BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Fort Hays State University Chapter of the American Association of University Professors, Petitioner v. Fort Hays State University, Respondent	)	Case No: 75-UCA-2-2005

ORDER CLARIFYING OR AMENDING BARGAINING UNIT AND DIRECTING SELF-DETERMINATION ELECTION

NOW on this 26th day of July, 2007, the above captioned matter came on for decision pursuant to K.S.A. 75-4321 *et seq.* and K.S.A. 77-514(a) before presiding officer Douglas A. Hager.

APPEARANCES

Petitioner Fort Hays State University Chapter of the American Association of University Professors appeared through counsel, Lawrence G. Rebman, Attorney at Law. Respondent, Fort Hays State University, appeared through its attorney, Mr. Todd D. Powell, General Counsel.

PROCEEDINGS

This matter comes before the Board as the latest in a long series of disputes between these parties.[1] This particular dispute was submitted pursuant to a Unit

[1]The parties' first appearance before PERB was the 1999 FHSU faculty bargaining unit determination, representation election and certification case, no. 75-UDC-1-1999. At the time of election, the parties had agreed to the bargaining unit description being challenged in this clari-

Clarification or Amendment petition filed by Petitioner Fort Hays State University Chapter of the American Association of University Professors, (hereinafter "Petitioner"

---

fication proceeding. After a close election in which AAUP won representative status by 79 votes in favor to 72 votes for "no representative", FHSU attempted to challenge the election results by two means. First, FHSU argued that only its pre-election challenges to voters could be heard and determined by PERB, and not the pre-election challenges filed by AAUP. Second, FHSU attempted to prevent the casting of a ballot by a Professor Ison, alleging his vote was untimely. These issues were ultimately resolved by agreement of the parties after a procedural ruling by this presiding officer. The ruling provided for a hearing to determine whether the election officer's decision disallowing the casting of Ison's ballot as untimely was proper. The ruling also directed further proceedings to determine the propriety of counting, or not counting, each of the votes that had been challenged by the parties pre-election. Based on these rulings, the challenged votes were too few in number to alter the election outcome and the matter was subsequently resolved by agreement of the parties. This initial skirmish, however, was quickly followed by numerous other disputes. In the brief period since the said 1999 election case, more than 20 cases have been filed with PERB involving one or both of these parties. These cases warrant additional mention as this will further the reader's understanding of the history of labor relations on Respondent's campus. These cases will be described in more detail later in this decision, as appropriate. Contrary to Respondent's assertions, *see* FHSU Counsel's Letters to the Presiding Officer dated November 1, 2005 and November 15, 2005, the familiarity of this presiding officer with FHSU's history of labor-management relations does not constitute bias against, or partiality toward, either party such as would taint my ability to fairly consider the issues of fact or law in this case or otherwise warrant recusal. *See generally*, 2 Am.Jur.2d, Administrative Law, § 386, pp. 192-194. *See also, City of Merriam v. Board of Zoning Appeals of City of Merriam*, 242 Kan. 532, 542-543 (1988)("it may be proper and in accord with due process for [an administrative board] to rely upon facts within its own knowledge if these facts are set forth for the purpose of judicial review"). Further, an administrative agency empowered to determine whether statutory rights have been violated may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. *Republic Aviation Corp. v. N.L.R.B.*, 324 US 793, 800 (1944). In *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1953), the Court stated:

> "An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. (citations omitted). In these cases we but restate a rule familiar to the law and followed by all fact-finding tribunals - that it is permissible to draw on experience in factual inquiries." *Id.* at 48-49.

A fact-finding body must have some power to decide which inferences to draw and which to reject. *Radio Officers', supra* at 50. The presiding officer would add that, in his opinion, it is permissible in making factual inquiries, to draw on his extensive experience regarding the labor relations between these two parties.

or "FHSU-AAUP"). *See* Petition for Unit Clarification or Amendment, 75-UCA-2-2005, filed December 28, 2004.[2] In its post-hearing brief, FHSU-AAUP maintains that the administration at Fort Hays State University, (hereinafter "FHSU" or "Respondent"), "has been systematically defining faculty out of the bargaining unit in an effort to prevent membership and deny professors on phased retirement or terminal contracts their rights under [the] Public Employer-Employee Relations Act". *See* Petitioner's Brief, 75-UCA-2-2005, p. 1. Petitioner also seeks to expand the bargaining unit. "The AAUP believes that all full time teaching faculty at FHSU should be included in the Bargaining Unit." *Id.*

After an initial exchange of position information between the parties and other preliminary proceedings designed to assist the parties in developing and refining their respective contentions of fact and law,[3] an evidentiary hearing was conducted by this

[2]The instant unit clarification or amendment petition, filed in 2004, is actually the second unit clarification or amendment petition filed with regard to this unit. The earlier petition, PERB case number 75-UCA-1-2001, was filed by the AAUP on May 29, 2001. The petition sought clarification or amendment of the unit, alleging that certain positions in the unit had supervisory status with regard to other unit positions. Before the matter came on for hearing, however, it was withdrawn by Petitioner.

[3]Preliminary proceedings included a Motion to Dismiss, a Motion for Summary Judgment, and a Motion for Continuance filed by Respondent. The Motion for Continuance was based upon a related case, No. 75-UDE-1-2002. That matter was a unit representative decertification case and as of this writing, Respondent's Motion for Continuance is moot because the unit decertification case was dismissed on April 25, 2006 due to its withdrawal by the petitioning party, Professor Dianna Koerner. (While the unit decertification petition was filed by both Professor Koerner and a Professor Christopher Crawford, the latter withdrew from the petition by reason of his promotion to a management position at FHSU, and his concurrent removal from the bargaining unit.) Respondent also conceded at the time of hearing that its Motion for Continuance was moot, but for other reasons. *See* Tr., pp. 19-20. Of the remaining two motions, both were taken under advisement and this matter came on for hearing in early 2006. *Id.* With regard to Respondent's Motion to Dismiss, Respondent asserted that this matter should be dismissed because the temporary employees sought to be added to this bargaining unit do not share a sufficient community of interest with full-time non-temporary faculty. Further, Respondent urged that where the record does not contain evidence that the job functions or duties of the employees at issue had changed subsequent to determination of the unit, the petition must be dismissed.

presiding officer. Thereafter, each of the parties submitted a post-hearing brief and Petitioner then filed a reply brief. The matter is fully submitted and this writing constitutes the presiding officer's administrative determination. Due to the resolution of certain issues by this determination, this order is not appropriately characterized as an Initial Order pursuant to the Kansas Administrative Procedures Act, K.S.A. 77-501 *et seq.*, and

---

Respondent also argued in the alternative that if PERB did not dismiss the petition, it must at the least require an election of those positions proposed to be added to the unit to determine whether they wish to be included in the unit. *See* Answer to the Petition for Clarification or Amendment of Appropriate Unit and Motion to Dismiss, pp. 2-7. Respondent's latter-most contention will be addressed later in this order. Respondent's Motion for Summary Judgment reiterated much of its contentions from its Motion to Dismiss. In addition, however, Respondent's Motion for Summary Judgment alleged that Petitioner failed to set forth any facts in support of its claim for relief. Respondent set forth the familiar standard for considering its motion, that summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the Movant was entitled to judgment as a matter of law. Although Respondent's Motion for Summary Judgment presented a closer question, due largely to Petitioner's failure to articulate its answers to Respondent's Interrogatories in greater detail, the presiding officer finds that when viewed in their entirety, Petitioner's pleadings, coupled with responses to discovery, demonstrate the existence of genuine issues of material fact such that the motion must be denied. In particular, the responses of Petitioner to Interrogatory Nos. 3, 6 and 9 are sufficient to raise issues of material fact precluding summary judgment. Of note is Petitioner's response to Respondent's Interrogatory No. 9. In its response to Respondent's query, "provide a specific description of the relief requested", Petitioner reveals that it was seeking to stop the removal of tenured faculty from the bargaining unit. As the presiding officer is aware from cases heard involving FHSU, particularly that of Professor Robert Dolan, discussed *infra*, Respondent has asserted that once its decision is made not to renew the contract of a tenure-track faculty member, and that unit member is given a terminal contract, he or she is no longer eligible for the statutory rights of unit representation available under K.S.A. 75-4324. *See* Tr., pp. 327-333. Respondent asserts that this result follows from non-renewal because the faculty member on terminal contract is no longer a "non-temporary" employee and therefore is not within the description of positions included in the bargaining unit. Employer's responses to Petitioner's First Interrogatories, Nos. 6 and 7, relate also to this issue and given the familiarity of this tribunal with the labor relations practices and history of the University, Respondent's motion for summary judgment must be denied. There are genuine issues of material fact for consideration in this matter and Respondent is not entitled to summary judgment as a matter of law, with regard to clarification, nor with regard to amendment, of the FHSU faculty bargaining unit description. Respondent's Motion for Summary Judgment is therefore denied. With regard to Respondent's Motion to Dismiss, same is denied. The question whether there is a sufficient community of interest between any employees sought to be added to the existing unit and those already in it is a mixed question of fact and law for determination herein. In addition, there exists a question of fact regarding whether circumstances regarding faculty positions on Respondent's campus have changed since the initial determination. As such, Respondent's motion to dismiss is denied.

the presiding officer will retain jurisdiction of the case until such time as a self-determination election is held and results thereof can be certified. At that point a certification of election results will be issued in initial order format and this entire matter, including the determinations made in this order, would then be subject to agency-head review.[4] *See* K.S.A. 77-526.

ISSUES OF LAW

There are five primary legal issues to resolve in this matter: first, whether the Fort Hays State University faculty bargaining unit, as defined, excludes from its membership and benefits those faculty members that are in phased retirement? Second, whether the Fort Hays State University faculty bargaining unit, as defined, excludes from its membership and benefits faculty members who have been placed on a terminal contract? Third, whether the description of the FHSU faculty bargaining unit should be amended to eliminate the modifying term "non-temporary" from the statement circumscribing those faculty members included in the unit, or otherwise revised? Fourth, whether the description of the FHSU faculty bargaining unit should be amended to exclude the positions of Curator and Academic Director, for their alleged supervisory status, and to exclude the position of Program Specialists, for its alleged lack of a sufficient community of interest with other bargaining unit members? Fifth, whether the

[4]This procedure will promote both administrative and judicial economy. Holding the self-determination election before the rulings made in this order are subject to agency-head, and judicial, review will further clarify and refine the issues actually in dispute in this matter. For example, should a majority of the eligible voting employees identified in this order vote not to be added to the existing unit, the conclusion reached herein that they are an appropriate addition to the unit would be moot. Thus, a self-determination election should precede agency-head review of this order.

definition of the FHSU faculty bargaining unit should be amended to include full-time adjunct faculty? Subsumed within these issues are a host of subsidiary issues, primary among them whether the new unit description as proposed is comprised of individuals sharing a sufficient community of interest, such that the unit as proposed is an appropriate one, whether the unit proposed is "more appropriate" than that existing and, whether it is necessary to hold a self-determination election with respect to any of the positions proposed to be amended into the bargaining unit? In addition, the presiding officer will examine and determine whether application of PERB policy favoring inclusion in the bargaining unit of all "regular part-time" faculty members would be an appropriate exercise of the PERB's discretion?

FINDINGS OF FACT[5]

1. Respondent is a public employer within the meaning of the PEERA. Petitioner is the statutory certified bargaining representative for the faculty bargaining unit at FHSU.

2. The Public Employee Relations Board issued a unit determination order on April 12, 1999, defining the faculty bargaining unit at Fort Hays State University pursuant to "mutual agreement of the parties". Respondent's Exhibit A.

3. The unit as defined by "mutual agreement of the parties" in the 1999 unit determination order was as follows:

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

> "Include: All full-time non-temporary university employees who have appointments as Professor, Associate Professor, Assistant Professor, Instructor, Program Specialist, Research Scientist, Curator, Lecturer, Librarian and Academic Director.
>
> Exclude: All persons who have appointments as: President, Provost, Vice Provost, Vice President, Associate Vice President, Assistant Vice President, Dean, Associate Dean, Assistant Dean, Department Chair, Director of the Library, Assistant Director of the Library, and Head Reference Librarian. Further exclude Program Specialists and Academic Directors with assigned unit supervisory duties. Exclude all other persons with temporary or part-time [contracts], full-time administrative contracts, persons who are confidential employees or whom are members of the classified service of the State of Kansas."

Respondent's Exhibit A. The "agreed" unit description included the position of "Instructor". *Id.* The term "Instructor" typically denotes a member of faculty who lacks a terminal degree in their field, thus being ineligible for tenure.[6] *See, e.g.*, Transcript (Tr.), p. 115 (noting that many "temporary" faculty do not have their terminal degree); Tr., p. 203-204 (noting that "temporary" faculty are almost always "Instructors", but sometimes are titled as "Assistant Professors"). The classification of "Instructor" would

[6] Whether lack of a terminal degree in their field renders a faculty member at FHSU ineligible for tenure was the subject of considerable dispute during the hearing of this matter, with the Employer taking the affirmative position in this debate. *See, e.g.*, Tr., pp. 277-278 (Respondent's President Dr. Edward Hammond testifying that a terminal degree is required for tenure, although acknowledging at Tr., p. 294 that "[i]t's generally the case" that to be on tenure track one needs the terminal degree). Petitioner argues that a terminal degree is not a requirement for tenure, or at least that this "requirement" is not uniformly applied. *See, e.g.*, Tr., pp. 242-243 (Petitioner's past-President, Dr. Keith Campbell, testifying that the current chair of the department in which he teaches, Sociology, is tenured but does not have the terminal degree in Sociology); Tr., pp. 111-115 (Respondent's President Dr. Richard Hughen testifying that a terminal degree is not required for tenure). Dr. Hammond acknowledged that the Sociology Department chair does not have a terminal degree in that academic field, but noted that "her tenure status was determined before" he became FHSU's President. Tr., p. 295. The presiding officer infers that Petitioner's quest for unit membership for the so-called temporary, or non-tenured, faculty is motivated, at least in part, by a desire to improve their terms and conditions of employment, including issues such as eligibility for tenure, grievance procedures, advancement and promotion, pay, notification of non-renewal and like concerns.

not have been included in the unit description by agreement of the parties if it was the parties' mutual intent to limit unit membership only to tenured and tenure-track faculty.

4. In general terms, the unit clarification petition filed in this matter, Petitioner's Exhibit 1, seeks to clarify or amend the unit description so as to include all full-time teaching faculty in the University's faculty bargaining unit. Tr., p. 97.

