

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD  
STATE OF KANSAS

KANSAS ASSOCIATION OF PUBLIC )  
EMPLOYEES (KAPE), )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 75-UD-1-1992  
 )  
KANSAS BOARD OF REGENTS, )  
UNIVERSITY OF KANSAS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

## ORDER ON JURISDICTION

ON the 20th, 21st, 22nd, 23rd, 24th and 27th day of September, 1993, the above-captioned matter came on for hearing pursuant to K.S.A. 75-4334(a) and K.S.A. 77-523 before presiding officer Monty R. Bertelli to determine whether the Public Employee Relations Board has jurisdiction.

### *APPEARANCES*

PETITIONER: Appeared by Scott A. Stone, attorney  
Kansas Association of Public Employees  
1300 SW Topeka Blvd.  
Topeka, Kansas 66612

RESPONDENT: Appeared by Karen A. Dutcher, attorney  
Assistant General Counsel  
University of Kansas  
Strong Hall  
Lawrence, Kansas 66045-1752

### *ISSUES PRESENTED FOR REVIEW*

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

1. WHETHER THE INDIVIDUALS IN THE POSITION OF GRADUATE TEACHING ASSISTANTS ARE "EMPLOYEES" OF THE UNIVERSITY OF KANSAS, AND THEREFORE, "PUBLIC EMPLOYEES" PURSUANT TO K.S.A. 75-4322(a).

75-UD-1-1992-0

## ***SYLLABUS***

1. **UNIT DETERMINATION** - *Definition of "Public Employee" - Definition of "Employed."* Since the legislature failed to provide a specialized definition for the word "employed" used in K.S.A. 75-4322(a), the task of determining the contours of the term "public employee," has been assigned to the Kansas Public Employee Relations Board as the agency created by the legislature to administer PEERA.
2. **UNIT DETERMINATION** - *Exclusions From Definition of "Public Employee" - Student/employees - Test adopted.* The NLRB "primary purpose" test developed in Cedars-Sinai and St. Clare's, which gave paramount consideration to the student's subjective intent in participating in the university programs is rejected and the two-stage "Balancing of Interests" test or the "Guiding Purpose" test are adopted and applied.

## ***FINDINGS OF FACT***

1. Petitioner, the Kansas Association of Public Employees, ("KAPE") is an "employee organization" as defined by K.S.A. 75-4322(i). KAPE is seeking to become the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for the Graduate Teaching Assistants ("GTAs") at the University of Kansas in Lawrence, ("University").
2. The University of Kansas is an educational institution operated and controlled by the Board of Regents of the State of Kansas, (K.S.A. 76-712), and therefore a "public agency or employer", as defined by K.S.A. 75-4322(f).
3. At the time of the filing of this action, the Lawrence campus of the University of Kansas had a student population of approximately 26,500 students (total enrollment figure of approximately 29,000 for both the Lawrence campus and the University of Kansas Medical Center stated in Respondent's Exhibit 7 minus the

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

enrollment for the University of Kansas Medical Center stated in Respondent's Exhibit 3).

### **GTA Utilization at the University**

4. The University is divided into schools and colleges which are further divided into departments or academic programs. There are approximately 90 departments or academic programs under the umbrella of the Graduate School, sixty-one of which use GTAs. (Tr.p. 469, 502, 577; Ex. P-83).
5. There are three components utilized by the University to teach students; 1) full-time faculty, 2) lecturers, instructors and adjunct faculty, and (3) GTAs. The first two categories, the University concedes, are employees. The third component, the GTAs, provide the same service as those employees in the second category. The only factor that distinguishes GTAs from the lecturers and adjunct faculty is their status of also being students at the University. (Tr.p. 541-45).
6. Graduate Teaching Assistantships serve three purposes at the University of Kansas. Those purposes are 1) to provide experience and training in teaching to graduate students; 2) to provide graduate students a means of financial support while they are in school; and 3) to assist the University in providing undergraduate instruction. (Tr.p. 493-95).
7. There were 6,177 graduate students enrolled at the University in the fall of 1990. (Tr.p. 479; Ex. P-67, 68). At the time of the hearing there were approximately 1063 GTAs employed by the University. (Tr.p. 98, 479; Ex. P-68). GTAs are classified as one-half time employees which typically requires teaching two three-hour classes and fourteen hours of out of class preparation per week. The testimony reveals most GTAs spend more than the 20 hours per week on their teaching assignments. (Tr.p. 140-41).
8. The following graduate programs do not currently offer GTA appointments, (Supplemental information sent to hearing officer on October 19, 1993):

Child Language  
Historical Administration and Museum Studies  
Latin American Studies  
Public Administration  
Russian and East European Studies  
Engineering Management  
Mechanical Engineering  
Hospital Pharmacy  
Medicinal Chemistry (October 19, 1993 letter).

