the function of the leadman in the industrial sector, holding by definition some responsibility beyond that of the rank and file employee, but less authority than that of the true supervisor. Their leadership roles are based upon skill and experience rather than on a need for the Sergeant to be in that position to carry out the City's labor policy.

As for the authority of Patrol Sergeants and the Internal Affairs Sergeant to effectively recommend discipline and promotion, the activities performed are also routine and do not constitute an "effective recommendation" as to be supervisory within the meaning of K.S.A. 75-4322(b)

#### **ACCRETION**

Having determined that the Sergeant position may properly be included in the F.O.P. bargaining unit, and that none of the individual Sergeants can be excluded as "supervisors", the question becomes whether those employees should included without the need

for a representation election to determine the desires of Sergeants to be represented by the F.O.P.

A self determination election is the usual method by which unrepresented employees may be added to a bargaining unit. See Capital Cities Broadcasting Corp., 194 NLRB 1063 (1972). However, unit clarification procedures under the NLRA permit the NLRB to add employees to a particular bargaining unit without an election. When the new employees are added to and co-mingled with existing employees to the extent that they lose their separate identity, their inclusion in the existing bargaining unit follows as a matter of course without first having an election, Westinghouse Elec. Corp. v. NLRB, 76 LRRM 2986, 2989 n.3 (CA2, 1971), and they are governed by the unit's choice of bargaining representative. Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 (CA7, 1982). The added employees are then considered covered by the existing collective bargaining agreement. The theory of unit clarification, insofar as adding positions to the collective bargaining unit, is that the added employees functionally are within the existing bargaining unit but had not formally been included. NLRB v. Magna Corp., 734 F.2d 1057, 1061 (CA5, 1984); Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 755-57 (CA7, 1982); Cutting Die Co., 98 LRRM 1431 (1978); Arthur C. Logan Memorial Hospital, 96 LRRM 1063 (1977); Copperweld Specialty Steel Co., 83 LRRM 1309 (1973).

[11] Under the NLRA, generally, a unit clarification petition is appropriate in the following circumstances: (A) where there is a dispute over the unit placement of employees within a particular job classification; (B) where there has been an "accretion" to the work force; and (C) where a labor organization or employer seeks a reorganization of the existing structure of a bargaining unit. Feerick, Baer & Arfa, NLRB Representation Elections, §6.1, p.180; Cf NLRB v. Magna Corp., 116 LRRM 2950, 2953 (CA5, 1984).

Circumstances "A" and "C" are the easiest to understand and apply. An example of circumstance "A", above, is where a dispute has arisen concerning the unit placement of employees whose job classifications have been renamed, or whose duties and responsibilities have undergone recent substantial changes which create real doubt as to whether their positions continue to fall in a job classification - either included or excluded from the unit - that they occupied in the past. Mass. Teachers Ass'n, 98 LRRM 1431, 1433 (1978). Unit clarification proceedings have also resolved questions relating to changed job responsibilities, but generally the changed job responsibilities related to whether an individual employee's assumption of new responsibilities, for example, supervisory or confidential responsibilities, would require exclusion of that employee from the bargaining unit. Philadelphia Fed. of Teachers v. PLRB, 103 LRRM 2539 (Penn. 1979); Western Colorado Power Co., 77 LRRM 1285 (19 ) [the NLRB, during the term

of an agreement, has clarified a bargaining unit and removed improperly included supervisors]. Finally, where the unit includes individuals whose inclusion is contrary to statute, it is appropriate for the NLRB to clarify the unit to exclude the improperly included individuals. Peerless Publications, 77 LRRM 1262, 1264 (1971).

Circumstance "C", where a labor organization or employer seeks a reorganization of the existing structure of a bargaining unit, is characterized by a sub-group of employees being severed from the bargaining unit to form a new bargaining unit. Before such severance is allowed, determination must first be made as to whether in reality, the petitioning employees, 1) constitute a functionally distinct group, and 2) whether, as a group, they have overriding special interests. Kalamazoo Paper Box Corp., 49 LRRM 1716 (1962). This determination is made on a case-by-case basis.

Most certainly, the majority of the unit clarification petitions filed under PEERA fall within circumstance "B", i.e. where there has been an "accretion" to the work force. To understand circumstance "B" it is necessary to define what is meant by an "accretion."