5. This unit clarification petition seeks to revise the unit's description to the following language:

> "Include: All full-time Fort Hays State University faculty members who hold academic rank as Instructor, Lecturer, Assistant Professor, Associate Professor or Professor, or Full-Time Adjunct Professor. Also included are employees who hold rank as Librarian or Research Scientist.
>
> Exclude: All employees who have appointments as: President, Provost, Vice Provost, Vice President, Associate Vice President, Assistant Vice President, Dean, Associate Dean, Assistant Dean, Department Chair, Curator, Academic Director, Program Specialists, Director of the Library, Assistant Director of the Library, and Head Reference Librarian and other employees with assigned unit supervisory duties. Also exclude Visiting Faculty, persons who are confidential employees, and members of the classified service of the State of Kansas."

Petitioner's Exhibit 1. The proposed bargaining unit description would exclude three positions currently specifically included in the unit, the positions of Curator, Academic Director and Program Specialists.[7] In addition, it would add "Full-time Adjunct Professor" to those positions included in the unit. Finally, the proposed language describing the unit would eliminate the modifier "non-temporary" from the description of full-time university employees qualified for membership in the unit. *Id.*

[7] The existing description includes "Program Specialists", while excluding "Program Specialists . . . with assigned unit supervisory duties. Respondent's Exhibit A.

6. The April 12, 1999 unit determination order does not define the bargaining unit agreed to by the parties by reference to whether they are tenured or tenure track faculty.[8] Respondent's Exhibit A. *See also*, Tr., p. 275 (Testimony of Respondent's President Dr. Edward Hammond). The unit determination order defines members by reference to two aspects of their status, that is, as to whether or not they are "full-time", and second, as to whether or not they are "non-temporary" university employees. Those university employees with appointments in listed positions, such as Professor, Associate Professor, Assistant Professor, Instructor "and so on down the line", Tr., p. 275, meeting these two criterion, or aspects of their status, are members of the bargaining unit by application of the parties' unit description.

7. Since the parties' original agreement on a bargaining unit description, things have happened that were "never anticipated" by Petitioner. Tr., p. 99. For example, "more and more [faculty] positions that used to be tenure track positions are slowly going to temporary [positions]." Tr., p. 223. *See also*, Tr., pp. 240-242 (testimony of FHSU Professor and Past-President of FHSU-AAUP, Dr. Keith Campbell expressing a similar concern, in effect, that bargaining unit work, work "absolutely identical" to that performed by tenured professors, is being reallocated to non-bargaining unit, non-tenure-track positions). Evidence supporting Petitioner's contention that Respondent is construing the parties' "agreed" unit definition in ways that were neither foreseen nor anticipated, nor agreed to by the parties, warrants re-examination of the bargaining unit description.

[8] Throughout this Order, the presiding officer will use the term "tenured" in reference to a faculty member with tenure, and "tenure-track" in reference to a faculty member working toward tenure. *See* Tr., p. 47

8. Since the parties' original 1999 agreement on a bargaining unit description, there have been changes in the usage and issuance of "temporary" contracts for university faculty. Tr., pp. 98-101. For example, relative to bargaining unit membership, which has generally gone down, university enrollment is up "dramatically" and the total number of faculty and, more particularly, the number of temporary and part-time faculty contracts issued by the administration has gone up. Tr., pp. 211, 222-223. "There's been a pretty significant increase in the temporary appointments." *Id.*, pp. 211-212. From academic year 2000/2001 until academic year 2004/2005, there had been "[a]bout a fifty percent increase." *Id.*, p. 212; Petitioner's Exhibit 12. This increase in temporary faculty is at least partly explained by development and staffing for FHSU's "China program". Tr., pp. 219-220. These changes regarding usage of temporary contracts for faculty and their effect on bargaining unit composition warrant re-examination of the unit description.

9. Since the parties' original 1999 bargaining unit description, the Employer has interpreted and applied the unit description so as to exclude faculty members on "terminal contract" status from the bargaining unit. *See, e.g.*, Tr., p. 73. Beginning with academic year 2001/2002, Professor Robert Dolan was removed from tenure track and given a terminal contract. *Id.* As a result, and despite Petitioner's repeated protests, the University removed Dolan from the bargaining unit, arguing that his terminal contract status meant he was no longer a "non-temporary" employee and thus he no longer met the definition of bargaining unit membership and was no longer eligible for inclusion in the unit. *See, e.g.*, Petitioner's Exhibit 9 (lengthy e-mail chain between AAUP President Hughen, University Counsel Kim Christiansen and University Provost Lawrence Gould arguing respective points of view on bargaining unit inclusion/exclusion of Professor

Dolan). As a result, Petitioner was prevented from representing Dr. Dolan in his grievance with the University. Tr., pp. 73-74. Had this interpretation of the agreed unit description been within the contemplation of both respective parties in 1999, i.e., that tenure-track professors on terminal contract status would no longer be in the bargaining unit, it seems that there could hardly have been any disagreement two years later over its application to Professor Dolan. The presiding officer infers from the facts of record that the parties did not in 1999 mutually agree to this interpretation of the unit description. This change in the University's application of the unit's description warrants re-examination of same.

10. Since the parties' original 1999 bargaining unit description, the Employer has interpreted and applied the unit description so as to exclude tenured faculty members on phased retirement from the bargaining unit. Tr., pp. 66-68. Four years after the original bargaining unit definition was reached, Professor Thomas Guss, who was a founder of the FHSU-AAUP chapter and served as Petitioner's President at the time of the original agreement, Tr., pp. 71-72, was removed from the bargaining unit when he began his phased-retirement in 2003. Tr., pp. 66-68. Dr. Guss had a grievance with the University after going on phased retirement and sought representation by Petitioner FHSU-AAUP in the dispute. Tr., p. 67. However, it was the University's position that Dr. Guss was no longer in the bargaining unit. Tr., p. 68. The presiding officer infers from the facts of record that the parties did not in 1999 mutually agree to this construction of the unit description. Had that been the case, Dr. Guss, who was President of the bargaining representative at the time the unit description was finalized, would have known that once he was in phased-retirement he would no longer be in the bargaining unit. This change in

the University's application of the unit's description warrants re-examination thereof. Tr., pp. 51-64

11. Since the parties' original bargaining unit description, Petitioner's leadership has come to realize that certain types of "temporary" faculty share a community of interest[9]

[9]The term "community of interest" is not susceptible to precise definition or to mechanical application. Morris, *The Developing Labor Law*, Ch. 11, p. 417 (2nd ed. 1989). The 1969 Report of the Advisory Commission on Intergovernmental Relations refers to the test as a "somewhat elusive concept." *ACIR Report* at p. 74. Though "its determinants are so vague that application to specific cases leaves considerable room for discretion", the requirement of a community of interest among employees of a unit is the "most fundamental" of the statutory factors set out at K.S.A. 75-4327(e), and was described by Goetz as being "essential" to an appropriate bargaining unit. Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 252 (1980). "The reasons for its preeminence are quite practical. . . . by requiring a cohesiveness within the unit and a degree of isolation from other employees of the same employer, it tends to assure effectiveness of any bargaining or meeting and conferring that may occur." *Id.* "Representatives of both employer and the employees are then able to concentrate on issues of real concern to a majority of the employees in the unit, without being distracted by demands of minority factions that might be militant enough to block settlement." *Id.* "Second, it protects the interests of an identifiable and unified group whose numbers might be too small to provide an effective voice if they had to be combined with a larger number of other employees intent on promoting their own interests." *Id.* However, a unit will generally be deemed appropriate if the employees grouped together have substantial mutual interests in wages, hours and other conditions of employment. *Kalamazoo Paper Box Corp.*, 1950 NLRB Ann.Rep. 39 (1951). *See also, Allied Chemical & Alkali Workers of America, Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172, 92 S.Ct. 383, 394, 30 L.Ed.2d 341, 354 (1971)(noting that the Board's "primary concern in resolving unit issues [is] 'to group together only employees who have substantial mutual interests in wages, hours, and other condition of employment.'"). PERB approaches the community of interest determination using a case-by-case analysis, and is given considerable discretion in making a decision. The factors considered in determining whether a group of employees share a community of interest include: 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. *See City of Wichita, Kansas v. Fraternal Order of Police, Lodge No. 5*, 75-UCA-1-1994 (October 27, 1995); *Teamsters Local Union #955 v. Wyandotte County, Kansas*, 75-UDC-3-1992 (August 5, 1993). *See also*, 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 controlling. The weight to be assigned each factor is within the sole discretion of the PERB. *Kansas Association of Public Employees v. Depart. of S.R.S, Rainbow Mental Health Facility*, 75-UCA-6-1990 (February 4, 1991).

with tenured and tenure-track faculty. Tr., p. 99. FHSU-AAUP's Past-President, Professor Keith Campbell summarized this community of interest as follows:

> ". . . [T]he core of who we are is teaching. . . . we are first teachers. This is not KU. This is not a research institution. And what binds the [faculty] together primarily, the primary bond that ties people together here at Fort Hays State . . . is the teaching. And it is that teaching that is the key factor that creates a community of interest. That includes both the full-time and the temporary teachers."

Tr., pp. 252-253. These teaching faculty all have appointments in some listed bargaining unit positions, which are Professor, Associate Professor, Assistant Professor, Instructor, librarian, research scientist and so on down. Tr., pp. 22-23. The realization by Petitioner's leadership that tenured/tenure-track faculty and non-tenured/tenure-track faculty share this community of interest, coupled with changes in the administration's interpretation and application of the bargaining unit's description warrants re-examination thereof.

12. Full-time faculty, whether tenured/tenure-track or not, receive various employment benefits, such as health insurance and pension benefits. Tr., pp. 36-37.

13. Full-time faculty, whether tenured/tenure-track or not, have nine-month employment contracts. Tr., p. 40.

14. Full-time faculty, whether tenured/tenure-track or not, have the same types of office facilities, maintain the same or similar hours of work and office hours and teach the same students in the same sorts of classes in the same sorts of classrooms. Tr., pp. 43-45.

15. Many full-time faculty, whether tenured/tenure-track or not, are expected to perform the same kind of research and the same kinds of service, to the department, to the

college and to the university. Tr., pp. 43-44. There are variations in the levels of expected research and service, not only between tenured/tenure-track faculty and non-tenured/tenure-track faculty, but also between members of the tenured staff, from department to department, and between faculty *within* the various departments. Tr., pp 109-110, 251.

16. Full-time faculty, whether tenured/tenure-track or not, are paid by check twice a month, in similar amounts. Tr., pp. 47-48, 108, 120.

17. Full-time faculty, whether tenured/tenure-track or not, answer to the same supervisors and supervisory structure. Tr., pp. 83, 108.

18. The classification of Adjunct Professor, sought to be included in Petitioner's amended unit description, is a new one. Tr., p. 23. Under the proposed unit description, if an adjunct faculty member is part-time, they would not be included in the unit. Tr., p. 130. There was no evidence during the hearing of this matter of full-time adjunct professors at FHSU; most adjuncts teach only one or two courses and Professor Hughen did not "know of any full-time adjuncts" nor of "any adjuncts that would be included in the unit." Tr., pp. 130-131. When asked about the difference between adjunct and full-time temporary, Dr. Hughen stated that "if they are the same we don't need [to include] the word 'adjunct' [in the unit description]". Dr. Hughen added, "[b]ut if adjuncts are [considered to be] temporaries, we don't want someone switching [to] the word 'adjunct' and then confusing all this again." Tr., p. 131.

19. The original unit determination and certification petition for the faculty bargaining unit at Ft. Hays State University was filed by Petitioner FHSU-AAUP with the Public Employee Relations Board, (hereinafter "PERB"), on December 17, 1998.

Respondent's Exhibit B. This petition was styled by PERB as case number 75-UDC-1-1999.[10] *Id.* This petition requested the Board to determine as appropriate a bargaining unit described as follows:

> "INCLUDE: [a]ll Full-time *tenure-track* (probationary) and *tenured* faculty members, including library faculty whose teaching and/or library responsibilities constitute a majority of the faculty member's responsibilities.
>
> EXCLUDE: All other employees, supervisors, confidential employees, and management officials."

Id. (emphasis added). This unit description, denoting full-time faculty for inclusion in the unit solely by reference to their status as tenured or tenure-track, was not adopted by "mutual agreement of the parties". *See* Respondent's Exhibit A.

20. The April 12, 1999 unit determination order, referred to above in Findings of Fact Nos. 2 and 3, was the result of the parties' apparent "mutual agreement" on a bargaining unit definition. Respondent's Exhibit A; Tr., p. 98. *See also*, Tr., pp. 274-275 (University President Hammond testifying that discussions between AAUP and FHSU regarding formation of the bargaining unit lead to a description that "doesn't use the term 'tenure track' or 'tenured faculty' to denote the bargaining unit" despite President Hammond's understanding and belief that AAUP wanted a bargaining unit consisting only of tenured and tenure-track faculty and the fact that the University was alleged to have had no position "as to the composition of the bargaining unit"). Since the parties mutually agreed on a bargaining unit definition, that definition could have been crafted in different language if the parties had agreed to it. Tr., p. 101. Thus, had the parties

[10]In PERB's administrative docketing system, a matter styled as a "UDC" case is a Unit Determination and Certification petition.

mutually agreed that the unit would consist solely of tenured and tenure track faculty, the unit description could have reflected wording to that effect. *Id.* The agreed unit description expressly included the classification of "Instructor", Respondent's Exhibit B, a position held only by teaching faculty lacking a terminal degree in their academic field and thus purportedly ineligible for tenure. *See, e.g.*, Tr., p. 456 (testimony of Instructor Sharon Wilson, indicating her ineligibility for tenure for lack of a terminal degree). Based upon the parties' mutual agreement to a bargaining unit definition different than that of the one initially proposed in the faculty's unit determination and certification petition, and due to its specific inclusion of the classification of "Instructor", the agreed description must have been intended to mean something other than solely tenured and tenure-track faculty.

21. Respondent's Faculty Handbook defines a full-time faculty member as:

> "A full-time faculty member is defined as an individual who is tenured or on tenure track and whose work load is normally sixty percent teaching, twenty percent research/scholarly activities, and twenty percent service. The normal full-time teaching load given this formula is four, three-unit classes. The faculty member is normally appointed on a nine-month contract."

Respondent's Exhibit K, p. 96.

22. Respondent's Faculty Handbook defines a full-time temporary faculty member as:

> "A full-time temporary faculty member is employed for one academic year only. There is no expectation for reappointment beyond that contract. A full-time temporary faculty member may accumulate a total of five (5) academic-year contracts.
> Duties of the full-time temporary faculty member are to be identified in an attachment to the contract and become a part of that contract. Duties may include instruction, research/creative activities and service responsibilities similar to other full-time faculty.
> The full-time temporary faculty member may choose to apply for an available tenure-track position at FHSU. The application will be treated in

> a fashion similar to all other applicants. At the time of employment within the tenure track, the full-time temporary faculty member may apply for up to three (3) years of credit on the tenure track. This credit might include full-time employment at FHSU and other institutions of higher education. The decision to accept any or all of these years is retained by this university."