9. The following schools of the University have graduate degree programs, (Tr.p. 468; Ex. R-3):

Allied Health  
Architecture and Urban Design  
Business  
Education  
Engineering  
Fine Arts  
Journalism and Mass Communications  
Liberal Arts and Sciences  
Medicine  
Nursing  
Pharmacy  
Social Welfare

10. The following departments or academic programs employed GTAs in 1993, (Ex. P-83):

<u>Department or Program</u>	<u>Number of GTAs</u>
Aerospace Engineering	5
African/African-American Studies	3
Anthropology	10
Applied English Center	27
Architecture and Urban Design	6
Art	7
Art/Music Education/Music Therapy	9
Biological Sciences	71
Business	23
Cartographic Lab	1
Chemical and Petroleum Engineering	10
Chemistry	40
Child Development Education Care Lab	3
Child Development Lab	4
Civil Engineering	16
Classics	4

Communication Studies	39
Computer Science	26
Counseling Psychology	9
Curriculum and Instruction	19
Design	10
East Asian Language and Culture	17
Economics	20
Ed. Microcomputer Lab	1
Education Policy and Administration	5
Educational Psychology and Research	12
Education Instructional Technology Lab	2
Electrical & Computer Engineering	14
English	88
Environmental Studies	6
French and Italian	41
Geography	17
Geology	12
Germanic Languages & Literature	12
Government	14
Health, Physical Education and Recreation	26
History	26
History of Art	11
Human Development & Family Life	24
Interdisciplinary Studies	6
Journalism	5
Law	13
Linguistics	3
Mathematics	48
Microbiology	11
Music and Dance	23
Pharmaceutical Chemistry	4
Pharmacology and Toxicology	2
Philosophy	20
Physics and Astronomy	31
Psychology	55
Religious studies	4
Slavic Languages and Literature	10
Social Welfare	18
Sociology	14
Soviet & East European Studies	1
Spanish and Portuguese	71
Special Education	13
Speech Language and Hearing	6
Theater and Film	18
Western Civilization	28

11. Those departments of the University with the largest number of service or core undergraduate courses or labs are also the departments employing the greatest number of GTAs. Two-thirds of the University GTAs are employed in the arts and sciences. (Tr.p. 99).

12. The following graduate programs have teaching requirements which must be met to obtain a Ph.D. degree but not a Masters degree, and which may be satisfied by holding a GTA appointment, (Ex. R-3; Supplemental information sent to hearing officer on October 19, 1993):

Business  
Botany (Biological Sciences)  
English - except those who do not intend teaching  
French (Liberal Arts)  
Germanic Languages (Liberal Arts)  
Human Development and Family Life  
Microbiology (Biological Sciences)  
Physiology and Cell Biology (Biological Sciences)  
Spanish and Portuguese (Liberal Arts)  
Sociology (Liberal Arts)  
Systematics and Ecology (Biological Sciences)  
Curriculum and Instruction (Education)  
Educational Psychology and Resource (Education)  
Music

13. The following graduate programs have teaching requirements which must be met to obtain a Masters degree, and which may be satisfied by holding a GTA appointment, (Ex. R-3; Supplemental information sent to hearing officer on October 19, 1993):

Pharmaceutical Chemistry - 1/4 time GTA for 1 sem.  
Chemistry - 1/2 time GTA for 2 semesters

14. The following graduate programs have teaching requirements which must be met to obtain a Ph.D. degree but not a Masters degree, and which cannot be satisfied by holding a GTA appointment, (Ex. R-3; Supplemental information sent to hearing officer on October 19, 1993):

Art and Music Education/Music Therapy  
Counseling Psychology  
Education/Visual Arts  
Educational Policy and Leadership  
Health, Physical Education and Recreation