[12] An "accretion" is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity. Consolidated Papers,

Inc. v. NLRB, 109 LRRM 2815, 2817 (CA7, 1982); See also Universal Security Instruments v. NLRB, 107 LRRM 2518, 2522 (CA4 1981); Renaissance Center Partnership, 100 LRRM 1121, 1122 (1979); Lammert Industries v. NLRB, 98 LRRM 2992, 2994 (CA7, 1978). The policy of the NLRB is to find accretions "only . . . when the additional employees share an overwhelming community of interest with the pre-existing unit to which they are accreted." Giant Eagle Markets Co., 308 NLRB No. 46 (August 11, 1992), and to prohibit accretion of employees to an existing unit unless the employees have little or no separate identity distinct from the bargaining unit. Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1041 n.16 (CA 9, 1978). The NLRB has, therefore, limited the scope of its unit clarification proceedings to something far less than the original determination process. Philadelphia Fed. of Teachers v. PLRB, 103 LRRM 2539 (Penn. 1979). The most common application of the accretion doctrine is where new classifications of employees have been created by a public employer after the original unit determination.

As a general rule, the NLRB and the courts have applied the accretion doctrine restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit. NLRB v. Masters Like Success, Inc., 47 LRRM 2607 (CA2, 1961); NLRB v. Adhesive Products Corp., 46 LRRM 2685 (CA2, 1960); Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 n.4 (CA7, 1982). Accretion petitions are closely

scrutinized because of the danger that employees who have not voted for representation may be "bootstrapped" into the bargaining unit. See Scott County v. PERB, 136 LRRM 2442, 2444 (Minn. 1990).

In determining whether a group of employees represents an accretion to an existing unit the Secretary must consider unique and complex sets of facts in light of the somewhat conflicting policies of stabilizing bargaining relationships while assuring employees the right to choose their own bargaining agents. See NLRB v. Food Employees Council, Inc., 69 LRRM 2077 (CA9, 1968). In this regard, as stated above, it is necessary to determine first the extent to which the employees to be included share a community of interest with existing unit employees, and then whether the employees to be added constitute such an identifiable, distinct segment so as to constitute an appropriate bargaining group. Capital Cities Broadcasting Corp., [1972 CCH NLRB ¶ 23,798] 194 NLRB 1063 (1972).

To determine whether certain employees share a sufficient community of interest to constitute an accretion, the factors used are generally the same as those employed in determining the appropriateness of a proposed bargaining unit in a unit determination proceeding. See Kaynard v. Mego Corp., 105 LRRM 2723, 2726 (CA2, 1990). The NLRB compares the employees to be added to the employees in the existing unit and examines such functions as similarity of working conditions, job classifications, skills and

functions, similarity of job duties, interchangeability of employees, geographic proximity, Lammert Industries v. NLRB, 98 LRRM 2992, 2994 (CA7, 1978); the extent of centralized management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations, Peter Kiewit Sons Co., 96 LRRM 1010 (1977); and the functional integration of the employer, and collective bargaining history, R.L. Sweet Lumber Co., 89 LRRM 2726 (1973). There is no requirement that all of the listed factors be present. To so require, the court concluded in Kaynard v. Mego Corp., 105 LRRM 2717 (E.D.N.Y. 1980), would be to hamstring the NLRB by requiring it to plug each unique case into an artificial test. According to the court, the NLRB has a duty to "unearth the factors relevant to the accretion issue in the case under consideration . . . [and] then decide the relative weight to be attributed to each factor." Id.

If it is determined that there is a community of interest between the new employees and the employees in the bargaining unit, accretion may still be denied. In the words of Judge Goldberg:

"The Board has traditionally been reluctant to find an accretion, even where the resulting unit would be appropriate, in those cases where a smaller unit, consisting solely of the accreted unit, would also be appropriate and the §7 rights of the accreted employees would be better preserved by denying the accretion." Boire v. International Brotherhood of Teamsters, 83 LRRM 2128 (CA5, 1973).

As explained in Melbet Jewelry Co., [1969 CCH NLRB ¶ 21,453], 180 NLRB 107, 110 (1969), the NLRB "will not, under the guise of accretion, compel a group of employees, who may constitute a



separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity to express their preference in a secret election." Towne Ford Sales, 270 NLRB 311 (1984). In this regard, it is necessary to determine whether the Sergeant proposed to be added to the F.O.P. bargaining unit constitute an identifiable, distinct segment so as to comprise an appropriate group. If so, the Sergeants will not be accreted to the existing unit, and a representation election must be sought. See Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1041 n.16 (CA 9, 1978); Giant Eagle Markets Co., 308 NLRB No. 46 (August 11, 1992).

