BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE) LOCAL 123, **Petitioner,** **vs.** **CITY OF COFFEYVILLE, KANSAS,** **Respondent.**	**Case No. 75-UCA-3-2009**

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

NOW on this ____ day of November, 2011, the above captioned matter comes on for decision pursuant to the Kansas Public Employer-Employee Relations Act, (hereinafter "PEERA" or "the Act"), K.S.A. 75-4321 *et seq.* and K.S.A. 77-514(a) before presiding officer Douglas A. Hager, Designee of the Public Employee Relations Board (hereinafter "PERB" or "the Board").

APPEARANCES

Petitioner *International Union of Operating Engineers (IUOE) Local 123*, (hereinafter "IUOE" or "Petitioner"), appeared through counsel, Michael Amash, BLAKE & UHLIG, P.A. Respondent City of Coffeyville, Kansas, (hereinafter "City" or "Respondent"), appeared through counsel Jeffrey M. Place, SPENCER FANE BRITT & BROWN L.L.P.

PROCEEDINGS

This matter comes before the Presiding Officer on the Unit Clarification or Amendment

petition filed by Petitioner. *See* Petition for Clarification or Amendment of Appropriate Unit, 75-UCA-3-2009.

In 2009, Respondent created the position of Wireless Internet Technician/Installer within the Finance Department. In 2007, City created two Stormwater Utility Worker positions. Subsequent to the filing of this petition, the IUOE and City discussed whether these positions should be included in the IUOE bargaining units.[1]

The IUOE seeks accretion of these positions into existing represented units, and relies on language from the Memorandum of Agreement Between City of Coffeyville and International Union of Operating Engineers (IUOE) Local 123 AFL-CIO and International Brotherhood of Electrical Workers AFL-CIO, Local 1523, January 1, 2008 - December 31, 2010, particularly Section A-5, 2 entitled I.U.O.E. Bargaining Unit, subsection (b) which states:

> The City agrees to notify the Union of the creation of any new classifications within any of the IUOE-represented departments listed above, and to meet with the Union to seek agreement on the inclusion or exclusion of the new classifications in the IUOE bargaining unit. The parties agree to submit such classifications to the Kansas Public Employee Relations Board for a determination of the inclusion or exclusion of any new classification, in the event the parties are unable to agree on inclusion or exclusion.

The parties were unable to agree, thus the present petition.

An evidentiary hearing was conducted by this presiding officer on January 14, 2010. Thereafter, each of the parties submitted a post-hearing brief. The matter is fully submitted and this writing constitutes the presiding officer's administrative determination. Due to the resolution

[1] The original petition also sought to include the Pro Shop Clerk, Maintenance Superintendent and Assistant Maintenance Superintendent of the City owned gold course, however the parties have reached resolution on that issue and the only positions presently before the Board are the Wireless Internet Installer/Technician, Journeyman Storm Water Utility and Apprentice Storm Water Utility. *See* Petition for Clarification or Amendment of Appropriate Unit, 75-UCA-3-2009; Post-Hearing Brief On Behalf of Respondent City of Coffeyville; Post-Hearing Brief On Behalf of Respondent International Union of Operating Engineers, Local 123.

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 the presiding officer will retain jurisdiction of the case until such time as further action is taken as directed by this order, culminating in PERB-administered self-determination elections and certification of the results thereof. At that point certification of elections 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.[2] *See* K.S.A. 77-526.

ISSUES OF LAW

There are two primary issues to resolve in this matter: first, whether the City of Coffeyville Public Service bargaining unit as defined, should be amended through accretion to include the position of Wireless Internet Installer/Technician? Second, whether the City of Coffeyville Water/Wastewater bargaining unit as defined, should be amended through accretion to include the positions of Journeyman Stormwater Utility and Apprentice Stormwater Utility.

FINDINGS OF FACT[3]

1. Respondent is a public employer within the meaning of the PEERA. Petitioner is the

[2] This procedure will promote both administrative and judicial economy. Holding the self-determination elections 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, self-determination elections should precede agency-head review of this order.