Respondent's Exhibit K, p. 96. The designation of "temporary" faculty is a designation based upon employment contract with the university. Tr., p. 24. The faculty members called "temporary" for purposes of exclusion from bargaining unit membership are those who "are issued contracts" which are designated as "temporary". *Id.* *See also*, Petitioner's Exhibit 15 (five most recent annual employment contracts for full-time English Department Instructor Sharon Wilson, employed at FHSU for some 25 years, titled "TEMPORARY OR PART-TIME APPOINTMENT"; while Wilson's contract is denoted as .90 FTE, she is in fact a full-time employee with a full class load. Tr., pp. 444-447.) "[O]n paper", according to Wilson's supervisor, English Department Chairperson, Dr. Cheryl Duffy, Sharon Wilson "was not full-time" following her first five one-year contracts of employment. Tr., p. 442. If a full-time temporary faculty member continues teaching beyond five one-year contracts, without moving to a tenure-track position, the administration moves the position "on paper" from a 1.0 FTE position to a .9 FTE position, so that "*technically*", they "are no longer full-time". Tr., p. 440. The reality, however, is that the faculty member is a full-time employee who is "still teaching full-time". *Id.*, pp. 440-441.

23. A typical teaching load for full-time faculty at FHSU, whether they are temporary or tenured/tenure-track, is twelve credit hours. Tr., pp. 305-306. According to University President Hammond, however, although "the majority of them would be

around twelve hours", there are "a lot of exceptions made to" this typical "recommended 60/20/20 distribution". *Id.*, p. 306.

24. Respondent's Faculty Handbook defines a part-time temporary faculty member as:

> "A part-time faculty member is one who is employed for less than one (1) FTE. Teaching loads may vary given the percent of time employed."

Respondent's Exhibit K, p. 96.

25. Respondent gives its faculty members employment contracts every year stating their academic rank, term of contract, percentage of full-time equivalency, salary, the academic year and conditions of their appointment. *See, e.g.*, Petitioner's Exhibits 2, 3 and 4. Respondent titles these contracts as "NOTICE OF CONTINUING TENURED FACULTY APPOINTMENT", or "TEMPORARY OR PART-TIME APPOINTMENT". Hearing Exhibits 2, 3, 4, 11, 14 and 15.

26. Phased retirement is a program offered at Board of Regents' institutions pursuant to state law. *See* K.S.A. 76-746. It is available for full-time, benefits-eligible faculty who have been employed for ten years and have reached age 55. Tr., p. 315. An eligible faculty member applies for inclusion in the phased-retirement program and the Board of Regent's policy limits the number of faculty at an institution that can be on phased-retirement in any given year to no more than two percent of eligible employees. Tr., pp. 314-315, 322. Maximum length of a phased–retirement plan is five years. Tr., pp. 315-317; Petitioner's Exhibit 5, p. 214. At FHSU, only tenured faculty are eligible for phased retirement. Tr., p. 314.

27. Upon entering phased-retirement, the FHSU faculty member's yearly appointment must be in a position which is no more than .75, but which is at least .25. Petitioner's Exhibit 5, p. 214. *See also*, Respondent's Exhibit T, Kansas Board of Regents, Policy and Procedures Manual, p. 51 (providing that employees on phased retirement will be "less than full-time but at least one-fourth time *and the institution will provide benefits on a full-time basis* for up to five years")(emphasis added). It is a fact that Regents policy and state law require that a Board of Regents' Institution, such as Respondent in the instant matter, must provide a faculty member on phased retirement with benefits as though he or she were employed on a full-time basis. Respondent's Exhibit T, Kansas Board of Regents, Policy and Procedures Manual; K.S.A. 76-746. *See also*, K.A.R. 88-12-6 (providing that participants in phased retirement "shall" receive certain enumerated full-time benefits).

28. At FHSU, the administration has denied faculty on phased retirement the benefit of inclusion in the faculty bargaining unit. Tr., pp. 312-313.

> "[S]ince the people that are on phased retirement are not full-time employees of the institution any longer, it didn't meet the definition *in our opinion* of being in the bargaining unit. So we deleted them."

Tr., p. 313 (testimony of University President Edward H. Hammond)(emphasis added). *See also*, Respondent's Exhibit G-1, September 1, 2004 Memo from FHSU Provost's Office to FHSU's Dr. Carl Parker (indicating changes to bargaining unit composition for academic year 2004-2005, including elimination of unit membership for faculty on phased retirement); Respondent's Exhibit G-2, August 25, 2005 Memo from FHSU Provost's Office to FHSU's Dr. Carl Parker (indicating changes to bargaining unit composition for academic year 2005-2006, including elimination of unit membership for

faculty on phased retirement). The university does not apply this same reasoning, however, to the determination whether a professor in the phased-retirement program, and consequently teaching fewer hours, is eligible to continue on phased-retirement, a benefit open only to full-time employees. Tr., pp. 317-321. Petitioner has contested Respondent's position that employees on phased-retirement are not in the bargaining unit.[11] Tr., pp. 53, 321.

29. Dr. Richard Hughen is an associate professor who has taught in the philosophy department at FHSU for approximately twenty years. Tr., pp. 20-21. He is the President of Petitioner Fort Hays State University Chapter of the American Association of University Professors. *Id.*, p. 21.

30. After applying for inclusion in phased-retirement for several years, Dr. Hughen went on phased-retirement beginning in the 2005-2006 school year. Tr., pp. 57-58. Dr. Hughen's employment contract for the 2005-2006 school year is titled "NOTICE OF CONTINU[ING] TENURED FACULTY APPOINTMENT." Tr., p. 57; Petitioner's Exhibit 2. His employment agreement is not titled as a "TEMPORARY OR PART-TIME APPOINTMENT" contract. *Id.* Dr. Hughen's appointment is as .5 FTE, Petitioner's Exhibit 2, Hughen's contract for Academic Year 2005-2006, but by law he is still entitled to benefits as though full-time. Tr., pp. 57-60, 171; *see also*, Respondent's Exhibit T, Kansas Board of Regents, Policy and Procedures Manual, p. 51 (providing that employees on phased retirement will be "less than full-time but at least one-fourth time

[11]In addition, as noted during the hearing of this matter, Tr., pp. 54-55, at the time of the parties' original unit determination and certification proceeding, there were questions by PERB staff regarding the meaning of terms used in defining the bargaining unit, terms including "non-temporary", the term used by the University as grounds for excluding faculty on terminal contracts from inclusion in the bargaining unit.

and the institution will provide benefits on a full-time basis for up to five years")(emphasis added). Dr. Hughen views himself to be a full-time faculty member who is teaching half the typical full-time teaching load of twelve credit hours. Tr., p. 60.

31. Phased retirement is beneficial to the University. Tr., p. 58. It helps maintain continuity of faculty by keeping experienced faculty, who might otherwise just retire, teaching for a longer period of time, and it allows the University to hire younger faculty to transition into replacing the retiring faculty member. *Id.*

32. Aside from denial of the benefit of his status as a member of the bargaining unit, none of Dr. Hughen's other benefits changed when he went on phased-retirement. Tr., p. 59. For example, he has continued to receive the same medical and retirement benefits as he did prior to phased-retirement. *Id.* In his testimony, Dr. Hughen pointed out that the state and the employer "pay into my retirement benefits the same as if I was full-time." *Id.* The state and the university "still pay that same amount as if I was full-time, even though my salary is half-time. They still pay that as if I was full-time." Tr., pp. 59-60.

33. Dr. Hughen characterized his status on phased-retirement as that of a full-time employee teaching part-time. Tr., pp. 59-61, 171-172. According to Hughen, this distinction is an important one. *Id.*, p. 60. "In the case of phased retirement and sabbatical and leave without pay, you have someone who's full-time who's teaching part-time." Tr., p. 172. While on sabbatical, Professor Hughen was .5 FTE and taught only one semester of that year. Tr., p. 61. Still, he remained in the bargaining unit because he was considered to be a full-time employee teaching part-time. *Id.* Likewise, when he was on leave without pay, he only taught half-time, yet remained in the bargaining unit as a full-time employee. *Id.* According to Dr. Hughen, the same should apply to a professor

on phased-retirement. They remain a full-time employee, and the fact that the teaching component of the responsibilities of a faculty member on phased retirement is less than the typical full-time teaching load should not exclude them from the bargaining unit. *Id.*, pp. 61-62.

34. Professor Thomas Guss[12] was one of the founders of the AAUP chapter at Fort Hays State University. Tr., pp. 71-72. Guss taught in the College of Education and was a member of the faculty bargaining unit. Tr., p. 66. Professor Guss went on phased retirement in 2003. Petitioner's Exhibit 7; Tr., p. 66. Professor Guss "had some problems" with the administration and asked FHSU-AAUP President Richard Hughen for help.. Tr., p. 67. Dr. Hughen "tried to inquire" into his situation. *Id.* However, the administration removed Guss from the list of bargaining unit members due to his phased

[12]In addition to his role as a founder of the FHSU Chapter of the AAUP, Dr. Guss was actively involved in several of the twenty-plus PERB cases involving FHSU and/or the FHSU-AAUP. Dr. Guss filed two prohibited practice charges against the university, accusing it of bad-faith bargaining in negotiations. *See* 75-CAE-1-2002 and 75-CAE-2-2002. These matters were dismissed without reaching the merits of the charges for lack of standing. At the time the complaints were filed, Dr. Guss, and his co-petitioner Dr. Norman Caulfield, did so in their personal capacities, as they were no longer serving as elected officials of the bargaining representative AAUP. Under state labor relations law, the only parties with standing to file a complaint of failure to bargain in good faith are those with whom the duty to negotiate in good faith is charged. That is to say, only those entities charged with the responsibility to negotiate in good faith are deemed to have standing to evaluate the good faith, or lack thereof, of the party with whom they must negotiate. Dr. Guss also filed an additional prohibited practice charge against Respondent. In case number 75-CAE-3-2002, Dr. Guss complained that by closing the parties' meet and confer sessions to the public, the Employer was in violation of both the Kansas Open Meetings Act and the PEERA. This matter was dismissed for failure to state a claim upon which relief could be granted. Dr. Guss also filed two of PERB's several other FHSU-related cases, though they were not filed against Respondent. *See* case nos. 75-CAEO-1-2001 and 75-CAEO-1-2002. The presiding officer is aware that after Dr. Guss went on phased-retirement, a dispute between he and the University arose over interpretation of their employment agreement. His employment was subsequently terminated by Respondent. After litigation, Dr. Guss' employment was ordered reinstated by the Ellis County District Court. At the time of this writing, the presiding officer is unaware of the precise status of that dispute.

retirement status and would not honor requests by Dr. Hughen that Petitioner be allowed to represent Professor Guss in his grievance against the University. *Id.*, pp. 67-72.

35. For a faculty member in a tenure-track position, receipt of a terminal contract is an indication that the person is being terminated from their employment with the University. Tr., p. 69. They are given a one-year final contract referred to as a terminal contract. *Id.* At the expiration of a terminal contract, that faculty member's employment with the University comes to an end. Tr., p. 155.

36. Dr. Hughen is familiar with those bargaining unit members who have received terminal contracts during his term as president of the FHSU-AAUP chapter. Tr., p. 69. Once a bargaining unit member receives a terminal contract, the university administration removes them from the bargaining unit, claiming that they are temporary employees and no longer eligible for representation by the bargaining unit representative. Id., pp. 69-71. *See also*, Tr., pp. 155-156 (Respondent's counsel asking Petitioner's President Dr. Richard Hughen if he would "agree with [him] that a person with a one-year [terminal] contract with a definite fixed duration that says you will be terminated after this year, that is a 'temporary' as opposed [to] a permanent employment?")

37. One such unit member receiving a terminal contract was FHSU Professor Robert Dolan,[13] who worked "for a number of years" in the University's Forsythe Library. Tr.,

[13]Professor Robert Dolan's experiences with the University account for four of the twenty-plus FHSU-related cases on PERB's docket since 1999. Dolan filed two separate prohibited practice charges, 75-CAE-10-2001 and 75-CAE-6-2002, claiming that he was discharged in retaliation for his union activities. Dolan's wife, whose employment at the FHSU's Forsythe Library was terminated by the University at approximately the same time as her husband's, also filed two prohibited practice charges, 75-CAE-11-2001 and 75-CAE-7-2002, essentially arguing that her employment was terminated in retaliation for her husband's union activities. Early on in their procedural history, these four docket numbers were consolidated into two cases. Ultimately they were dismissed following the Petitioners' untimely deaths. Consistent with Dr. Hughen's

pp. 69-70. Professor Dolan received a terminal contract in academic year 2001-2002. Tr., p. 70. Professor Dolan sought representation from the Petitioner to dispute his termination. Tr., p. 73. The administration told Dr. Hughen that the bargaining representative had no right to represent Professor Dolan. *Id.*, pp. 73-74. Professor Hughen was advised by FHSU President Hammond that Petitioner could not represent Professor Dolan in his grievances with the University. Tr., p. 71. The University refused to allow Petitioner to represent Dolan. Tr., p. 74. Dr. Hughen had a "protracted discussion on e-mail", first with university counsel Kim Christiansen and then with Provost Lawrence Gould, regarding the right to represent Dolan in his grievance. *Id.* Ultimately, the University refused to change its position and Petitioner did not represent Dr. Dolan in his grievance. Tr., p. 78; *see also*, Petitioner's Exhibit 9.

38. Petitioner was not allowed to provide grievance representation for another terminated unit member, Professor Frank Gaskill.[14] Tr., pp. 74-75. Dr. Gaskill was not given a terminal contract. Tr., p. 80. He was simply terminated "so quickly he . . . didn't even get that last year." *Id.* The University refused to allow the bargaining unit to represent Dr. Gaskill in his grievance over the termination. Tr., p. 75. *See also*, Tr., p.

---

testimony in this case, FHSU-AAUP did not represent the Dolans in their disputes with FHSU. However, the presiding officer does not recall being aware, at the time of their administrative proceedings, of the reason(s) the Dolans were not represented by the AAUP, but rather were represented by private counsel, Attorney at Law Mr. Jim Lawing of Wichita.