### **Basis for Dismissing Clarification Petition seeking Accretion**

#### **A. Does the Accretion Raise Questions of Representation**

##### **I. Numerically Overshadows**

[13] Even when the group to be accreted has sufficient community of interest with the existing unit and is not an identifiable, distinct segment, there are two circumstances under which the NLRB will not accret the unrepresented employees without giving them a chance to express their representational desires; 1) when the unrepresented group sought to be accreted numerically overshadows the existing unit, Carr-Gottstein Foods, 307 NLRB No. 199 (July 16, 1992); or 2) when the job classifications of the unrepresented group have been historically excluded from the bargaining unit by the parties, Plough, Inc., 83 LRRM 1206 (1973).

As stated in Renaissance Center Partnership, 100 LRRM 1121  
(1979):

"[T]he Board is cautious in making such a finding [of accretion] particularly when the accreted group numerically overshadows the existing certified unit, because it would deprive the larger group of employees of their statutory right to select their own bargaining representative."

The point at which the number of employees sought to be included into an existing unit may trigger a representation election is determined by answering the question, "Does the addition raise a question of representation?". Boston Gas Co., 221 NLRB 628 (1975) [80 new employees added to 184 in existing unit does not raise question]; Scott County v. PERB, 136 LRRM 2442, 2444 (Minn. 1990) [7 new employees to a unit containing 114 would not significantly effect employee organization's majority status].

## **2. Historical Exclusion**

Pursuant to a line of NLRB decisions, a unit clarification petition will not be entertained to clarify the unit placement of job classifications that have been historically excluded from the unit by the parties, and accordingly are dismissed by the NLRB. Plough, Inc., 83 LRRM 1206 (1973); Lufkin Foundry & Machine Co., 70 LRRM 1262 (1969). It is established NLRB policy that a classification of employees will not be found to be an accretion to a certified unit where that classification was in existence at the time of the certification but not included in the unit when the certification was issued, Bendix Corp., 66 LRRM 1332 (19 ); Gould-National Batteries, Inc., 61 LRRM 1436 (19 ), and no recent

changes have occurred to warrant finding the individuals to be accretions to an existing unit. Monongahela Power Co., 81 LRRM 1084, 1084-85 (1972). A petition to include a position historically excluded from a unit is considered to raise a question concerning representation. Monongahela Power Co., 81 LRRM 1084, 1084-85 (1972). As stated in Port of Portland v. Municipal Employees, Local 483, 2 PBC ¶ 20,298 (Oregon App. 1976);

"We therefore conclude that regardless of the label used - a petition for unit clarification or anything else - a previously unrepresented employee in a longstanding job classification cannot be added to an existing bargaining unit without the opportunity to vote."

#### **B. Timing of Clarification Petitions**

It 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. Wallace Murray Corp., 78 LRRM 1046 (1971); Safeway Stores, Inc., 88 LRRM 1596 (1975); Pacific Northwest Bell Tel. Co., 80 LRRM 1296 (1974); Austin Cablevision, 122 LRRM 1084, 1085 (1986)[the NLRB will not clarify a unit defined by contract during the contract's mid-term to include an excluded position in existence before the contract was signed]; International Ass'n of Machinists, 101 LRRM 1978 (1979)[The NLRB dismissed a unit clarification petition that sought inclusion of several job categories created after the effective date of the existing contract]. To allow such mid-term petitions, the NLRB has stated, would be disruptive of continued bargaining relationships.

Two factors in addition to the stability of bargaining relationship seems to support the Wallace-Murray rule. First, the rule prevents non-unit employees from joining an existing bargaining unit *without voting* and prevents their participation in an existing collectively bargained agreement *without bargaining*. NLRB v. Mississippi Power & Light, 120 LRRM 2302, 2304-05 (1985). Thus it protects employee freedom of choice by preventing the imposition of a representative upon them, and it also protects the employer by preventing the inclusion of additional employees within the terms of a bargaining agreement without bargaining.