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

certified bargaining representative for the Public Service, Water/Waste Water, Electric Generation, and Finance Department units within the City of Coffeyville. From 1984 through the present, various jobs and job titles have changed and the parties have modified their Agreements accordingly. For the applicable time period, Respondent and Petitioner had a Memorandum of Agreement (hereinafter "MOA") effective from January 1, 2008 through December 31, 2010. (Union Exhibit 5).

2. Kevin Mersberg is a city worker and union Business Representative. Tr., pp. 17-19.

3. In November, 2006, the City created a new Stormwater Utility (Union Exhibit 1; Charter Ordinance No. 26.) In April, 2007, the City created two Stormwater Utility Worker positions to staff the Utility. See Union Exhibit 2, at 3, Notice of Job Opening. The City first posted open positions within the Stormwater Utility on April 13, 2007. (Union Exhibit 2). The positions were listed as Stormwater Utility Worker, entry level, and were classified as part of the Water/Wastewater Distribution department. (Union Exhibit 2). Two existing City employees were selected to fill these positions in May, 2007. *See* Union Exhibit 2. Both employees had previously served as Water/Wastewater Distribution Journeymen. (Union Exhibit 2). Although the two employees' titles changed from Water/Wastewater Distribution Journeyman to Stormwater Utility Journeyman, their rate of pay remained the same. (Union Exhibit 2; Tr., p. 21 @ 4). Of the two employees from Water/Wastewater who were assigned to Stormwater, one was a Union dues payer, the other was not. Two existing City employees were selected to fill these positions in May, 2007. *See* Union Exhibit 2. Both employees had previously served as Water/Wastewater Distribution Journeymen. (Union Exhibit 2). Although the two employees' titles changed from Water/Wastewater Distribution Journeyman to Stormwater Utility

Journeyman, their rate of pay remained the same. (Union Exhibit 2; Tr., p. 21 @ 4). Of the two employees from Water/Wastewater who were assigned to Stormwater, one was a Union dues payer, the other was not.

4. At some point between 2007 and 2009, one of the original Stormwater Utility Journeymen transferred out of the Stormwater Utility and was replaced by another Water/Wastewater employee. (Tr., p. 60). Sometime in early 2009, the City hired James Bradshaw III into a position in the Public Works Department. (Tr., p. 24). James Bradshaw III is the son of the Deputy Director of Public Works, and the position James Bradsahw III was hired into was in a line of reporting which led directly to the Deputy Director of Public Works (Tr., p. 24). IUOE subsequently filed a grievance with the City for violation of the anti-nepotism provision contained in Article C-1 of the MOA. (Union Exhibit 5; Tr., p. 24). The grievance was resolved by changing one Stormwater Utility Journeyman position to a Stormwater Utility Apprentice Position, moving the Stormwater Utility to a different reporting chain, and transferring James Bradshaw III into the Stormwater Utility Apprentice Position. (Tr. p.26). These changes took place after the effective date of the current MOA. (Union Exhibit 5). The Stormwater Utility remains part of the Public Works Department. (Union Exhibit 3). Tr., pp. 24-25.

5. The IUOE represents all positions in the waste water utility department. Tr., p. 27 @ 5.

6. The work performed by Water/Wastewater and Stormwater utility is similar. Tr., p. 28 @ 6. The job description for an Apprentice Stormwater Utility Worker lists no special skills-specifically states entry level position (Exhibit 2; Tr., p. @ 1-23. The Journeyman Stormwater position is the second in the class of these positions. Tr., p. 30 @ 14-20.

7. Chuck Shively Director of Public Works testified that expertise not a hiring requirement

for the Stormwater Utility. There is no requirement that the Stormwater Utility personnel seek out violators and they have no enforcement authority. Tr., pp. 152-153.

8. The original MOA between the parties provides for the positions of keypunch operator, computer operator and computer programmer, however from 1984 through the present, various jobs and job titles have changed and the parties have modified their Agreements accordingly. For the applicable time period, Respondent and Petitioner had an MOA effective from January 1, 2008 through December 31, 2010. (Union Exhibit 5).