[14]Respondent's termination of Dr. Frank Gaskill was the subject of a prohibited practice charge filed by Petitioner, case number 75-CAE-12-2001. Petitioner charged that the University, by its refusal to honor Petitioner's statutory right to represent Dr. Gaskill in his termination grievance, committed prohibited practices under K.S.A. 75-4333(b)(1), (2), (3), (5) and (6). As the Board is aware, this presiding officer found for the Petitioner in that matter, awarding a make-whole remedy to compensate bargaining unit member Gaskill for Respondent's violations of the Act. PERB adopted much of the Initial Order, but reversed its award of damages. At the time of this writing, the Gaskill matter is in its second round of judicial review, following a district court's remand of the matter to the PERB after its initial judicial review by the court.

163 (Dr. Hughen testifying that with regard to the Gaskill grievance, "[t]he administration refused to work with us, to communicate with us on his case whatsoever, so we could not file the grievance on his behalf. In fact, they wouldn't even communicate with us about . . . the Frank Gaskill case. And they said they didn't have to because he wasn't in the bargaining unit.").

39. Petitioner has attempted numerous times to resolve the issues regarding representation of and bargaining for terminal-contract and phased-retirement individuals with the University's bargaining team. Tr., p. 81. "We've raised [these issues] over and over." *Id.*

40. The parties' bargained agreement says that "the administration is to provide the AAUP President with a list of the bargaining unit members at the beginning of a semester." Tr., pp. 156-157. In the event of a disagreement over who is in the unit, the parties will meet and discuss those disputes. Tr., p. 157. The University has refused to discuss these issues with Petitioner. "In the case of terminal contracts they'll say, well, they're temporary and temporaries are not in the unit. For phased retirement they'll say, well, you're part-time. You're not in the unit. Part-timers are not in the unit. And that's it. Discussion ends there." Tr., p. 82 (testimony of Dr. Richard Hughen). "We had been complaining about this for a long time. And it looked to me like there was no way we were going to resolve this discussing it with the administration." Tr., p. 158 (testimony of FHSU-AAUP President Richard Hughen).

41. Program Specialists do not teach. Tr., p. 93. They "work with technology, helping set up computer programs or online teaching experiences". *Id.*

42. Academic Directors and Curator have administrative supervisory responsibility over faculty. Tr., pp. 93-94. In the university setting, a faculty supervisor assigns classes to teach, coordinates teaching schedules, determines which faculty receive release time and travel fund allocations, has investigatory and disciplinary authority with regard to student complaints and performs or has influence in faculty's merit evaluations. Tr., p. 91. Academic Directors and Curator are paid from administrative "salary lines", not "faculty lines", that is, they are not paid from monies negotiated for by Petitioner for members of the bargaining unit. Tr., pp. 92, 94. They are paid on an eleven-month contract year rather than a nine-month contract. *Id.*, p. 92. Curator and Academic Directors perform the supervisory functions set out above with regard to faculty members within the bargaining unit. Tr., pp. 91-94.

43. In addition to trying repeatedly to resolve disputes over who was properly included in the bargaining unit by addressing those concerns, i.e., phased retirement and terminal contract status, with the administration, Dr. Hughen made numerous repeated attempts to discuss concerns "about a number of positions, individuals who we thought were [in] supervisory positions, and [] should be removed [from the bargaining unit]." Tr., p. 158. *See also*, Petitioner's Exhibit 9. "[F]or the first three or four years, [AAUP had been] constantly complaining . . . . [w]e tried and we tried, and it was to no avail." Tr., p. 157. Subsequently, Petitioner "decided we're going to have to go to PERB because the administration is not responding – not being responsive." *Id.*

44. When asked by Respondent's counsel on cross-examination why Petitioner had not brought a prohibited practice charge against FHSU's administration over their refusal to allow Petitioner to represent Dr. Robert Dolan in his termination grievance, Dr.

Hughen responded that they "[r]eally couldn't afford it. We already had probably a dozen complaints filed [with PERB].[15] We just couldn't afford it anymore." Tr., pp. 162-163.

45. In response to a discovery request by Petitioner, the University produced a document that was marked and introduced into evidence as Petitioner's Exhibit 10. Tr., p. 201. This exhibit listed the names of faculty considered by the University to be "temporary" who had been teaching at the University for varying lengths of time,

[15]At the time of Dr. Hughen's testimony in the administrative hearing of this matter, in addition to the twelve various FHSU labor relations cases described in the several previous pertinent footnotes, there had been eight other prohibited practice cases filed between these parties. Those cases were docket nos. 75-CAE-6-2001, 75-CAE-7-2001, 75-CAE-3-2003, 75-CAE-4-2004, 75-CAE-4-2000, 75-CAEO-4-2000, 75-CAE-4-2002 and 75-CAE-8-2002. These disputes were each resolved informally, by agreement of the parties. The latter-most four of these cases dealt with related issues, and bear mentioning in the instant matter. The allegations of fact that formed the basis of those several complaints were that the university administration refused to allow the complainant, FHSU-AAUP, to utilize meeting rooms for organizational purposes in the campus' memorial union, refused the organization usage of the on-campus mail system and refused it usage of the university's on-line e-mail system. FHSU's refusal of these privileges came despite PERB's certification of Petitioner as the faculty employees' bargaining representative and the University's long-standing policy and practice to allow other approved on-campus organizations the same and similar privileges. These complaints alleged generally that the said actions were in violation of the Act, interfering, restraining or coercing public employees in the exercise of rights guaranteed under the act, discouraging membership in the employee organization and denying rights accompanying certification under K.S.A. 75-4328. (In 75-CAEO-4-2000, the University counter-charged, alleging that AAUP was in violation of the Act by interfering, restraining or coercing an employer with respect to management rights.) A common theme resounds in these, and other cases between these parties, and the instant matter, at least in so far as the issues of terminal contract and phased-retirement are concerned: in the presiding officer's opinion, the facts complained of with regard to these two issues are the result of the University administration's repeated and systematic refusal to conduct its labor relations activities within the framework for public employer-employee labor relations established by Kansas law and are a reflection of the University's willful bad faith in labor relations. The law imposes upon the parties to meet and confer proceedings a duty to conduct themselves in good faith, that is, with a fair and open mind and with a sincere purpose to find a basis for agreement. This requirement to act in good faith extends beyond formal negotiating sessions and must also be applied in the day to day resolution and adjustment of grievances, to the interpretation of terms and conditions of employment, including those established by past practice of the parties and most certainly also with regard to construing the description of the bargaining unit itself. The facts of record, apparent to both this presiding officer and to any disinterested observer, suggest that FHSU's administration is not interpreting and applying the bargaining unit's description in good faith.

including periods in excess of twenty years. Tr., p. 202; Petitioner's Exhibit 10. For example, in response to Petitioner's request that the University "[p]lease identify all temporary academic faculty who have been 'temporary' at FHSU for 20 or more years", Respondent's document identifies faculty members Mary Kay Schippers of the Mathematics and Computer Science Department and Sharon Wilson of the English Department. Petitioner's Exhibit 10. In all, Respondent identified 27 faculty members who have been teaching at FHSU as a "temporary" for three or more years.

46. Some of these "temporary" faculty members are assistant professors and "quite a few of them" have their doctoral, or other, terminal degree, i.e., the highest degree attainable within their field of study. Tr., pp. 203-204, 207. *See also*, Tr., p. 114 (Respondent's counsel acknowledging that some of Respondent's temporary faculty have their terminal degrees); Petitioner's Exhibit 10; Petitioner's Exhibit 11 (compilation of ten "temporary" academic year 2004-2005 contracts for Assistant Professors Margaret M. Butcher, Clark Sexton, Kathryn McGonigal, Jason K. Taylor, Robert B. Scott, Stephen G. Donnelly and Lisa E. Arnhold, who hold terminal degrees for the Departments of Communication Studies, Philosophy, Sociology, Art, Special Education, Chemistry and Nursing, respectively and for Instructors Keith Woodall, Alejandro R. Sanchez-Aizcorbe and Amy Young who each have the terminal degree for the Department of Modern Languages).

47. According to the testimony of Dr. Hughen, the nature of "temporary" faculty has changed since the bargaining unit came into existence. Tr., pp. 100, 120. "[A]t the time the unit determination order was issued", temporary employees were primarily people who came to the university as the spouse of a full professor and "the spouse may have - -

taught at high school or something" and decided "they'd rather teach here than the public school system, and so they'd be hired as temporaries." Tr., p. 100. "They really were not serious professionals in the same way that a college professor is." *Id.* Within the last five years, however, "the temporaries we've been hiring have really changed radically." *Id.* Many of the temporaries hired at FHSU in the last five years have their terminal degree. Tr., p. 100, 114. And, they are not coming to campus just as the spouse of a serious professional, they are moving there, across country at times, just for the job. Tr., p. 100.

48. There are different types of temporary, or non-tenured, teaching faculty at FHSU. Tr., p. 131. Some non-tenured faculty are hired specifically to fill in for another professor who is on leave without pay or who is on sabbatical. Tr., pp. 123, 131. *See also*, Petitioner's Exhibits 3 and 4 ("temporary" contracts for Assistant Professor Clark Sexton and Instructor Ruth Dysart, both hired at least in part to teach courses while Dr. Hughen was on sabbatical, Tr., pp. 27-28, 30-36.) An example of another type of non-tenured faculty would be those hired specifically to teach in the international program, such as the one in China. Tr., p. 133. These faculty are subject to more volatility in their employment. Tr., pp. 133-134. Another type of non-tenured faculty are those who are trying to complete their terminal degree, such as a Ph.D. Tr., p. 134.

49. The University has actively pursued development and expansion of a virtual college program since the mid-1990's. Tr., p. 279. The virtual college "is an organizational structure that facilitates faculty from existing departments to teach classes within those departments through distance learning". Tr., p. 236. The virtual college encompasses teaching off-campus, some of it face-to-face, some online, some through

IPTV. Tr., p. 279. A variety of mediums are used. *Id.* The basic means of delivering a course in the virtual college is not face-to-face. Tr., p. 253.

50. In the last few years, the virtual college program has expanded to include courses taught in China, and Turkey. Tr., pp. 279, 242. Virtual college courses are a "volatile area" in that they may create a need for rapid change in course and program offerings. Tr., p. 280.

51. Faculty teaching in the virtual college programs are generally not tenured or tenure-track professors. Tr., pp. 280-281. *See also*, Tr., p. 290 (indicating that full-time non-tenured Instructor Ruth Dysart was teaching some on-campus courses for Dr. Hughen during his sabbatical leave, while also teaching some virtual college courses). However, some tenured professors also teach in the virtual college. Tr., pp. 281, 289, 241-242. For example, at the time of hearing, all five of the courses taught by Dr. Keith Campbell, a tenured professor of 31 years in the Sociology Department, who is a past-president of Petitioner FHSU-AAUP and its current vice-president, were online, "distance learning" courses. Tr., pp. 235-236, 242, 244.

52. To ensure flexibility to respond to enrollment fluctuations in individual academic departments, the typical departmental "operating policy" with regard to staffing structure at FHSU has traditionally been to employ one "temporary", or non-tenured faculty with the remainder as professional tenured faculty. Tr., pp. 280-284.

53. In the virtual college, an administrative decision was made not to employ this traditional faculty staffing structure. Tr., p. 284. The faculty unit's bargaining representative has not been involved regarding this decision, nor has its implementation

nor its effects on the unit or its members' terms and conditions of employment been the subject of bargaining with Petitioner. Tr., pp. 280-287.

54. Most of the faculty teaching in Respondent's virtual college program physically reside in Hays, Kansas. Tr., p. 239.

55. It is important to the University to have the flexibility to hire "temporary" instructors, those who teach full-time on a one-year contract, but who do not have the assurances that come with tenure, to respond to fluctuations in enrollment. Tr., pp. 301-305.

CONCLUSIONS OF LAW/EXPLANATION OF POLICY CONSIDERATIONS
Pursuant to K.S.A. 77-526(c)

ISSUE NUMBER ONE

> The first primary legal issue for resolution in this matter is whether the Fort Hays State University faculty bargaining unit, as defined, excludes from its coverage and benefits those faculty members that are in phased retirement?

1. The PEERA gives "public employees" the right to form, join and participate in the activities of employee organizations, i.e., "labor unions", for the purpose of meeting and conferring with public employers regarding grievances and conditions of employment. K.S.A. 75-4324. The Act provides an election machinery and process by which public employees can choose an employee organization or union to represent them. The PERB conducts representation elections and certifies the results. Where an organization represents the majority of employees in "an appropriate unit", K.S.A. 75-4327(b), the PEERA requires the public employer to recognize the organization to effectuate the bargaining process afforded by state law. K.S.A. 75-4327(a); Raymond

Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 252 (1980). In the instant matter, of course, an appropriate unit was determined by agreement of the parties in 1999 and Petitioner seeks to modify the composition of this agreed bargaining unit. In seeking a source of authority for the modification of an existing bargaining unit, a review of the PEERA, at K.S.A. 75-4321 *et seq.*, reveals no specific reference to clarification or amendment of an employee unit after the initial determination. However, there can be no question that K.S.A. 75-4327 vests the PERB with broad discretionary authority in the determination of what constitutes an appropriate bargaining unit:

> "Any group of public employees considering the formation of an employee organization for formal recognition, any public employer considering the 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; (5) the effects of overfragmentation and the splintering of a work organization; (6) the provisions of K.S.A. 75-4325 and amendments thereto; and (7) the recommendations of the parties involved."

K.S.A. 775-4327(e)(emphasis added). Further, regulations promulgated and adopted pursuant to state law make provision for the clarification of bargaining units. *See* K.A.R. 84-2-7.

2. PEERA does not expressly detail the Board's authority to amend or clarify bargaining unit determinations and there is no Kansas case law discussing the question. Consequently, it may be helpful to look to other jurisdictions for guidance.[16] The PERB's

[16]Where there is no Kansas case law interpreting or applying a specific section of the Kansas PEERA, the decisions of the National Labor Relations Board ("NLRB") and of Federal courts

authority to decide a unit appropriate for the purposes of collective bargaining is similar to that of the National Labor Relations Board ("NLRB") under the National Labor Relations Act ("NLRA"). *See* 29 U.S.C. § 159. Under the NLRA, issuance of an NLRB certification does not forever establish the precise parameters of the parties' bargaining relationship. Norris and Shershin, *How to Take a Case Before the NLRB*, §§ 10.15, p. 273 (1992). It has been reasoned that since the NLRA provides a specific statutory scheme for resolving questions concerning representation through an election and the certification of a labor organization, Congress has granted the NLRB concomitant authority to regulate such certification by clarification or amendment. *Century Electric Co.*, 146 NLRB No. 139 n. 4 (Feb. 4, 1964). The NLRB, therefore, may subsequently revise the description of the appropriate bargaining unit. NLRB Rules and Regulations, §§ 102.60(b), 102.61(d), 102.63(b); *NLRB Casehandling Manual* ¶¶ 11480, 11490-98. Based on this authority, the NLRB has repeatedly held that its certifications are subject to reconsideration, *Worthington Pump and Mach. Corp.*, 30 LRRM 1052 (1952), and that it may police its certifications by clarification and amendment. *NLRB Casehandling Manual*, ¶ 11478.3; *Independent Metal Workers Local No. 1, 56 LRRM 1289 (1964).*

3. Similarly, unit clarification or amendment proceedings under the PEERA derive from the Board's authority to determine the appropriateness of a bargaining unit. *See, e.g., Butler County Community College Education Ass'n v. Butler County Community College,*

---

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, *Kansas Association of Public Employees v. State of Kansas, Department of Administration*, 75-CAE-12/13-1991. *See also, Oakley Education Association v. USD 274*, 72-CAE-6-1992, p. 17 (December 16, 1992) wherein the same conclusion has been reached under the Kansas Professional Negotiations Act.