The NLRB's consistent procedure in such cases, therefore, has been to dismiss the unit clarification petition without prejudice to the filing of another petition "*at an appropriate time*." Wallace Murray Corp., 78 LRRM 1046 (1971). Ordinarily, "*an appropriate time*" is shortly before expiration of the current collective bargaining agreement.<sup>9</sup> Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 (CA7, 1982); Shop Rite Foods, 103 LRRM 1223, 1224 (1980); Peerless Publications, 77 LRRM 1262, 1264 (1971).

The Wallace-Murray rule thus deals only with the timeliness of the unit clarification petition by expressing a policy of deferring, during the term of the contract, to the previously

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<sup>9</sup> In this manner the parties are put on notice that the unit composition is being questioned, and that the matter will be resolved by means of the statutory process. The parties can plan accordingly for the upcoming negotiations. See Fire Fighters, Local 1054 v. PERC, 110 LRRM 2306, 2308 (Wash. 1981). For ease of administration, this time period under PEERA should coincide with the window period set forth in K.S.A. 75-4327(d) - filed no more than 150 days or less than 90 days prior to expiration date of agreement.

determined appropriate unit description.<sup>10</sup> Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2818 (CA7, 1982). Whether the rule applies to a given case has nothing to do with the appropriateness of the bargaining unit, Consolidated Papers, 109 LRRM at 2818, and an employer is not able to escape forever a finding of accretion. As explained by the court in Consolidated Papers:

"The effect of Wallace-Murray is to leave the party seeking to include a group of employees in the unit with two options: (1) to await the expiration of the current collective bargaining agreement and file another unit clarification petition with the Board, or (2) to seek an immediate self-determination election among the employees sought to be included."

By application of the Wallace-Murray rule, a contract during its term bars the non-elected addition of employees to the bargaining unit. It does not, however, bar an elected addition. Indeed, a contrary rule might be inconsistent with PEERA, in that some employees would be deprived of their right to representation pursuant to K.S.A. 75-4324 for as much as three years simply because other employees had entered into a memorandum of agreement not benefitting the unrepresented employees. See NLRB v. Mississippi Power & Light, 120 LRRM 2302, 2305-06 (1985).

The NLRB has consistently held that representation elections are the proper procedure to follow when unit clarification is inappropriate. Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 (CA7, 1982). See Copperweld Specialty Steel Co., 83 LRRM 1309

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<sup>10</sup> The caveat remains that the memorandum of agreement must clearly define the unit. Whether the unit is clearly defined is an issue which may be raised by a unit clarification petition. Only if the job position is clearly included or excluded from the unit by the description in the memorandum of agreement will the Wallace Murray rule be applied.

(1973) [holding representation election rather than unit clarification as to existing positions not previously included in bargaining unit]; Remington Rand Division of Sperry Rand Corp., 77 LRRM 1240 (1971); W. Wilson, Labor Law Handbook, ¶231 (1963). Even where a bargaining unit is being "clarified" to add only one employee, it has been concluded that meaningful freedom of choice can only be protected through an election process. Cf. Linden Lumber Division v. NLRB, 419 U.S. 301 (1974); Port of Portland v. Municipal Employees, Local 483, 2 PBC ¶ 20,298 (Oregon App. 1976). This type of election is referred to, in the private sector, as an Armour-Globe election, and it differs fundamentally from a representation election.

The purpose of representation or certification election is to determine which employee organization, if any, shall be certified to represent the employees in an predetermined appropriate unit. In a pure Armour-Globe election, on the other hand, the question of which employee organization will be the certified representative in the preexisting unit has already been determined - it will always be the incumbent organization - and the only purpose of the election is to determine whether a group of unrepresented employees desires to share in the representation provided by that incumbent employee organization. See NLRB Field Manual, §11090.2c(1). Accordingly, when a majority of the voting employees vote in favor

of such representation, a Certification of Results rather than a Certification of Representation is issued.

[14] Stated another way, in an Armour-Globe election, the issue at stake is not who the employee representative shall be, but precisely who shall be represented. Federal-Mogul Corp., 85 LRRM 1353, 1355 (1974). The ballot used, as well as the Notice of Election, clearly states that a vote for the employee organization indicates that the employee desires to be represented as part of the existing unit. Carr-Gottstein Foods, 307 NLRB No. 199 n.3 (July 16, 1992).