9. The City launched a new wireless internet service in February, 2005. Tr., pp. 67:20-68:1; (City Exhibit 1). Initially the City attempted to install and maintain the wireless system itself. At one point Mr. Giger, a city power plant technician did some of the installation work. Tr., p. 69. After a brief period, the City contracted out the work of maintaining the wireless system and installation of new service for customers and to provide the services assigned to the IT Manager, to KKI. Tr., p. 68 @ 5-13. Bruce Fouts worked for KKI and did the majority of the installations for the City. KKI subsequently decided to get out of the wireless business, (for the City anyway), and Fouts formed his own business which contracted with the City for the Wireless system. There was not enough work during the winter season for Fouts to keep his business going, so in January, 2009, the City brought this work in house by creating a Wireless Internet Technician/Installer position within its Finance Department. Fouts was hired into this position. (Union Exhibit 8).

10. From 1997 to the present, the IT Manager has been responsible for maintaining the computers and programming computers and ensuring the smooth operation of the City's information technology system. Tr., p. 65 @10-15.

11. Historically, the IT Manager had no supervisory duties, and was not within the IUOE bargaining unit. Tr., pp. 57-58.

12. There has been no "showing of interest" among the employees in question.

APPLICABLE LAW

The Public Employer Employee Relations Act 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, or to choose that there be no representation. The PERB conducts representation elections and certifies the results. Where an organization represents the majority of employees in "an appropriate unit", K.S.A. 754327(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), p. 31.

K.S.A. 75-4327 provides:

> 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[4] and amendments thereto;

[4] K.S.A. 75-4325 - Supervisory employee not prohibited from membership in employee organization. Nothing herein shall prohibit any individual employed as a supervisory employee from becoming or remaining a member of an employee organization, but no public employer subject to this act shall be compelled to deem individuals defined herein as supervisory employees as public employees for the

and (7) the recommendations of the parties involved.

"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." K.A.R. 84-2-6.

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.

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,* 72-URE-5-1995, p. 33.

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).

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purposes of this act.

While 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), unit clarification procedures under the NLRA do permit the NLRB to add employees to a particular bargaining unit without an election.

> 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).

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. Ferrick, Baer & Arfa, *NLRB Representation Elections,* §6.1, p.180; *Cf NLRB v. Magna Corp.,* 116 LRRM 2950, 2953 (CA5, 1984).

ACCRETION

Accretion is arguably an option in the present case. 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. *Fort Hays State University Chapter of the American Ass'n of Univ. Professors v. Fort hays State University, 75-UCA-2-2005; Consolidated Papers, Inc. v. NLRB,* 109 LRRM 2815, 2817 (CA7, 1982); *see also, Universal Security Instruments v. NLRB,* 107 LRRM 2518,

2522 (CA4 1981); *Renaissance Center Partnership,* 100 LRRM 1121, 1122 (1979); *Lammert Industries v. NLRB,* 98 LRRM 2992, 2994 (CA7, 1978).

An accretion occurs "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 the accretion of employees to an existing unit is not appropriate unless the employees have little or no separate identity distinct from the existing 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

As a general rule, the accretion doctrine is applied 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).

In this regard, as stated above, it is necessary to first determine 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).

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 rights of the accreted employees would be better preserved by denying the accretion.

Boire v. International Brotherhood of Teamsters, 83 LRRM 2128 (CA5, 1973). 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).

WALLACE-MURRAY DOCTRINE

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); *See also, International Ass'n of Machinists,* 101 LRRM 1978 (1979).

A caveat exists, however, 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.

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.

In a pure *Armour-Globe* election, 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).*

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 199, n.3 (July 16, 1992).

The test 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.

The benefit of mutual agreement as to inclusion or exclusion is further demonstrated by the fact that any 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 1126,281] 209 NLRB 343 (1974). As the NLRB reasoned in *Federal-Mogul Corp.,* 85 LRRM 1353, 1354 (1974); 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). P.60. The same reasoning would apply under the PEERA.