72-UCA-1-1993 (1994)(the Secretary of Human Resources reached a similar conclusion that the Secretary's authority, under the Professional Negotiations Act, to amend or clarify an existing bargaining unit derives from the Secretary's statutory authority to determine the appropriateness of a bargaining unit in the first instance). The clarification of an existing employee unit by authoritative construction of its defining terms, by modification of its terms, or by adding or removing positions from its description is similar in effect and purpose to the Board's function of initially defining an appropriate unit. In each situation, the expertise of the Board is employed to determine the most appropriate employee composition for a particular bargaining unit. *See Consolidated Papers, Inc. v. NLRB*, 109 LRRM 2815, 2817 (CA7, 1982).

4. The need to be able to modify an existing bargaining unit has clearly been recognized by the Board. K.S.A. 75-4323(e)(3) provides that the Board may:

> "[m]ake, amend and rescind such rules and regulations, and exercise such other powers, as appropriate to effectuate the purposes and provisions of this act."

Pursuant to that authority, regulations have been promulgated and adopted to guide the Board in administering its authority to resolve unit determination, amendment or clarification questions. *See* K.A.R. 84-2-6[17]; K.A.R. 84-2-7.

[17]K.A.R. 84-2-6 provides that "(1) Any unit may consist of all of the employees of the public employer, or any department, division, section or area, or party or combination thereof, if found to be appropriate by the board, except as otherwise provided in the act or these rules. (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."

5. Relying upon the above rationale, the PERB in *International Association of Firefighters, Local No. 2612 v. Sedgwick County Fire District No. 1*, 75-UCA-3-1999 (2000), implicitly recognized, but declined to use, its authority to clarify or amend a bargaining unit after it had been established. Respondent has offered no persuasive authority that would warrant the Board ruling otherwise in the case at hand. It is within the Board's statutory authority to clarify or amend a bargaining unit description.

6. A bargaining unit is a group of employees, defined by positions, who may properly be grouped together for purposes of representation under PEERA, for meeting and conferring relative to grievances and regarding conditions of employment. The Board's role in determining the appropriateness of a unit arises only when there is an unresolved disagreement over the proposed unit or when such unit is contrary to the policies of PEERA. The Board's duty is to determine whether the unit set out in a petition for unit determination or clarification and amendment is "appropriate." It has been a long-standing rule used by PERB that nothing requires that the bargaining unit approved by the Board be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be an appropriate unit. *Teamsters Local Union #955 v. Wyandotte County, Kansas*, 75-UDC-3-1992 (August 5, 1993); *United Rubber Workers Local Union 851 v. Washburn University of Topeka*, 75-UDC-3-1994 (September 16, 1994); *City of Wichita, Kansas v. Fraternal Order of Police, Lodge No. 5*, 75-UCA-1-1994 (October 27, 1995).

7. However, once a determination has been made and an employee unit is established by order of the Board, as in this case, a Petitioner seeking to amend the unit by adding or removing classifications bears the burden of proof to establish that the

proposed unit is "more appropriate" than that existing. *See Kansas Association of Public Employees v. Depart. of S.R.S., Rainbow Mental Health Facility,* 75-UCA-6-1990 (February 4, 1991). This is especially true once an employee bargaining representative has been certified for the unit. *Id.*

8. The factors to be considered in exercising the Board's authority to determine the scope of the proper unit are found at K.S.A. 75-4327(e).[18] Because of the number of factual considerations that must be taken into account in deciding upon an appropriate bargaining unit, the Board has not found it possible to enunciate a clear test. *Teamsters Local Union #955 v. Wyandotte County*, Kansas, 75-UDC-3-1992 (August 5, 1993). While the legislative guidance in K.S.A. 75-4327 enumerates specific factors to be considered in making the unit determination, the list is not exclusive, and the weight to be assigned each factor is within the sole discretion of the Board. *Cf. Kansas Association of Public Employees v. Depart. of S.R.S, Rainbow Mental Health Facility*, 75-UCA-6-1990 (February 4, 1991). Unit determinations are made based on all relevant factors on a case-by-case basis:

---

[18]The statute provides that:

> "Any group of public employees considering the formation of an employee organization for formal recognition, any public employer considering the 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; (5) the effects of overfragmentation and splintering of a work organization; (6) the provisions of K.S.A. 75-4325 and amendments thereto; and (7) the recommendations of the parties involved.

K.S.A. 75-4327(e).

> "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."

Cf. Friendly Ice Cream Corp., 110 LRRM 1401 (1982), enforced, 705 F.2d 570 (1st Cir. 1983). Unit clarification, like the original determination of an appropriate unit, is almost entirely a factual determination, *South Prairie Construction Co. v. Operating Engineers*, 425 U.S. 800 (1976), committed to the Board's sound discretion, and may not be set aside unless the reviewing court is convinced that the Board has acted in an arbitrary and capricious manner, *Consolidated Papers*, 109 LRRM at 2817, or the unit is a "crude gerrymander." *S.D. Warren Co. v. NLRB*, 353 F.2d 494, 498 (CA 1, 1965). The party opposing the Board's unit determination must show that the unit as composed is "clearly not appropriate." *See Banco Credito v. NLRB*, 390 F.2d 110, 112 (CA 1, 1968).

9. Pressing on to the first primary legal issue in dispute, that is, whether the FHSU faculty bargaining unit, as defined, excludes faculty members in phased retirement, the Presiding Officer concludes that the Employer's construction of the unit description is too restrictive and cannot be sustained. As noted in Findings of Fact Nos. 26-37, the Board of Regents policy pursuant to state law, K.S.A. 76-746, requires that a faculty member on phased retirement be provided benefits as though still a full-time employee. *See* Respondent's Exhibit T, Kansas Board of Regents Policy and Procedures Manual, p. 51 (providing that "an unclassified employee aged 55 or older may enter into a written agreement with the employing institution whereby the unclassified employee will accept a position which is less than full-time but at least one-fourth time, and the institution will provide benefits on a full-time basis for up to five years."). Respondent cites no

persuasive authority to contravene this aspect of state law and of the Regents Policy and Procedures Manual administering same, nor is the presiding officer aware of any. Pursuant to the plain language of the Regents Policy and Procedures Manual, the employing institution is required to provide faculty on phased retirement benefits on a full-time basis for up to five years. These benefits include "continued full-use of university facilities". K.A.R. 88-12-6(a)(5). Under the facts and circumstances of this case, the "full use of university facilities" need not be limited to the physical assets found on a typical campus and could reasonably be construed to include the mutual support and assistance provided to employees by access to an employee labor organization and bargaining representative within a state-sanctioned employer-employee relationship such as that conducted under the PEERA. The presiding officer concludes that the terms "will provide benefits on a full-time basis", as used in the Board of Regents policy administering K.S.A. 76-746, assures a faculty bargaining unit member on phased retirement of continued unit membership under PEERA.

10. Further, the bargaining unit description as it is currently written includes faculty on phased retirement. Faculty on phased retirement continue to be full-time employees, albeit ones whose teaching component of their overall duties have been reduced to less than that of other full-time faculty counterparts. Finding of Fact No. 33. PERB's clarification of this issue, by adoption of this conclusion, will guide the parties in their future bargaining relationship.

11. Even were state law not clear that FHSU is to continue providing faculty on phased retirement the benefit of bargaining unit membership, it is the presiding officer's conclusion that exclusion of phased-retirement faculty from the bargaining unit was not

the mutual intention of the parties when they reached their agreement on a unit description. *See* Finding of Fact No. 10. That being the case, the presiding officer finds and concludes that inclusion of faculty on phased retirement in the bargaining unit is appropriate,[19] that the community of interest shared by faculty on phased retirement with other faculty in the unit is overwhelming, and that their continued inclusion in the unit, following entry into phased-retirement, is more appropriate than exclusion from the unit, for many of the same reasons phased retirement is of benefit to Respondent. *See* Finding of Fact No. 31. The continued inclusion of faculty on phased retirement in the bargaining unit during their winding-down to retirement will maintain continuity of institutional bargaining unit knowledge while younger faculty members transition into positions of responsibility in the unit representative's organizational and administrative hierarchy. This maintaining of institutional bargaining unit knowledge and experience will promote a healthier, more stable bargaining relationship between the parties which will, in turn, advance the purposes for which PEERA was enacted.

12. In sum, the presiding officer finds and concludes as a clarification of the existing bargaining unit description, that the language in which it is currently written encompasses faculty on phased-retirement. Transition of a bargaining unit member to phased-retirement status does not trigger their exclusion from the bargaining unit. Entry into phased-retirement does not transform a bargaining unit member into a non-member for

[19]As will be discussed in more detail under issue number five, an underlying problem in this case involves the university's ability to effect bargaining unit composition, intentionally or not, by its assignment of classes and its control over which faculty are full-time and which are not. For this reason, PERB has historically resolved demonstrated or potential problems of this nature by inclusion of all "regular part-time" faculty in faculty bargaining units, where a shared community of interest makes this appropriate. See the discussion of this result under issue number three, *infra*.

no longer being "full-time", in the sense that that term was envisioned in the Unit Determination Order approved in 1999 by the PERB. The rationale urged here by the Employer and brandished for several years to justify its exclusion of faculty from the bargaining unit too narrowly construes the term "full-time" as it is used in the unit description. As stated above, the presiding officer finds merit in Petitioner's contention that a faculty member on phased retirement remains a full-time employee, albeit one teaching less than a full class load, and in the proposition that state law and Regents' policy governing phased-retirement precludes elimination of the benefit of bargaining unit membership. Further, as will be discussed and addressed, *infra,* the term "full-time" as used in the unit description is subject to misinterpretation and gives the employer unilateral control to determine who is, and who is not, in the bargaining unit by assigning, or withholding, classroom teaching assignments, research, service and other duties and responsibilities. Going forward, the unit description would be less susceptible to misapplication, bargaining unit work would be retained within the bargaining unit, and the unit description would be easier to understand and administer by adoption of long-standing PERB/Office of Labor Relations policy favoring inclusion of all "regular part-time" faculty in the bargaining unit. This possibility will be further discussed, *infra,* under Issue Number Three.

ISSUE NUMBER TWO

> The next issue for consideration is whether the Fort Hays State University faculty bargaining unit, as defined, excludes from its coverage and benefits those faculty members who have been placed on a terminal contract?

13. Using much the same rationale as that utilized to justify exclusion of phased-retirement faculty from the bargaining unit, the university administration has eliminated other faculty from unit membership, by a restrictive interpretation of the unit description, upon issuance of terminal contracts. By doing so, the employer has refused to afford these faculty the privileges that accompany unit membership, such as representation in grievances, including grievances of the decision to place the faculty member on terminal contract. While a faculty's transition to phased-retirement was met with claims that they were no longer a "*full-time* non-temporary university employee", and thus no longer in the unit, a faculty member receiving a terminal contract was excluded from the unit by claims that they were no longer "non-temporary". Because the faculty member's terminal contract would limit their further employment to no more than a year, they no longer met the unit description, that is, a faculty member on terminal contract was no longer a "full-time *non-temporary* university employee".

14. Again, the presiding officer is of the view that the employer misconstrues terms used in the parties' 1999 mutually-agreed unit description. Had this interpretation of the description been within the mutual contemplation of the parties when they reached the agreement in 1999, there could hardly have been any disagreement over it two years later when, in 2001, the FHSU-AAUP vigorously disputed the University's contention that they could not represent terminal-contract recipient Professor Robert Dolan. And, while these concerns could certainly have been brought before PERB as prohibited practices, as was pursued under analogous circumstances for Professor Frank Gaskill,[20] they can also

[20] *See supra* note 14.

be addressed, going forward, by clarification or amendment of the bargaining unit description.

15. As written, the unit description does not exclude professors on terminal contract from membership in the bargaining unit. While from a strict, hyper-technical perspective it may seem that a professor on terminal contract is no longer "non-temporary" in the sense that he has no expectation of remaining an employee after expiration of the contract, that professor still shares in the same community of interest as other unit members, and is still otherwise largely subject to the same terms and conditions of employment as those existing before imposition of the terminal contract. More importantly, since the faculty member removed from tenure-track can file a grievance of that decision prior to acceptance of the final, or terminal, contract, the decision of removal from tenure-track would not immediately become final. During that grievance and appeal or litigation period, unit membership and representational benefits would continue.[21]

16. Moreover, the employer's construction of the unit description is unreasonably narrow. Were its construction upheld, an employer could too easily manipulate the composition and membership of a bargaining unit. Were the vote sustaining a representational choice a narrow one in the first instance, elimination of a few key union

[21]Despite its past contradictory actions, e.g., denial of AAUP representation for Professor Robert Dolan in his grievance of terminal contract status, *see* Finding of Fact No. 9, FHSU averred that a unit member placed on terminal contract status would be entitled to continued union representation during a grievance of such action, both at the hearing and in its written legal arguments. *See* Tr., pp. 330, 361-362 (Testimony of President Hammond); Respondent's Proposed Findings of Fact and Conclusions of Law, Findings No. 113-116, pp. 16-17; *Id.*, p. 35. *But see*, Tr., p. 368 (Dr. Hammond testifying that Petitioner could no longer assist a faculty member with grievance representation once both the University and the faculty member have signed that faculty member's terminal contract).

adherents, say by issuance of a few terminal contracts, by exclusion of others on phased retirement, or by promoting another unit member or two into supervisory positions, would allow an unscrupulous employer to unduly and improperly interfere in the administration of a bargaining representative, resulting perhaps, in the extreme case, in the bargaining representative's very elimination in a decertification proceeding. Such actions are clearly impermissible under state law and the parties' unit description should not be susceptible to, nor invite, such misconduct. In point of fact, it is the policy and practice of the PERB *sua sponte* to remedy problems such as those presented by the inartfully-drafted unit description in this matter, in an effort to further the PEERA's legislative purpose of promoting harmonious public employer-employee labor relations in Kansas. In the discussion under Issue Number Three, remedies for the several deficiencies inherent in the parties' "agreed" unit description will be advanced and considered.