#### **Coverage of New Employees by Existing Agreement**

Following proper expansion of a bargaining unit to add previously unrepresented employees, the question may arise whether the existing bargaining agreement applies to the new members of the bargaining unit, or whether it is necessary to bargain over the terms and conditions of the new member's employment. The existing agreement between the employer and the existing bargaining unit cannot be applied to the new members, and it is necessary to negotiate about this position. This is in accord with federal labor law. Federal-Mogul Corp. Bower Roller Bearing Div., [1974 CCH NLRB ¶ 26,281] 209 NLRB 343 (1974). As the NLRB reasoned in Federal-Mogul Corp., 85 LRRM 1353, 1354 (1974):

"That would create the only situation in law known to us in which individuals theretofore not a party to an agreement could, by their own unilateral action, vote themselves a share of the bargain which the other parties had agreed to between and for themselves."

Given the above-described differences between a regular unit certification election and an Armour-Globe style election, it must be recognized that different bargaining obligations flow therefrom. Following a regular certification election in which the employee organization is victorious, a certification of representation is issued and the public employer is thereafter obligated to bargain with that representative in a good-faith effort to reach a collective bargaining agreement covering the unit employees.

Following an Armour-Globe style election in which the unrepresented employees vote to join the preexisting unit, the parties have already discharged their duty to bargain, at least with regard to contract provisions which are unit-wide in scope and which therefore apply equally to all unit members. With respect to such provisions, the incumbent employee organization and the public employee have already bargained in good faith, have already agreed to specific terms, and have already incorporated those terms into an executed memorandum of agreement covering each and every employee in the unit. In short, in regard to these provisions, no duty to bargain remains at the time of the election.

[15] The public employer cannot unilaterally extend the terms of an existing contract to job classifications added to the bargaining unit during the term of the contract. Instead, the terms and conditions of the new bargaining unit members' employment must be negotiated. And until negotiations are concluded, the



terms and conditions enjoyed by the employees in question when they were unrepresented apply. Port of Portland v. Municipal Employees, Local 483, 2 PBC ¶ 20,298 (Oregon App. 1976).

[16] Following the election to include additional employees in a bargaining unit covered by an existing memorandum of agreement, the public employer becomes obligated to engage in good faith bargaining as to the appropriate terms and conditions of employment to be applied to this new group of employees. Thus, in such situations, the new employees added to the existing bargaining unit are treated as a separate unit for the period of time until the expiration of the existing memorandum of agreement, and thereafter as a part of the existing bargaining unit. See Federal-Mogul Corp., 85 LRRM 1353, (1974). As the NLRB explained in Federal-Mogul:

"We do not perceive either legal or practical justification for permitting either party to escape its normal bargaining obligation upon the theory that this newly added group must somehow be automatically bound to terms of a contract which, by its very terms, excluded them. Such a determination would appear to be at odds with the Supreme Court's holding in H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970). In H.K. Porter, the Supreme Court noted that "while the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision or a collective-bargaining agreement. Were the Board to require unilateral application of the existing contract to the setup men we would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the H.K. Porter doctrine. We understand the teaching of that case to be that we have no statutory authority here to force on these employees and their Union, as well as the Employer, contractual responsibilities which neither party has ever had the opportunity to negotiate.

"Our decision promotes bargaining stability, since a major consequence of the opposite view would be that in contract negotiations both parties would be held to be making agreements for groups of persons whose identity and number would be totally unknown to, and unpredictable by, either party. Costs of wages and benefits under negotiation would thus become equally unpredictable, and

informal negotiations of such benefits as health and pension plans would become well-nigh impossible. The unpredictable scope of the number, age groups, and other factors of coverage which are essential to develop cost data as to such items would leave negotiators in the dark as to how to make any reliable estimates of future costs. Bargaining under such conditions would be seriously handicapped. "

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". . . [W]hen it comes time to negotiate a new contract, the union and the Employer must bargain for a single contract to cover the entire unit, including the setup men. In the meantime, the Union must, of course, fairly represent all employees in the unit, including both setup men and those previously included in the unit. But we fail to perceive anything divisive, or even unusual, about requiring interim bargaining for this new group. If an agreement is reached it will in all likelihood be an addendum to the existing production and maintenance contract. Insofar as it may contain terms peculiarly applicable to setup men, that seems to us a practical, acceptable and not a divisive result. Single contracts often have separate or special provisions for separate classifications, departments, or shifts, depending upon the extent to which the bargaining has developed agreement upon whether all-inclusive provisions are adequate - or inadequate - to deal with the problems of each such group. We believe this is what is needed to be bargained here, and that such bargaining is to be preferred, both legally and practically, over automatically fitting the new group, sans bargaining, into a fixed mold no matter how badly that mold may fit either the employees' or the employer's circumstances, needs and desires at the time." Id. at 1354-55.