Special Education  
Pharmacology and Toxicology

**GTA JOB DUTIES**

15. At the University, the structure and requirements of a graduate program are determined by the faculty members who teach in the program, (Tr.p. 467-68), subject to review by the Graduate Council in accordance with the provisions of the Constitution and Bylaws of the Graduate School, (Ex. 2), and ultimately subject to approval by the Board of Regents. (K.S.A. 76-716).
16. Teaching Assistants are graduate students employed by the University to assist faculty in classroom teaching, laboratory instruction, and other instructions-related activities such as grading papers, preparing, monitoring and grading exams, consulting with students, and servicing laboratories. (Tr.p. 138). The duties of a graduate teaching assistant vary from department to department, and departments have the authority and discretion to determine the structure and duties of the graduate assistantships awarded by their departments. (Tr.p. 489-90).
17. The responsibilities of the GTAs are varied. In some departments the GTAs teach sections of a basic undergraduate course developed by faculty who design the course and supervise the GTAs. (Tr.p. 621-23, 851-53, 921-22, 385-86). In other departments the GTAs supervise laboratory sections that are part of a large undergraduate lecture course taught by a faculty member. In such cases the GTAs, under the direction of a faculty member, are supervising laboratory exercises and experiments that are designed by faculty. (Tr.p. 767-69, 825-26, 1007).
18. GTAs generally work within their graduate departments but GTAs are increasingly teaching outside their area of study either in another department or within their own department, e.g. an economist teaching Western Civilization. (Tr.p. 49-50, 225).

### Supervision

19. Methods of supervision vary by department and by faculty member. Each course taught by a GTA has a faculty supervisor. The supervision required is determined by the supervisor. Generally, this involves weekly meetings to discuss problems, coming assignments, preparation of the course syllabus, and selection of textbooks. (Tr.p. 129-30). However, the testimony indicates that the amount of supervision provided decreases the longer a GTA teaches.
20. The contract between the graduate student and the University relative to the GTA appointment provides that the GTA is expected to perform their responsibilities "in accordance with instructions," and failure to follow instructions can result in termination. (EX. P-26).

### Compensation

21. Graduate students at the University usually obtain financial support from the University while they are in school in one of three ways: fellowships, which are awarded for outstanding academic achievement, and are rare; research assistantships, in which students receive money from research grants and engage in research which is usually directed toward their terminal project under the direction of faculty; or graduate teaching assistantships, in which students perform teaching services in exchange for money. Since there are limited funds available to the graduate students through the first two alternatives, most graduate students must look to some form of employment to fund their education. (Tr.p. 616-17, 821, 847-48, 915, 958-59, 1001; Ex. P-3, 4). While graduate teaching assistantships are not one of the financial aid programs administered by the Office of Student Financial Aid, (Tr.p. 163), in literature provided by the University to prospective and incoming graduate students, GTA positions are listed, among other opportunities, as available to graduate students for funding their education. (Tr.p. 41-43; Ex. P-3, 7, 14, 26, 30).
22. The amount paid to GTAs varies from department to department, and is determined at the department level



rather than being determined by the central administration. (Tr.p. 487-89, 619-20, 760-61, 850, 886-87, 916, 959, 1003). University departments are allotted certain funds for teaching service courses. The budgeted funds divided by the number of GTAs needed to teach the required number of courses generally will determine the wage level paid to GTAs. (Tr.p. 62, 164, 295).

23. GTAs are paid approximately one-fourth the salary of a faculty member, e.g. \$8000/yr for a GTA in philosophy as compared to \$30-40000/yr for a faculty member. (Tr.p. 97-98).
24. In addition to a salary, GTAs receive full tuition waivers as part of their compensation if they have at least a 40% GTA appoint. (Tr.p. 88-89; Ex. P-4, 58). GTAs are not eligible for medical, retirement, life insurance or other benefits received by the full-time faculty. (Tr.p. 72-74).

### Employment Laws

25. GTAs are covered by the Kansas Workers' Compensation Act. (Tr.p. 112, 122; Ex. P-61, 68).
26. GTAs are excluded from the coverage of the Kansas unemployment compensation laws (K.S.A. 44-703(i)(3)(E)).

### Appointments and Continuity of Employment

27. GTAs apply for appointments by competing the appropriate form included in their graduate student applications. Departments also advertise for GTAs by mailing out notices to graduate students or posting vacancies on bulletin boards. (Tr.p. 46-48; Ex. P-3, 4).
28. In order to hold a graduate teaching assistantship (commonly a half-time, nine-month appointment, although this may vary from program to program and within a program), a graduate student must be enrolled as a student during the regular academic year and must be making satisfactory academic progress in the program in which he or she is enrolled. (Ex. P-9, 10, 11, 13, 22, 31).