ISSUE NUMBER THREE

> The third primary legal issue to resolve is whether the definition of the Fort Hays State University faculty bargaining unit should be amended to eliminate the modifier "non-temporary" from the definition of faculty members included in the unit? Stated in another way, should the parties' agreed bargaining unit description remain unchanged, be replaced by the one requested by Petitioner or be replaced by some other description?

17. In Issues Number One and Two, the presiding officer has attempted to clarify the construction of terms used in the parties' agreed unit description. By the clarification rendered herein, it should be clear to the respective parties that faculty in phased-retirement and on terminal contract status are not excluded from the unit, under any

reasonable reading of the current unit description. Within the remaining issues, beginning with this Issue Number Three, we will determine whether PERB should amend the unit description. First, however, we must review the law governing unit amendments and the consequences and responsibilities that flow therefrom. In so doing, the presiding officer is indebted to the prior work of another PERB Presiding Officer.[22]

18. As the reader will recall, Petitioner requests that the bargaining unit definition be amended to eliminate the modifier "non-temporary" from its description of qualifications for unit membership. The result of such a change would be that the bargaining unit would include more of the University's teaching faculty than it has under the unit description as construed up to this time. Under the employer's interpretation of the unit description, only tenured and tenure-track faculty, excluding phased-retirement and terminal contract faculty, have been included in the unit.

19. Under Petitioner's requested change, the unit would include all full-time teaching faculty, including not only tenured and tenure-track faculty, but also those teaching and not tenured nor on tenure-track, but employed on contracts titled "TEMPORARY OR PART-TIME APPOINTMENT", including those teaching in the virtual college programs. In answering these questions, first, whether to modify the unit description and if so, whether to eliminate the term "non-temporary" and adopt Petitioner's requested description, or some other description, the perspectives of both parties, as well as legal and policy considerations peculiarly the province of this labor relations agency must be carefully thought through.

[22]Several previous PEERA and PNA, (Professional Negotiations Act, K.S.A. 72-5413 *et seq.*), orders written by Presiding Officer Monty R. Bertelli provided a legal framework helpful in discerning and understanding applicable and persuasive law and policy regarding unit clarifications and amendments, and self-determination elections.

20. Before examining the applicable legal and policy concerns, however, it will assist the reader to reflect on the perspectives of each of the respective parties and I will attempt to briefly summarize their viewpoints here.

The Petitioner's Concerns

21. Petitioner's concerns, highly summarized, appear to be rooted in frustration with a bargaining relationship that has met with only limited success, alleged to be largely due to the Employer's attempts to thwart Petitioner from exercising its statutory role as the faculty bargaining unit's exclusive representative. More particularly, Petitioner believes that the employer "has been systematically defining faculty out of the bargaining unit in an effort to prevent membership and deny professors on phased retirement or terminal contracts their rights under [PEERA]." Petitioner's Brief, April 24, 2006, p. 1. Petitioner notes that its purpose in filing this unit clarification or amendment petition is "to prevent the erosion of the bargaining unit by the University's capricious interpretation of faculty contracts and titles." *Id.*, p. 11. The "erosion" referenced by Petitioner appears to be not only that of unit positions, but more generally that of bargaining unit work.

22. However, Petitioner seeks not only to correct the University administration's misapplication of the agreed unit description, by ensuring that those on terminal contract status and phased retirement remain in the bargaining unit, but also to exclude the classifications of Academic Director and Curator, alleged to be supervisors, and Program Specialists, for their purportedly lacking a sufficient community of interest to be included with the teaching faculty.

23. Petitioner further seeks bargaining unit inclusion of all other full-time teaching faculty, urging that "there is no significant distinction between the [community of interest] of full-time non-temporary faculty and those given 'temporary or part-time appointments.'" Petitioner's Brief, April 24, 2006, p. 12. Petitioner's Brief devotes its next nine pages to an analysis of the facts of record in light of the statutory factors for determination of appropriate bargaining units set out at K.S.A. 75-4327(e), concluding "that all full-time faculty should be included in the bargaining unit due to their strong community of interest and other relevant factors." *Id.*, p. 21.

The Employer's Perspective

24. It appears that the University is opposed to any changes to the bargaining unit description, with the possible exception of excluding from the unit the classifications of Academic Director, Curator and Program Specialists, which it did not address in its briefing. Nearly ten years ago, from the outset of the faculty's attempt to determine an appropriate unit and certify a bargaining representative, the Employer professed to have no position with regard to composition of the bargaining unit. Now, however, the Employer contends not only that non-tenured/tenure track faculty do not share a community of interest with tenured/tenure-track faculty, but also that the "agreed" unit description, written in language starkly different from that proposed by faculty in their original unit determination and certification petition, clearly and unequivocally excludes terminal contract recipients and faculty on phased-retirement from the unit. On the further basis of insufficient community of interest, Employer urges that the clarification and amendment petition must be dismissed.

25. With regard to amending the unit description, the Employer advocates that the presiding officer "should independently find that the unit proposed by [Petitioner] is not a more appropriate unit than the existing unit, given that [Petitioner] agreed to the current unit definition despite the knowledge that temporary faculty were employed by [Employer], and since [Petitioner] has not demonstrated that the interests or duties of temporary faculty have changed since unit creation." Petitioner's Brief, April 24, 2006, p. 38.

26. Employer urges, in the alternative, that Petitioner must be required to submit a 30% showing of interest and that a self-determination election be held, "giving the proposed [new] unit members an opportunity to vote for inclusion in the unit." *Id.* "Under no case may proposed unit members be automatically added to the unit." *Id.* Neither the PEERA statute nor the rules and regulations adopted specifically speak to this issue.

Legal and Policy Considerations:
Addition of Employees to Bargaining Units by Clarification Petition or by Self-Determination Election

27. In the experience of the National Labor Relations Board, a self-determination election is the usual method by which unrepresented employees are 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, 670 F.2d 754, 755-57 (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 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,* 109 LRRM 2815, 2817, 670 F.2d 754, 755-57 (CA7, 1982); *Boston Cutting Die Co., 98 LRRM 1431 (1978); Arthur C. Logan Memorial Hospital*, 96 LRRM 1063 (1977).

Unit Clarification by Accretion

28. Under the NLRA, generally, a unit clarification petition is appropriate: (A) where there is a dispute over the unit placement of employees in a particular job classification; (B) where there has been an *"accretion"* to the work force; and (C) where a labor organization or employer seeks to reorganize 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).

29. 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 significant change. *Mass. Teachers Ass'n*, 98 LRRM 1431, 1433 (1978); *Philadelphia Fed. of Teachers v. PLRB*, 103 LRRM 2539 (Penn. 1979). In addition, clarification of a unit may be necessary to avoid violations of the Act or of Board policy. *Peerless Publications*, 77 LRRM 1262, 1264 (1971); *The Washington Post*

Company, 254 NLRB 168 (1981); *Williams Transportation Company*, 233 NLRB 837 (1977). *See also, Western Colorado Power Co.*, 77 LRRM 1285 (1971)(the NLRB, during the term of an agreement, clarified a bargaining unit and removed improperly included supervisors).

30. Circumstance "C", where a labor organization or employer seeks to reorganize 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 unit. Before such severance is allowed, the determination must first be made as to whether in reality, the proposed new unit of employees, 1) constitute a functionally distinct group, and 2) whether, as a group, they have overriding special interests, such that their constitution as a separate bargaining unit is appropriate, based upon an analysis of all the applicable factors. *Kalamazoo Paper Box Corp.*, 49 LRRM 1716 (1962). This determination, like any determination of an appropriate bargaining unit, is made on a case-by-case basis.

31. The majority of unit clarification petitions filed under the PEERA fall within circumstance "B", i.e., where there has been an *"accretion"* to the work force. To understand circumstance "B" it will be helpful to define the term *"accretion."*

32. 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 lack a separate identity, that is, they would not more appropriately be constituted as a separate and distinct bargaining unit. *Consolidated Papers, Inc. v. NLRB*, 109 LRRM 2815, 2817 (CA7, 1982); s*ee 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.

Policy Exceptions to Accretion:
In General

33. 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 an existing bargaining unit. *See Scott County v. PERB*, 461 N.W.2d 503 (Minn. 1990).

34. In determining whether a group of employees represents an accretion to an existing unit the PERB must consider unique and complex sets of facts in light of the somewhat

conflicting policies of stabilizing bargaining relationships, assuring employees the right to choose their own bargaining agents and avoiding violations of labor relations law and Board policy. *See NLRB v. Food Employees Council, Inc.*, 69 LRRM 2077 (CA9, 1968); *The Washington Post Company*, 254 NLRB 168 (1981); *Boston Cutting Die Co.*, 258 NLRB 771, n. 5 (1981). 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 whether the employees proposed to be added constitute an identifiable, distinct segment such as to constitute an appropriately separate bargaining group. *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972).

35. In some circumstances, clarification of an existing bargaining unit may be necessary to avoid violations of the Act or of Board policy. *See, e.g., Boston Cutting Die Co.*, 258 NLRB 771, n. 5 (1981); *Butler County Community College Education Association v. Butler County Community College, El Dorado, Kansas,* 72-UCA-1-1993 (June 15, 1994).

Policy Exceptions to Accretion:
Does Proposed Addition Constitute Separate Unit?

36. To determine whether a group of employees share a sufficient community of interest to constitute an accretion, the factors[23] 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,

[23]Under PEERA, those factors are set out at K.S.A. 75-4327(e).

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.*

37. 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 employees to be added constitute an identifiable, distinct segment so as to comprise an appropriate group. If so, the employees 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).

Policy Exceptions to Accretion:
Question Concerning Representation and
Historical Exclusion

38. Even when the group proposed for accretion has a sufficient community of interest with the existing unit and is not an identifiable, distinct segment, there are circumstances under which the unrepresented employees will not be accreted without giving them a chance to express their representational desires, e.g., when the unrepresented group sought to be accreted numerically overshadows the existing unit or otherwise raises a question concerning representation, *Carr-Gottstein Foods*, 307 NLRB No. 199 (July 16, 1992), or when the job classifications of the unrepresented group have historically been 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 concerning representation?" *Boston Gas Co.*, 221 NLRB 628 (1975)(80 new employees added to 184 in existing unit did not raise question); *Scott County v. PERB*, 461 N.W.2d 503 (Minn. 1990)(7 new employees added to a unit containing 114 would not significantly effect employee organization's majority status).

39. Pursuant to a line of its decisions, the NLRB has generally not entertained unit clarification petitions to clarify the unit placement of job classifications that have historically been excluded from the unit by the parties. *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 excluded from the unit when the certification was issued, *Bendix Corp.*, 66 LRRM 1332 (1971); *Gould-National Batteries, Inc.*, 61 LRRM 1436 (1966), 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 that historically was 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."

Policy Exceptions to Accretion:
***Wallace-Murray* Doctrine**

40. In addition to its reluctance to entertain an accretion in the instances cited above, without giving the affected employees an opportunity to vote, it is well-settled that the NLRB will not normally entertain a petition for unit clarification to modify a *clearly defined* unit during the term of a current bargaining 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.[24]

41. Two factors in addition to the stability of bargaining relationships seem 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

[24]Conversely, the NLRB will entertain midterm unit clarification petitions seeking to clarify supervisory status of employee classifications included in a unit by agreement of the parties. Unit clarification is always available and appropriate to resolve disputes over agreements including individuals who are not employees within the meaning of the labor relations act. *Arthur C. Logan Memorial Hospital*, 231 NLRB 778, 96 LRRM 1063 (1977). This conclusion is equally applicable under the Kansas PEERA.

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.

42. The NLRB's consistent procedure in such cases 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.[25] *Consolidated*

[25]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 at a later time. The parties can plan accordingly for the upcoming negotiations. *See Fire Fighters, Local 1054 v. PERC*, 110 LRRM 2306, 2308 (Wash. 1981). Former PERB Presiding Officer Bertelli opined in an Initial Order rendered in *City of Wichita, Kansas v. Fraternal Order of Police, Lodge No. 5*, 75-UCA-1-1994, that this time period under PEERA should coincide with the statutory contract-bar window period set forth in K.S.A. 75-4327(d) - filed no more than 150 days nor less than 90 days prior to the expiration date of the agreement. *City of Wichita v. F.O.P., Lodge No. 5*, 75-UCA-1-1994 (October 27, 1995), p. 60, n. 9. The *City of Wichita* decision announced a policy, in *dicta*, consistent with the NLRB's so-called *Wallace-Murray* rule despite its complete absence from the statutory provisions of the Kansas PEERA. The presiding officer in the instant matter declines to adopt the previous hearing officer's suggestion. Had it been the legislative intent to limit clarification petitions to such a finite and restrictive time period, the legislature could easily have set out that guidance, as it did by limiting representation questions to the statutory contract-bar period. *See* K.S.A. 75-4327(d). Further, there is no compelling policy reason to limit a petitioner's right to seek inclusion of additional classifications in a bargaining unit to such a rigid and inflexible timing model. Given that this petition is filed and under consideration, there is no justification for dismissing this filing, only to require the filing of another petition, seeking similar action, but at a later time. Given that the disposition of this matter can account and make provision for questions of representation and of the need to exclude any added employees from benefit of inapplicable and "unbargained-for" terms and conditions set out in the current negotiated agreement until such time as their own terms and conditions are addressed through bargaining, there is no compelling need to march in lockstep with the precise and pedantic pronouncements of an extensive national body of law driven by its own unique machinery, mechanisms and historical administrative jurisprudence. This is especially true where, as here, the parties' bargaining relationship has historically been anything but a stable one, there is evidence to suggest that the parties' mutual unit description agreement was neither mutual nor in agreement and there appear to have been changes if not in the *per se* duties of so-called "temporary", that is, non-tenured/tenure-track, faculty, then at least in the employer's utilization of "temporary" or non-tenured/tenure track positions versus tenured and tenure-track positions, a process by which bargaining unit work is being systematically reallocated from bargaining unit positions to non-bargaining unit positions. Since the parties' bargaining relationship has not been a stable one, concern over the possible disruption of the parties' bargaining relationship should not command undue attention. The noted

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).

43. The *Wallace-Murray* rule thus deals only with the timeliness of the unit clarification petition by expressing the NLRB's administrative policy of deferring, during the term of the contract, to the previously-determined appropriate unit description.[26] *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."