[17] In summary, the test for determining whether a job classification can be accreted to an existing bargaining unit without need for an election, and be covered by an existing memorandum of agreement without need for new negotiations, is as follows:

- 1). Has the petition or request been timely filed?
- 2). Do the job classifications share a community of interest with the employees in the existing bargaining unit?
- 3). Do the job classifications constitute an identifiable, distinct segment of employees so as to constitute a separate appropriate bargaining unit?
- 4). Does the number of employees in the job classifications to be added when compared to the number of employees presently in the existing bargaining unit raise a question of representation? and

- 5). Have the job classifications been historically excluded from the bargaining unit?

If the classifications fail the test, accretion is not appropriate, and the employee organization seeking the unit clarification must petition the Public Employee Relations Board for an election and submit the requisite thirty percent showing of interest.

In the instant case, the petition was timely filed because the memorandum of agreement between the City and the FOP had expired and no new agreement had been ratified at the time the unit clarification and amendment petition had been filed. As concluded above, the Sergeant position has a sufficient community of interest with the members of the FOP bargaining unit to be included in the unit. The Sergeant position does not constitute an identifiable, distinct segment of employees so as to constitute a separate appropriate bargaining unit. The relatively few employees in the position of Sergeant proposed to be added to the FOP bargaining unit, when compared to the large number of employees presently in that bargaining unit does not raise a question of representation. Finally, since the position of Sergeant was just recently created, and there is no evidence in the record that the position was in existence at the time the FOP bargaining unit was established, it historically has not been excluded from the bargaining unit. Accordingly, the position by be accreted into the bargaining unit without an election, and shall be covered by the existing memorandum of agreement.

*ISSUE 2*

**WHETHER THE POSITION OF BAT VAN OPERATOR SHOULD BE EXCLUDED FROM THE BARGAINING UNIT REPRESENTED BY THE FRATERNAL ORDER OF POLICE PURSUANT TO K.S.A. 75-5327(e), i.e. LACK OF COMMUNITY OF INTEREST.**

The F.O.P. seeks to have the existing bargaining unit amended to add the position of BAT Van Operator. "BAT" stands for Breath Alcohol Testing. BAT Van Operators are support people for the patrol officer positions, but are not certified nor commissioned as a law enforcement officer. When the Patrol officer stops a driver for suspicion of being under the influence of alcohol or drugs, they call for the BAT van. The BAT Van Operator administers the breathalyzer test, and will, where appropriate, transfer the suspect to the Sedgwick County jail for booking. When not responding to DUI calls, BAT Van Operators also used their vehicles as a paddy wagon to transport unruly prisoners, who may damage a patrol car or injure a patrol officer.

The BAT Van Operator position is officially designated a Service Officer I(B), and are in the Traffic Division with police officers, traffic safety officers, and parking control checkers. The above duties of the BAT Van Operators have not changed since the position was created six or seven years ago. There are approximately eight BAT Van Operators. The position of BAT Van Operator is presently in a bargaining unit represented by the Service Employees Union.

Uniform Police Employee Requirement

[18] K.S.A. 75-4327(f) provides, in pertinent part, that "a recognized employee organization shall not include: (1) . . . ; (2) uniform police employees and public property security guards with any other public employees, but such employees may form their own separate homogeneous units; . . ." There is no statutory definition of "uniform police employee." Because the statute does not provide a definition, the task of ascribing meaning to the term falls to the PERB. Unaided by any specific explanation or definition of uniform police employee in the legislative history or the statute, one must turn to the "most universal and effectual way of discovering the true meaning of a law, when the words are dubious," which is, "by considering the reason and spirit of it; or the cause which moved the legislator to enact it."<sup>11</sup> 1 Blackstone Commentaries 61 (Lewis ed. 1922); McCaffrey, Statutory Construction, Sec. 5, p. 13 (1953).