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

ISSUE NUMBER ONE

Whether the City of Coffeyville public sector employee bargaining unit, as defined, should be amended through accretion to include the position of Wireless Internet Installer/Technician?

This prospective accretion consists of one employee. Petitioner seeks to have the position added by accretion to the existing bargaining unit. The Respondent City argues that a self determination election is preferable. The City, almost in passing, states "[t]he City has not petitioned for an election, and does not believe the Board should order one at this point, since the Union has not presented any showing of interest among the employees who would participate in the election." (Respondent's Post Hearing Brief, p. 5). The City's point is well taken.

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, or to refrain from doing so. K.S.A. 75-4324. It is the employee's right, not the employer's or the union's, but the employee's. Freedom expressed through the mechanism of individual choice is a recurring theme in Kansas laws seeking to temper the collectivist nature of union representation. For example, the Kansas Constitution[5] preserves an employee's individual choice by prohibiting union membership as a condition of employment. Likewise, the PEERA establishes a mechanism for employees to express their individual choice through a voting process for selection of a specific bargaining representative, or to select "no representation". The underlying theme in Kansas law favoring employee freedom through individual choice sets a high standard for finding an accretion to be appropriate.

[5] Constitution of the State of Kansas, Art. 15, § 12.

Does the job classification of Wireless Internet Installer/Technician constitute an identifiable, distinct segment of employees so as to appropriately constitute a separate bargaining unit?

After the inception of the Wireless Internet project, one of the city workers from the powerplant unit had responsibility for installing the wireless units for customers. Because many of these installations had to be reinstalled or corrected, the City then contracted out the process to a third party. Eventually, the individual who started out as the installer technician for the third party contractor, then as a contractor himself, and finally as a city employee became the employee holding the position the Petitioner seeks to accrete to the existing bargaining unit. The evolution of this position establishes an independence from, rather than comity of interest with, the other members of the bargaining unit. Petitioner also argues that this classification does not constitute a separate bargaining unit by seeking to establish a community of interest between this position and those within the existing unit by noting that there are already "computer related" positions within the original bargaining unit, i.e., keypunch operator, computer operator and computer programmer. The logical progression, it is argued, is that since these are computer-related positions they demonstrate a common interest. As the evidence established however, these positions, as well as the uses of computers generally, have evolved dramatically since 1984, making these positions obsolete (some of the witnesses had no idea what a keypunch operator did).

Given the number of employees here involved, one, overfragmentation of the workforce is a concern. While there may be other factors suggesting a community of interest between this position and others in the existing unit, there are other more critical reasons the position cannot stand as its own unit.

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?

Based upon the record as a whole, the presiding officer finds that the position of wireless internet installer/technician shares a sufficient community of interest with other bargaining unit members to support their inclusion in the existing unit. *See* Tr., pp. 21, 27-28, 37, 98, 148-150.

Have the job classifications historically been excluded from the bargaining unit?

Given the brevity of time between the creation of the positions, attempts at resolution and the filing of the petition for determination, historical exclusion is a nonfactor.

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?

The fact that the Petitioner wants this position added by accretion, and the City wants to opt for an election gives the presiding officer reason to believe that it is not anticipated that an election will bode well for representation. However, the Board's function in an election is to assure that it is properly run and to certify its results, nothing more. Nothing about the current composition of the existing unit, the total numbers involved or the number sought herein to be added suggests to the presiding officer that the addition of the proposed classification will raise a question concerning representation in the unit as it is proposed to be amended.

An evaluation of all the above factors leads the presiding officer to conclude that the job classification of Wireless Internet Installer/Technician does not constitute an identifiable, distinct segment of employees so as to appropriately constitute a separate bargaining unit. As a practical

matter, the job classification of wireless internet installer/technician does not and cannot constitute an identifiable, distinct segment of employees so as to appropriately constitute a separate bargaining unit. A bargaining unit of one classification, in which there is only one employee, cannot effectively comprise a separate bargaining unit for purposes of negotiating terms and conditions of employment nor for resolving grievances. Accretion to the existing bargaining unit, however, is not assured by this conclusion. Accretion does not protect employee freedom of choice. Protection of the statutory preference for individual choice is an important factor and disfavors accretion. The presiding officer finds and concludes that an accretion is not an appropriate mechanism for determining the questions raised in this case.