44. Under the NLRA's application of the *Wallace-Murray* rule, a contract during its term bars the non-elected addition of employees to the bargaining unit and to entitlement to the unit's previously-bargained terms and conditions. It does not, however, bar an elected addition. Indeed, a contrary rule might be inconsistent with the PEERA, in that some

---

possible lack of mutuality in the parties' 1999 unit description agreement lessens the policy rationale for limiting clarifications during the term of a current MOA because the unit was not "clearly defined" by the parties' agreement. Moreover, an expansion of the current bargaining unit composition, either by clarification of the bargaining unit by accretion, or through an *Armour-Globe* style self-determination election of the proposed added faculty, will help promote a more productive bargaining relationship and environment at FHSU and may also promote compliance with the Act by precluding removal of not only bargaining unit positions but also of bargaining unit work, by administrative allocation of positions between "temporary", i.e., non-tenure-track contracts, and tenure-track contracts.

[26]The caveat remains that the unit determination order or memorandum of agreement must *clearly* define the unit. Whether the unit is clearly defined is an issue which may be raised and resolved by a unit clarification proceeding. Only if the job position is clearly included or excluded from the unit by its description will the *Wallace-Murray* rule be applied.

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 benefiting the unrepresented employees. *See NLRB v. Mississippi Power & Light*, 120 LRRM 2302, 2305-06 (1985).

Usage of Self-determination Elections

45. The NLRB has consistently held that self-determination 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 (1973)(holding 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). This type of election is referred to, in the private sector, as an *Armour-Globe* election, and it differs fundamentally from a representation election.

46. The purpose of a representation or certification election is to determine which employee organization, if any, shall be certified to represent the employees in a 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 bargaining 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 be added to the unit and share in the representation provided by the incumbent employee organization. *See NLRB Field Manual*, §11090.2c(1). Accordingly,

when a majority of the voting employees vote in favor of such a proposition, a Certification of Results rather than a Certification of Representation is issued.

47. 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

48. 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 members' employment. The existing agreement between the employer and the existing bargaining unit cannot be applied to the newly-added members, and it is necessary to negotiate with regard to the terms and conditions of the added position(s). 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."

49. 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 Employer is thereafter obligated to bargain with that representative in a good-faith effort to reach a collective bargaining agreement covering the unit employees.

50. Following an *Armour-Globe* style election in which the previously-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 employer have already bargained in good faith, have already agreed to general unit-wide 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.

51. The employer cannot unilaterally extend classification-specific terms of an existing contract to job classifications newly-added to a bargaining unit during the term of the contract. *Port of Portland v. Municipal Employees, Local 483*, 2 PBC ¶ 20,298 (Oregon App. 1976). Instead, any classification-specific terms and conditions of the new bargaining unit members' employment must be negotiated.[27] And until negotiations are concluded,

[27]As with many other facets of the particulars of their relationship, the parties must evaluate and meet and confer over this question in good faith. Many of the terms and conditions of employment contained in the parties' current memorandum of agreement are doubtless equally applicable to unit members proposed to be added to the bargaining unit by this order. Others will not be and the parties must in good faith attempt to sort through issues that may arise regarding

the classification-specific terms and conditions applicable to the employees in question when they were unrepresented continue to apply. *Id.*

52. 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. 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 of 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

---

them. Further, as should be clear from this order, faculty on terminal contract or phased-retirement have always been members of the unit from its inception and the terms and conditions contained in the current MOA are equally applicable to said faculty.

> 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."
>
> * * * * *
>
> ". . . [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.

53. In summary, the test in the case *sub judice* for determining whether a job classification can be accreted to the existing bargaining unit without the need for an election, is as follows:

1) Do the job classifications constitute an identifiable, distinct segment of employees so as to appropriately constitute a separate bargaining unit? If not,

2) Do the job classifications in question share a sufficient community of interest with the employees in the existing bargaining unit such that their inclusion in the unit is more appropriate than their continued exclusion?

3) Have the job classifications historically been excluded from the bargaining unit? and

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 concerning representation?

If the classifications fail the test, accretion is inappropriate, and the determination regarding additions to the unit must be made in an *Armour-Globe* style election, to be administered by PERB staff. We will proceed to examine the record and apply the law, as set forth above, to the facts of this case

Community of Interest and Separate Appropriate Unit

54. As noted above, the questions concerning unit membership of faculty on terminal contract and faculty on phased retirement have already been resolved. As the unit description was originally written, it is clear, or should have been clear, that the interpretation devised by Employer following the PERB certification of representation election results and its subsequent order to meet and confer, was not reasonable nor in accord with the unit description for the reasons previously stated. These two small subsets of FHSU faculty have always been in the unit and are subject to the parties' current bargained agreement and its terms and conditions of employment. This clarification of the unit description with respect to these two distinct subsets of Respondent's faculty is complete and no further discussion need be had with regard to their continued representation in the unit. The following discussion of the four questions set out above is applicable only to the so-called "temporary" faculty, i.e., those who are not tenured or on tenure-track.

55. When all of the facts set out above at findings of fact numbers 11-18, 22-25 and 45-54 are viewed together and evaluated with respect to factors appropriately considered in a community of interest analysis,[28] the teaching faculty described as non-tenured, and usually employed under a contract titled as "TEMPORARY OR PART-TIME APPOINTMENT", do not have a community of interest between themselves sufficient to constitute an identifiable, distinct segment of employees, nor sufficient to qualify as an appropriate unit separate from the existing unit. Their community of interest, however, with the tenured/tenure-track faculty is overwhelming. Respondent makes far too much of the relatively minor differences between tenured and non-tenured faculty, essentially equating their respective, but relatively minor, differences in terms and conditions of service with similarly differing communities of interest. When these faculty subsets' commonality of interests, however, are viewed in relation to the other factors appropriately considered in determining a proposed bargaining unit's appropriateness, particularly with regard to overfragmentation and governmental efficiency, it is apparent that the whole of Respondent's teaching faculty comprise a more appropriate bargaining unit than that currently constituted, particularly when one considers the changing nature of faculty at FHSU and in higher education including the national trend toward less use of traditional tenured faculty. *See* Tr., pp. 121-122, 226-227.

56. The PERB is vested with broad discretionary authority in the determination of what constitutes an appropriate bargaining unit. The Michigan Supreme Court, in interpreting its public employee relations act provisions on unit determination, said in *Hotel Olds v. State Labor Mediation Board*, 53 N.W.2d 308 (Mich. 1952):

---

[28] *See supra* note 9.

> "In designing bargaining units as appropriate, a primary objective of the commission is to constitute the largest unit which, in the circumstances of the particular case, is most compatible with the effectuation of the purposes of the law and to include in a single unit all common interests."

Two commentators similarly recommend that bargaining units in the public sector "should be as broad as is consistent with viable negotiations." *See*, L.C. Shaw & R.T. Clark Jr., *Determination of Appropriate Bargaining units in the Public Sector: Legal and Practical Problems*, 51 Ore.L.Rev. 152 (1971); E.G. Gee, *Organizing the Halls of Ivy; Developing a Framework for Viable Alternatives in Higher Education Employment*, Utah L.Rev. 233 (1973).

57. One of the factors to consider in determining an appropriate unit is over-fragmentation of bargaining units. Over-fragmentation has been variously defined, and certainly involves mixed questions of law and fact. *Fire Fighters, Local 2287 v. City of Montpelier*, 2 PBC ¶ 20,042 (Vermont 1974). As noted by the Nebraska Supreme Court in *American Ass'n of University Professors v. Bd. of Regents*, 2 PBC ¶20,440 (1977):

> ". . . fragmentation leads directly to development of expensive and administratively unmanageable bargaining structures and to increased administrative costs once an agreement is reached. It fosters proliferation of personnel necessary to bargain and administer contracts on both sides of the bargaining table. It destroys the ability of public institutions . . . to develop, administer, and maintain any semblance of uniformity or coordination in their employment policies and practices. In the long run, it results in an inefficient, ineffective, and unworkable relationship for all parties concerned. Its ultimate effect is to substitute litigation for negotiations as the principal dispute resolving process in the public sector, in effect, it defeats the purpose of Nebraska's public sector labor law."

58. Shaw and Clark, in their article on *Determination of Appropriate Bargaining units in the Public Sector: Legal and Practical Problems*, 51 ORE.L.REV. 152, state the problem as follows:

> "The more bargaining units public management deals with, the greater the chance that competing unions will be able to whipsaw the employer. Moreover, a multiplicity of bargaining units make it difficult, if not impossible to maintain some semblance of uniformity in benefits and working conditions. Unfortunately, in many states and localities bargaining units have been established without consideration of the effect such units will have on negotiations or on the subsequent administration of an agreement. The resulting crazy-quilt pattern of representation has unduly complicated the collective bargaining process in the public sector."

59. The determinative factor in ascertaining the appropriateness of a unit is neither what the employees want nor what the public employer wants, but rather whether the inclusion of the job position(s) in the unit will serve and not subvert the purposes of the act, i.e., establishment and promotion of fair and harmonious employer-employee relations in the public service. *West Orange Bd. of Ed. v. Wilton*, 1 PBC ¶ 10,086 (N.J. 1971). To allow the formation of a separate bargaining unit for the "temporary", i.e., non-tenured/tenure-track, faculty, given their strong community of interest and the similarities of their terms and conditions of employment, would cause overfragmentation of the faculty, and defeat the purposes of the PEERA. *See Kendall College v. NLRB*, 97 LRRM 2880 (CA 7, 1976).

60. Analysis of the factors set forth at K.S.A. 75-4327(e) persuades the presiding officer that inclusion of the faculty in question in the current bargaining unit is both appropriate and more appropriate than their continued exclusion for the reasons expressed herein. *See* Findings of Fact Nos. 6-18, 22-25 and 45-54.

Historical Exclusion

61. While "temporary", or non-tenured/tenure-track, faculty positions were in existence and in use at the time of the original unit description agreement, compelling arguments can be made that the parties' original agreement contemplated a faculty bargaining unit

comprised of more than just tenured/tenure-track faculty, and that it included the faculty positions here in dispute. We need not address this precise issue, however, for consideration of the final question presented next compels the conclusion that the faculty positions proposed for addition to this unit must be given an opportunity to vote in an *Armour-Globe* style election, that is, to vote as to whether a majority thereof desire to be included in the faculty bargaining unit represented by Petitioner.

Question Concerning Representation

62. The positions at issue in this matter are sufficient in number when compared to the number of employees presently in the existing bargaining unit to raise a question concerning representation.[29] This circumstance makes a self-determination election necessary. *See, e.g., Scott County v. PERB*, 461 N.W.2d 503 (Minn. 1990)(holding that addition of 7 new positions to unit comprised of 114 would not "significantly affect" majority status of incumbent representative). Although the current members of the bargaining unit outnumber those sought to be added by this action, the vote favoring representation in the original 1999 certification and election proceeding was so close, and a decertification attempt remains a very real, potential threat, that it is inappropriate to add new positions without giving them an opportunity to express their collective interest in inclusion in the current bargaining unit, represented by the incumbent employee organization, by a secret ballot election. To rule otherwise could subject the bargaining unit majority's collective expressed determination, that of being represented in PEERA

[29]Broadly speaking, a "question concerning representation", or QCR, exists whenever there are circumstances that may require the PERB to determine whether an employee organization represents a majority of the employees in an appropriate bargaining unit.

meet and confer proceedings by FHSU-AAUP, to being overturned by decertification, by including a significant number of additional faculty without first determining whether they share the incumbent unit members' collective representational desire. Moreover, this result, requiring that the employees to be added to the unit be given an opportunity to express their representational desires, is consistent with and advances one of the legislatively-expressed objectives of the Act, that of "recognizing the right of public employees to join [employee] organizations of their own choice, or to refrain from joining, and be represented in their employment relations and dealings with public agencies." K.S.A. 75-4321(b).

Other Policy Determinations: Unit Inclusion of "Regular Part-time" Faculty

63. The presiding officer raises *sua sponte* the question of inclusion of part-time faculty in the bargaining unit. Although the parties appear to agree that the unit should be comprised solely of full-time faculty, Petitioner raises several concerns over just how this determination, whether a faculty member is full-time or part-time, is made. For example, it is clear from the discussion above, regarding the full-time or part-time status of professors on phased retirement, that the parties have struggled with this question, creating unnecessary conflict in their labor relations and distracting from fulfillment of the Act's purpose, that of enabling public employees to organize and negotiate to improve their terms and conditions of employment and in the resolution of grievances. Accordingly, discussion of this topic from the PERB's perspective may provide guidance to assist the parties in the day-to-day administration of their labor-management relationship.

64. In other circumstances raising this issue, administrative actions by hearing officers and agency heads in the Kansas Department of Labor's Office of Labor Relations, encompassing administration of both the Kansas Public Employer-Employee Relations Act and the Kansas Professional Negotiations Act, have reached the following conclusion: part-time faculty who, because of regularity and frequency of employment, have a substantial community of interest with the unit's full-time faculty in conditions of employment are regarded as regular part-time faculty and are includable in the bargaining unit. *See, e.g., Butler County Community College Education Association v. Butler County Community College, El Dorado, Kansas*, 72-UCA-1-1993, p. 84 (June 15, 1994)(citing Morris, *The Developing Labor Law*, Ch. 30, p. 1438). *See also, Colby Community College Faculty Alliance v. Colby Community College, Colby, Kansas,* 72-UCA-4-1992, p. 33 (November 1, 1993) (order established criteria for bargaining unit inclusion of part-time faculty, adopting a modified version of NLRB policy set out in *Tusculum College*, 199 NLRB 28, 81 LRRM 1345 (1972), whereby part-time faculty members who teach at least one-quarter the normal load for full-time faculty members were considered regular part-time professional employees who must be included in the same unit as the full-time faculty, unless the parties agreed to exclude them).[30]

[30]While the presiding officer is well aware that the NLRB has abandoned its prior policy determination, reflected in the *Tusculum College* case cited above, to mandate inclusion of part-time faculty in units of full-time faculty, for reasons reflecting concerns regarding community of interest, the presiding officer declines to follow suit in this matter. As noted, the additional faculty requested by Petitioner to be included in this unit do not have such a distinct and identifiable separate community of interest that they would appropriately constitute a separate and distinct bargaining unit. And while there are differences in their terms and conditions of employment versus full-time salaried tenured faculty, and slight differences in the factors constituting their respective communities of interest, these differences are not so significant that the basic overall community of interest in teaching, with all its attendant facts, shared by all faculty at FHSU becomes less than a satisfactory indicia or guidepost by which to gauge the

65. In the instant matter, it is apparent that the faculty on Respondent's campus, whether they are denoted as tenured or not, full-time or not, temporary or non-temporary, share an overriding and unifying commonality of interests based upon their common devotion to the University's mission, that of teaching, whether face-to-face or in the virtual college format, in a higher education setting. It is the presiding officer's hope and belief that as the parties' negotiating relationship continues to unfold, they will meet and confer in good faith with one another whenever questions arise regarding membership of specific faculty in the bargaining unit and that the parties will endeavor in good faith to resolve these issues, applying the contours of guidance spelled out in this writing.