Ayres and Wheelen, Collective bargaining in the Public Sector, (1977), p.95, provides the rationale behind prohibiting police from joining an employee organization that admits nonpolice to membership. Police administrators, concerned with the growth of organized labor, questioned whether an officer could remain neutral when he belongs to a police union. Policeman, the administrators

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<sup>11</sup> Examination of analogous legislation of other jurisdictions and their judicial interpretations is appropriate in construing the statutory language. See 3 Sutherland, Statutory Construction, (3d ed. 1943), Sec. 5902, p. 129; 50 Am.Jur., Statutes, Sec. 323, p. 315 (1944).

argued, serves the public first and his own welfare second. Having this unique role in society, his primary obligation is to the public. When the policeman holds membership in a police union, he owes an allegiance to that organization also. Should a conflict in the dual allegiances arise, argues the police administrators, the temptation to place union loyalties above law enforcement duties must be considered. The Legislature presumably wanted only uniform police employees in a bargaining unit because to mix uniform police employees and non-police employees would inhibit the discipline and strict impartiality demanded of law enforcement personnel. The Legislature may well have believed that such commingling of employees might reasonably cause friction and dissention within the police force and create prejudice and favoritism in the enforcement of the laws. See King v. Priest, 206 S.W.2d 547, 555 (Mo. 1947).

An oft-cited example of divided loyalties is where a union police officer is called upon to break up a demonstration involving fellow union members that has become violent. If the police officer takes enforcement action against the demonstrator, the officer may incur the displeasure of the union, but if he fails to act, he has abdicated his sworn duties as a police officer.

The correctness of this rationale was recognized by the court in Gloucester City v. PERC, 107 N.J. Super. 150, 157 (N.J. 1970):

"[W]e think it to be apparent that the Legislature was seriously concerned with preventing law enforcement officers authorized to make detections, apprehensions and arrests from joining an employees' union which might place them in a conflicting position and create circumstances for possible divided loyalty or split

allegiance. Compare the analogous policy fostered by 29 U.S.C. Sec.159(b), which precludes guards from joining a labor union if that organization includes member employees other than guards. National Labor Relations Bd. v. American Dist. Tel. Co., 205 F.2d 86, 89 (3rd Cir. 1953)."

This legislative purpose can best be effectuated if the exclusion provision is interpreted to encompass those persons engaged in law enforcement who, regardless of job title, perform duties and functions substantially comparable to those performed by police officers. The key here is obviously the power of the police officer to make arrests. The legislature apparently did not want those employees in a bargaining unit with employees that did not possess that power. This same conclusion was reached by the Wisconsin Employment Relations Commission. The commission concluded that it is inappropriate to include employees who do not possess the power to arrest in a bargaining unit of law enforcement personnel. Marinette County, Dec. No. 22102-D (WERC 7/87).

"Those employees who possess the power to arrest play a critical role in maintaining the public peace . . . . On the other hand, employees in law enforcement departments who do not possess the power of arrest do not play the same critical role in maintaining the public peace. . . . . To combine law enforcement personnel with non-law enforcement personnel would create an untenable situation . . . ."

[19] Accordingly, the term "uniform police employee" should be read to include only those employees of an organized civil force for maintaining public order, preventing and detecting crime and enforcing the laws. See Burke v. State, 47 S.E.2d 116, 126 (Ga. 1948). Interpreting the statute in this manner is consistent with the generally recognized definition of "police." See Wyndham v.

United States, 197 F.Supp. 856 (1961); Police Pension Board of the City of Phoenix, 398 P.2d 892 (Ariz. 1985); Burke v. State, 43 S.E.2d 116, 126 (Ga. 1948); Texeno v. Maryland Casualty Co., 166 So.2d 351 (La. 1964); Jackson County v. Board of Mediation, 121 LRRM 3229, 3231 (Mo. 1986); Black's Law Dictionary, (4th rev. ed. 1968); Fraxier v. Elmore, 173 S.W.2d 563, 565 (Tenn. 19 ) (Commonly refers to and describes those whose duty it is to preserve the peace as peace officers or law enforcement officers); Police Pension Bd. of City of Phoenix v. Warren, 398 P.2d 892, 895 (Ariz. 19 ) (The word applies particularly to those who are appointed for purpose of maintenance of public tranquility among citizens); Human Relations Comm. v. Beaver Falls City Council, 366 A.2d 911, 914 (19 ) (Term "policeman" means one who performs services critical to public safety in the investigation and detection of serious crimes thereby encompassing persons trained, equipped and actually engaged in the detection of persons suspected of crime); Baer v. Civilian Personnel Div., 647 S.W.2d 159 (Mo. 1960) (Civilian employees of metropolitan police department are not "police" within meaning of labor relations statute).