If Accretion of the Position is not Appropriate, Should a Self-Determination Election Be Held?

As noted above, a self-determination election presumes that the current bargaining representative is the proper representative, but answers the question of whether or not this employee sought to be accreted should be represented by the existing unit's bargaining representative, i.e. a vote for the employee organization indicates that the employee desires to be be added to the existing unit and be represented as part of that existing bargaining unit. *Carr-Gottstein Foods,* supra.

This step once again presupposes that the employee(s) sought to be accreted wants to be represented at all. The fact that the parties may agree between themselves that upon failure to reach agreement, the issue shall be submitted to the PERB for determination, does not mean that the parties can circumvent PERB's established procedures. The more basic question is whether this classification of employee(s) wishes to be represented at all. A self-determination election is

the appropriate mechanism for amendment of this bargaining unit. As an initial step in that process, submission of a required showing of interest by the city employee in the Wireless Internet Installer/Technician Position, would be the first step.[6]

ISSUE NUMBER TWO

Whether the City of Coffeyville Water/Wastewater bargaining unit as defined, should be amended through accretion to include the positions of Journeyman Stormwater Utility and Apprentice Stormwater Utility.

Do the job classifications of Journeyman Stormwater Utility and Apprentice Stormwater Utility constitute such an identifiable, distinct segment of employees so as to appropriately constitute a separate bargaining unit

Under the evidence before the Presiding Officer, the analysis and reasoning here are much the same as that used with regard to the wireless internet installer/technician. The presiding officer finds and concludes that the job classifications of Journeyman Stormwater Utility and Apprentice Stormwater Utility do not constitute such an identifiable, distinct segment of employees so as to appropriately constitute a separate bargaining unit. Again, as a practical matter, a bargaining unit of two classification, each having only one employee, cannot effectively comprise a separate bargaining unit for purposes of negotiating terms and conditions of employment nor for resolving grievances. The presiding officer sets out the remaining factors below for determining whether the proposed amended bargaining unit is more appropriate than that existing, and if so, should that amendment take the form of accretion or should a self-determination election be used.

[6] Practically speaking, a showing of interest (or the failure to show sufficient interest) should resolve the issue as to this classification.

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?

There certainly is evidence of a community of interest in that when the Stormwater Utility was formed, it was staffed by two former employees of the Water/Wastewater classifications which are contained in the existing bargaining unit. One of the former employees, following the transfer, even continued to pay his dues to the union. When one of these employees left the City's employment, he was replaced by another employee from the Water/Wastewater classification. When advertised, the positions were listed as being in the Water/Wastewater division.

Additionally, sometime in early 2009, the City hired James Bradshaw III into a position in the Public Works Department. (Tr. p.24). James Bradshaw III is the son of the Deputy Director of Public Works, and the position James Bradshaw III was hired into was in a line of reporting which led directly to the Deputy Director of Public Works (Tr., p. 24). IUOE subsequently filed a grievance with the City for violation of the anti-nepotism provision contained in Article C-1 of the MOA. (Union Exhibit 5; Tr., p. 24). The grievance was resolved by changing one Stormwater Utility Journeyman position to a Stormwater Utility Apprentice Position, moving the Stormwater Utility to a different reporting chain, and transferring James Bradshaw III into the Stormwater Utility Apprentice Position. (Tr., p. 26). The practical effect of this reorganization was simply to take the Deputy Director out of the supervisory chain for the Stormwater department and making it a direct report to the Director. For all intents and purposes both Water/Wastewater and Stormwater departments report to the Director of Public Works.