66. In view of the Board's strong interest in effectuating the purposes of the Act, the presiding officer concludes that adoption of the so-called "four-to-one" policy is appropriate herein to establish criteria for making the case-by-case determinations whether faculty members meet a minimal workload level to qualify for unit participation. Faculty members teaching at least one-quarter the normal load for full-time faculty members are considered regular part-time faculty who must be included in the same unit as full-time faculty. *See Colby Community College Faculty Alliance v. Colby Community College, Colby, Kansas*, 72-UCA-4-1992 (November 1, 1993). This criteria is consistent with the

---

appropriateness of this unit. The varying interests of all faculty under consideration herein can be adequately represented and bargained for in the proposed unit, as modified and adopted herein. While the presiding officer is also aware of a variation of the four-to-one rule, approved by the Seventh Circuit in *Kendall College v. NLRB*, 570 F.2d 216, 97 LRRM 2878 (CA 7, 1978), he declines to adopt that policy variation *per se* in the instant matter. The *Kendall College* rule provides that "pro-rata" part-time faculty members are included with full-time faculty for bargaining purposes. Faculty whose pay and fringe benefits are on the same basis as full-time faculty, but proportional to their respective work loads should be included in a full-time faculty bargaining unit, but part-time "per-course" faculty members should be excluded because they are paid a flat fee per course taught and they receive no fringe benefits. Elements of both policy variants are reflected in the facts of this matter and they were thoroughly considered in reaching the ultimate conclusions herein.

legislative reasoning reflected in statutory provisions guaranteeing full-time benefits for faculty on phased retirement, will provide greater continuity and greater stability, from year to year and from semester to semester, in bargaining unit membership, and reduces an employer's unilateral control over who qualifies for membership in the bargaining unit. Including regular part-time faculty in this bargaining unit will also unify faculty bargaining issues in one representative, promoting efficiency in negotiations and fostering stability in the bargaining relationship.

Other Concerns

67. There is no question that matters of unique concern to certain employees in a bargaining unit can be addressed separately in a negotiated agreement. As stated in *Federal-Mogul Corp.*, 85 LRRM 1353, 1355 (1974):

> "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 [all employees] 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."

68. Certainly, while they share a significant community of interest, the terms and conditions of the instructors and other non-tenured/tenure track faculty at FHSU are not co-extensive with those of current unit membership. However, as is apparent in negotiating any memorandum of agreement, these differences can be addressed and memorialized in an *"addendum"* to the current memorandum of agreement.

69. A single bargaining unit can accommodate for such differences being addressed through viable negotiations while still providing for the common interests of all employees in the unit. The record supports the conclusion that inclusion of the non-tenured/tenure-track employees in question in the existing faculty bargaining unit will be consistent with effectuation of the purposes of the law.

ISSUE NUMBER FOUR

> The fourth primary legal issue to be resolved in this case is whether the description of the FHSU faculty bargaining unit should be amended to exclude the allegedly supervisory positions of Curator and Academic Director, and to exclude the position of Program Specialists, for lacking a sufficient community of interest with other bargaining unit members?

CURATOR AND ACADEMIC DIRECTOR

70. As noted earlier, the PEERA gives "public employees" the right to form, join and participate in the activities of employee organizations, i.e., "labor unions", for the purpose of meeting and conferring with public employers regarding grievances and conditions of employment. K.S.A. 75-4324. The Act defines "public employees" to mean "any person employed by any public agency, except those persons classed as supervisory employees", K.S.A. 75-4322(a), and certain other specified classes which the parties agree are not applicable for purposes of this case. The PERB has long ruled that the burden of proving that an individual should be excluded pursuant to one of the exclusionary categories of K.S.A. 75-4322(a) rests on the party alleging that exclusionary status. This rule is consistent with Kansas law holding that the burden of proof or persuasion rests with the party pleading the affirmative existence of the matter. See, e.g.,

In re Wrights Estate, 170 Kan. 600 (1951)(burden of proof on any point is on party asserting it); *Amos v. Livingston*, 26 Kan. 106 (1881)(general rule is that he who asserts an affirmative has the burden of proving it).

71. The Kansas PEERA provides an election machinery and process by which public employees can choose an employee organization or union to represent them. The PERB conducts representation elections and certifies the results. Where an organization represents the majority of employees in "an appropriate unit", K.S.A. 75-4327(b), the PEERA requires the public employer to recognize the organization to effectuate the bargaining process afforded by state law. K.S.A. 75-4327(a); Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 252 (1980).

72. PEERA provides that it is the Board's responsibility to determine the scope of an appropriate unit, i.e., which employee positions should be included in the bargaining unit:

> "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 in accordance with the provisions of the Kansas administrative procedure act, rule on the definition of the appropriate unit in accordance with subsection (e) of this section."

K.S.A. 75-4327(c). This responsibility is equally applicable to a unit clarification. K.A.R. 84-2-7; K.A.R. 84-2-9.

73. In its request to modify the present bargaining unit description, Petitioner alleges, as noted previously, that the positions of Curator and Academic Director are "supervisory employees" as that term is defined in the Act. Further examination of the supervisory employee exclusion is therefore in order.

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 responsibly 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 judgment. . . ."

74. The statutory exclusion of supervisory employees from bargaining units is based on language of a similar exclusion found in the National Labor Relations Act at 29 U.S.C. § 152(11). *Kansas Univ. Police Officers Ass'n v. Public Employee Relations Bd.*, 16 K.A.2d 438, 439 (1991). Federal case law has interpreted this exclusionary language as signifying congressional intent to assure the private employer, for whom the NLRA is applicable, of a loyal and efficient cadre of supervisors and managers independent of the interests of rank and file workers and their union. *See Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 661-2 (1974). *See also, City of Wichita v. F.O.P.*, 75-UCA-1-1994, pp. 26-31(October 27, 1995); *United Rubber Workers Local Union 851 v. Washburn University of Topeka*, 75-UDC-3-1994, pp. 15-21 (September 16, 1994) and the lengthy discussions therein. This purpose is equally applicable to public sector employers. *Elk Grove Firefighters Local No. 2340 v. Willis*, 400 F.Supp. 1097, 1101 (N.D.Ill.1975). In fact, "[t]he need for the distinction [between managerial employees and rank-and-file employees] is perhaps greater in public employment where there are no vested 'employers' as owners or a management associated with employing owners." *Shelofsky v. Helsby*, 32 N.Y.2d 54, 61 (1973), *dism.*, 414 U.S. 804 (1973). Exclusion of supervisory employees also protects rank-and-file employees against undue influence by management in the selection of union leaders. *See URW v. Washburn, id.*, at pp. 19-20.

75. The enumerated supervisory functions listed in PEERA's "supervisory employee" definition at K.S.A. 75-4322(b) are disjunctive. The existence of any one of these powers is the test of supervisory status, see, e.g., *Kansas Univ. Police Officer's Ass'n, id.*, at pp. 440-1 (upholding lower court order on basis that supervisory employee status is shown where purported supervisory employee had the authority to issue reprimands and recommend discipline, assign various duties and perform evaluations), provided, however, that such exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment. In the instant matter, based upon the findings of fact outlined above, it is the conclusion of the presiding officer that Petitioner has carried its burden of showing by a preponderance of evidence that the positions here in question possess the authority, in the interest of the employer, to discipline, reward, and assign employees under their supervision, and have the authority responsibly to direct employees, and that such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. *See* Finding of Fact No. 42. Moreover, payment of the positions in question from funding sources other than that negotiated by Petitioner is sufficient of itself to determine that their inclusion in the unit is inappropriate. *Id.* Exclusion of these positions from the unit is herein ordered and such clarification of the bargaining unit will help further and effectuate the purposes for which the Act was enacted.

PROGRAM SPECIALIST

76. The position of Program Specialist is of a different character from that of the regular teaching faculty. As noted previously, it is Petitioner's desire to group together in

a single bargaining unit those university employees sharing the basic community of interest summed up by the concept of "teaching". Personnel other than full-time faculty present a particularly acute issue in the higher education setting because of the greater diversity of functions. *The Law and Practice of Teacher Negotiations*, § 2:53. The question of whether ancillary personnel belong in an overall professional faculty unit came before the NLRB on several occasions since it assumed jurisdiction over private colleges and universities. The NLRB apparently has drawn a dividing line which includes in a regular faculty unit those categories of ancillary employees whose "ultimate function, aiding and furthering the educational and scholarly goals of the University, converges with that of the faculty, though pursued through different means and in a different manner." *New York University*, 83 LRRM 1549 (1973); *Rensselaer Polytechnic Institute*, 89 LRRM 1844 (1975).

77. In public colleges and universities, the supportive personnel seems generally to be included. The position of the New York PERB is fairly typical:

> "Although these 'satellite personnel' [personnel involved in initiating, developing, and coordinating teaching and research programs, professionals providing technical assistance in services directly related to teaching and research programs, professionals working primarily and directly with students and student affairs, and professionals with traditional administrative duties] are not primarily concerned with the instruction of students, they share with the rest of the permanent staff a community of professional interest inasmuch as they are engaged in directly supportive activities that are clearly and closely associated with the function of teaching. . . [T]hey do have many common interests. All are professionals, and their functions dovetail."

Board of Higher Education of the City of New York, 1 N.Y. PERB ¶1-407 at 4021, *aff'd*, 2 N.Y. PERB ¶2-3056. Nearly identical reasoning was used by the Michigan Employment Relations Commission, *Wayne State University*, GERR No. 444, B-11 (1972), and the New

Jersey Public Employment Relations Commission, *State Colleges of New Jersey*, GERR No. 293, E-1 (1969), in reaching similar conclusions.

78. In the instant matter, the presiding officer is inclined to think that the duties and responsibilities of a program specialist may well be within the parameters of an ancillary personnel function. *See* Finding of Fact No. 41. Based upon the very limited record regarding this position, it appears that a program specialist's "ultimate function" is the "aiding and furthering [of] the educational and scholarly goals of the university", and that it "converges with that of the faculty, though pursued through different means and in a different manner." *See New York University*, 83 LRRM 1549 (1973). It is essentially for this same reasoning that librarian positions are included in faculty bargaining units. *See Fordham University*, 214 NLRB 971, 87 LRRM 1643 (1974).

79. Given, however, that the record is insufficient on this point, and given that Petitioner bears the burdens of proof and persuasion with regard to this issue, the presiding officer concludes that there is insufficient evidence to sustain Petitioner's request. Program Specialists, excepting those with "assigned unit supervisory duties", shall remain in the bargaining unit.

ISSUE NUMBER FIVE

80. The final legal issue to consider and address is whether the definition of the FHSU faculty bargaining unit should be amended to include full-time adjunct faculty? As noted at Finding of Fact No. 18, there are currently no full-time adjunct faculty at FHSU. Inclusion of this requested modification of the faculty bargaining unit definition, as is apparent from said finding, is a prophylactic measure to avert further confusion to

the bargaining unit description and to prevent further erosion of the bargaining unit composition. *Id. See also*, Tr., pp. 129-131.

81. In view of the resolution regarding part-time faculty within Issue No. 3, above, *see* footnote number 30 and accompanying text, "adjunct faculty" are includable in the unit. To the extent, however, that so-called adjunct faculty are paid on a per-course basis, do not qualify for fringe benefits, do not share responsibility for any research or service duties, and do not share responsibility in any university governance arrangements, they should be excluded from the bargaining unit.

IT IS THEREFORE ORDERED, that the appropriate unit, if and as amended by this order and the self-determination election it directs, shall be composed as follows:

> "Include: All full-time and regular part-time Fort Hays State University faculty members who hold academic rank as Instructor, Lecturer, Assistant Professor, Associate Professor or Professor, or Adjunct Professor. Also included are employees who hold rank as Program Specialist, Librarian or Research Scientist.
>
> Exclude: All employees who have appointments as: President, Provost, Vice Provost, Vice President, Associate Vice President, Assistant Vice President, Dean, Associate Dean, Assistant Dean, Department Chair, Curator, Academic Director, Director of the Library, Assistant Director of the Library, and Head Reference Librarian and other employees with assigned unit supervisory duties. Also exclude Visiting Faculty, persons who are confidential employees, and members of the classified service of the State of Kansas."

IT IS FURTHER ADJUDGED that unit faculty on phased-retirement retain their status as members of the bargaining unit.

IT IS FURTHER ADJUDGED that unit faculty on terminal contract retain their status as members of the bargaining unit.

IT IS FURTHER ADJUDGED that the following positions will remain in the bargaining unit:

Program Specialists, excepting those with assigned unit supervisory duties

IT IS FURTHER ADJUDGED that the following positions will be excluded, as supervisors, from the existing bargaining unit:

Curator
Academic Director

IT IS FURTHER ORDERED that the presiding officer shall retain jurisdiction over this matter until such time as a self-determination election regarding those positions in question is held and the results thereof certified, which such certification, together with the instant order, shall constitute an initial order reviewable by the Public Employer-Employee Relations Board per K.S.A. 77-527. Petitioner is directed to submit the requisite showing of interest for such election by petition containing the signatures of not less than thirty percent of those eligible to vote in such proceeding. Said petition should be submitted to this office by not later than the last day of regular classes for the fall, 2007 semester, subject to extension for good cause shown.

IT IS SO ORDERED.

DATED this 26th day of July, 2007.

Douglas A. Hager, Presiding Officer
Public Employee Relations Board
1430 SW Topeka Blvd.
Topeka, Kansas 66612
(785) 368-6224

CERTIFICATE OF SERVICE

I, Sharon L. Tunstall, Office Manager for PERB and Labor Relations, Kansas Department of Labor, hereby certify that on the 30th day of July, 2007, a true and correct copy of the above and foregoing Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

Lawrence Rebman, Attorney at Law
Rebman & Associates, LLC
400 Scarritt Building
818 Grand Blvd.
Kansas City, MO 64106

Ms. Mary Prewitt, General Counsel
Kansas Board of Regents
1000 SW Jackson, Ste. 520
Topeka, KS 66612

Todd D. Powell, General Counsel
Ft. Hays State University
312 Sheridan Hall
600 Park Street
Hays, KS 67601

Les Hughes, Labor Negotiator
Kansas Department of Administration
900 SW Jackson, Ste. 600
Topeka, KS 66612

Sharon L. Tunstall

Sharon L. Tunstall, Office Manager