The record clearly demonstrates that BAT Van Operators, while working in a support position with patrol officers, do not have the authority to arrest. The record is also void of evidence that the BAT Van Operators have been, or would be used, to maintain order, prevent and detect crime, or enforce laws. Consequently, for purposes of unit determination, the BAT Van Operator is not a



"uniform police employee" as that term is used in K.S.A. 75-4327(f), and cannot be included in the F.O.P. bargaining unit composed of patrol officers. The F.O.P.'s petition must be dismissed.

### ***Appropriate Unit***

[20] Even if it were determined that the BAT Van Operator is a "uniform police employee", the record does not support the conclusion that the position should be included in the F.O.P. bargaining unit. As concluded in KAPE v. Department of Administration (Physical & Natural Science), et al., Case No. 75-UCA-2-1990, p. 14 (Aug. 31, 1990):

"It should be noted K.S.A. 75-4327(c) speaks only to the designation by the Board of an "appropriate unit." The statutory language does not require the Board define the only appropriate unit or the most appropriate unit. PEERA requires only that the unit be "appropriate." Such is the standard to be applied in the initial determination of an "appropriate" employee unit.

"However, once a determination has been made and an employee unit established by order of the Board, a petition seeking to amend the unit by adding or removing classifications has the burden of proof to establish the proposed unit is "more appropriate" than the existing unit. This is especially true once an exclusive employee representative has been certified for the unit."

This is done because of the concern regarding the stability of all the bargaining units across the state which had been defined pursuant to the unit determination process.

Where the record does not contain evidence that the job functions or duties of the employees at issue had changed subsequent to the determination of the bargaining unit, the petition must be dismissed. See City of Marshalltown, Iowa and Local 715 I.A.F.F., Iowa PERB Case No. 826 (October 22, 1976).

Here it was conceded that the duties of the BAT Van Operators have not changed since the position was created six or seven years ago. Additionally, the evidence produced by the F.O.P. does not establish the proposed unit is "more appropriate" than the existing unit. Consequently, the F.O.P. petition must be dismissed.

**ORDER**

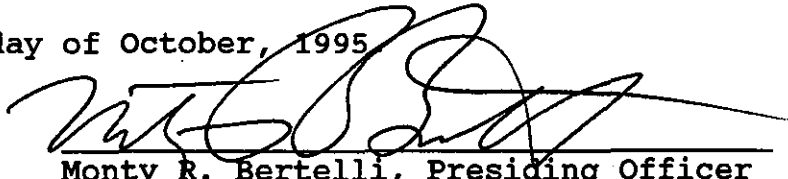
**IT IS THEREFORE ADJUDGED**, that the position of Sergeant has a community of interest with the employees in the bargaining unit represented by the Fraternal Order of Police, and is not a "*supervisory employee*" pursuant to K.S.A. 75-4322(b).

**IT IS FURTHER ADJUDGED**, that the position of BAT Van Operator does not have sufficient community of interest with the employees in the bargaining unit represented by the Fraternal Order of Police

**IT IS THEREFORE ORDERED**, that the bargaining unit represented by the Fraternal Order of Police be amended to include the position of Sergeant, and none of the police officers in the position of Sergeant is to be excluded from the unit as a "*supervisory employee.*"

**IT IS FURTHER ORDERED**, that the Fraternal Order of Police's petition seeking to include the position of BAT Van Operator be dismissed for lack of community of interest.

Dated this 27th day of October, 1995



Monty R. Bertelli, Presiding Officer  
Labor Conciliator III  
Employment Standards & Labor Relations  
1430 Topeka Blvd.  
Topeka, Kansas 66612  
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 its 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 November 14, 1995 addressed to: Public Employee Relations Board, Employment Standards and Labor Relations, 1430 Topeka Blvd., Topeka, Kansas 66612.

### CERTIFICATE OF SERVICE

I, Monty R. Bertelli, Labor Conciliator III for the Kansas Department of Human Resources, hereby certifies that on the 1st day of October, 1995, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action through 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: Carl L. Wagner,  
Office of the City Attorney, 13th Flr.  
City of Wichita, Kansas  
455 North Main  
Wichita, Kansas 67202

RESPONDENT: Steve A.J. Bukaty, attorney  
Blake & Uhlig, P.A.  
475 New Brotherhood Bldg.  
753 State Avenue  
Kansas City, Kansas 66101

And to the members of the Public Employee Relations Board on October 30, 1995.