The direct report status that Stormwater enjoys is not because of factors creating an

"identifiable, distinct segment of employees so as to appropriately constitute a separate bargaining unit", but rather to resolve the nepotism problem of Jim Bradshaw II being the direct report of Jim Bradshaw III. The Petitioner is the recognized bargaining representative for all other journeyman and apprentice positions within the Public Works Department. Petitioner has provided evidence tending to show that joining the Stormwater department to the present bargaining unit might be appropriate through community of interest, however the standard that must be shown is that it is "more appropriate":

> 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. *Fort Hays State University, supra at 35-36, (citing Kansas Association of Public Employees v. Depart. of S.R.S., Rainbow Mental Health Facility,* 75-UCA-6-1990 (February 4, 1991).

The fact remains however that the Stormwater department is more of a regulatory department. It was established to comply with federal clean water and EPA requirements to assure as one employee stated, that "nothing goes down the drain but rain." While they have no separate enforcement authority, they do have the authority to utilize local law enforcement to enforce ordinance violations. Union Exhibit 1 is the Charter Ordinance 26 creating the Stormwater Utility as a separate utility with its own funding. Attached to this exhibit is a document entitled "Stormwater Utility Survey of Various NPDES Phase II Cities in Kansas". A significant number of these cities do not have a separate stormwater fund, but rather funding is through the water/waste water utility funding. The City of Coffeyville chose to create a separate funding source for the Stormwater Utility. In addition, it is clear that manning levels within the Stormwater Department are mandated in large part by the need to meet federal requirements imposed upon the Stormwater Utility. For example the Statement of Chuck Shively, Director of

Public Works in favor of the Charter Ordinance stated that originally compliance could easily be accomplished by himself and one other staff member "such as the City Clerk and Engineering and Water/Wastewater staff." However, the federal requirements were increasing requiring the formation of the Stormwater Utility positions.

Giving full consideration to the evidence, these two job classifications share a certain community of interest with the employees in the existing bargaining unit. Such shared community of interest, however, is not sufficient by itself to find that the proposed unit as amended by the addition of these two classifications is more appropriate than the existing unit.

Have the job classifications historically been excluded from the bargaining unit?

Given the brevity of time between the creation of the positions, attempts at resolution and the filing of the petition for determination, historical exclusion is a nonfactor.

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?

Comparison of the number of employees sought to be added with the number of employees in the existing unit does not appear to raise a question regarding representation. As with the other classification discussed above, consideration of all the factor suggests to the presiding officer that the unit as it is proposed to be amended would be more appropriate that the existing unit. Community of interest and efficient administration of government favor amendment. As previously discussed, accretion is not a favored mechanism for such amendment. Protection of the statutory preference for individual choice is the determining factor in ruling that a self-determination election is called regarding these two classifications of employees. The first

step toward a self-determination election is for those city employees in the Journeyman Stormwater Utility and Apprentice Stormwater Utility classifications, if they wish to be represented at all, to submit the requisite showing of interest by petition.[7]

IT IS THEREFORE ORDERED AND DECREED that the presiding officer shall retain jurisdiction over this matter until such time as self-determination elections regarding those positions in question are 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 showings of interest for such two separate elections by petitions containing the signatures of not less than thirty percent of those eligible to vote in each such proceeding. One signature will constitute a sufficient showing of interest in each of the two said proceedings. Said petitions should be submitted to this office by not later than twenty-one, (21), days from the mailing date of this Order, subject only to extension for good cause shown.

IT IS SO ORDERED.

DATED, this 2nd day of November, 2011.

Douglas A. Hager, Presiding Officer
Public Employee Relations Board
401 SW Topeka Blvd.
Topeka, Kansas 66612
(785) 368-6236

[7]Practically speaking, a failure to show sufficient interest would resolve the issue as to these two classifications.

CERTIFICATE OF SERVICE

I, Loyce McKnight, Kansas Department of Labor, hereby certify that on this 3rd day of November, 2011, a true and correct copy of the above and foregoing Order was deposited in the U. S. Mail, first class, postage prepaid, addressed to:

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