29. The hiring process varies by department. The application forms for a GTA position seek only "merit" information and not "financial need" data. The criteria used to hire a GTA is similar to that used to hire University faculty members. (Tr.p. 56; Ex. P-16, 20). The applicants are ranked on a merit basis and appointments awarded in that order. (Tr.p. 161-62, 283). GTA appointments are not based upon financial need. There are always more graduate student applicants than there are GTA positions to fill. (Tr.p. 64).
30. GTA contracts are renewable, but the number of semesters a GTA may hold an appointment varies by department. It is common for departments to place limits on the number of semesters graduate students are permitted to hold graduate teaching assistantships. This limit usually corresponds to the length of time which the department expects its graduate students to complete their degree programs. The reason for these limits is to discourage graduate students from taking an inordinately long time to complete their degree programs, and also to free up assistantship appointments for newly admitted graduate students. (Tr.p. 388-89; 849-50; 917-19, 961-62, 1006-07; Ex. 16).
31. GTAs may expect continued employment if their academic progress meets the criteria set out by the department and their prior work has been satisfactory. If a GTA fails to make satisfactory academic progress in his or her program, or he or she is no longer enrolled as a student, the graduate teaching assistant appointment will be terminated regardless of the student's abilities as a teacher. (Tr.p. 389-90, 620-21, 763, 824, 917, 961). A graduate student can be terminated from their GTA position but still remain a student in the graduate program of the University. (Tr.p. 145-46, 191, 237-38, 294, 312, 615, 657).
32. The GTA's employment is governed by the terms of an individual employment contract. The duration of the contract is usually one academic year (two consecutive semesters) but can also be limited to one semester. One-half time GTAs are required to work 20 hours per week.

### *Distribution of GTAs*

33. GTAs have become an integral part of University operations, and teach an ever-increasing number of University classes. A large number of the classes taught by GTAs are required undergraduate courses, i.e. freshman and sophomore 100 and 200 level, and labs. GTAs, however, are also beginning to teach 300 and 400 level courses. (Tr.p. 95-96, 158). By way of example, in the Philosophy Department, GTAs teach sixty percent of the 100 and 200 level courses. They are teaching an ever increasing number of 300 level courses, and their use is expanding into 400 and 500 level courses.
34. According to Howard Mossberg, Vice Chancellor for Research, Graduate Studies and Public Service, GTAs are teaching approximately one-fourth of the credit hours of instruction offered by the University, in some departments it may be in excess of fifty percent, and in at least three departments the GTAs teach more classes than the faculty. Those three departments are also the three departments with the largest number of GTAs. (Tr.p. 500-02). Reports prepared by the University's Office of Institutional Research and Planning indicate GTAs accounted for approximately twenty-eight percent of the staff devoted to teaching organized classes at the University in the 1990 academic year. GTAs taught approximately twenty-seven percent of organized class credit hours as compared to sixty-three percent for the faculty, i.e. professors, associate professors, assistant professors and other instructors. The GTAs also taught the same percentage of organized class sections. (Tr.p. 124-25, 484-85; Ex. P-67, 68). In the English Department, from 1978 through 1992, the GTAs went from teaching thirty-nine percent of the courses offered to fifty-two percent. For that period the faculty went from teaching a high of one hundred twelve 100 and 200 level courses in 1982 to only eight for the 1993 academic year. (Tr.p. 249-55, 441-48; Ex. P-69).

### *Indicia of Employee Status*

35. The University concedes that there are aspects to the GTAs' relationship to the University that have an employment nature to them. (Tr.p. 554).

36. The ethical provisions and Code of Conduct imposed upon GTA's are exact duplicates of those placed upon faculty members.
37. GTAs are required to sign a State of Kansas employee oath. (Tr.p. 72, 231; Ex. P-32).
38. The pay check the GTAs receive is from the State of Kansas, and is the same type of check received by other state employees. (Tr.p. 91, 240; Ex. P-57).
39. Federal and state income tax is deducted from a GTA's pay check, but no such deductions are made for monies received under a fellowship grant. Social Security is not deducted from GTA wages during fall and spring semesters when the GTA is enrolled in classes. However, if a GTA teaches a class during the summer session but is not enrolled in any classes during that session, Social Security deductions are made. (Tr.p. 85-86, 87-88; Ex. P-56, 57).
40. The GTAs are generally furnished office space, materials, supplies and secretarial assistance required to perform their teaching duties. (Tr.p. 207, 273, 310, 655).
41. The GTA cannot hire anyone else to perform the teaching responsibilities of the GTA appointment. (Tr.p. 207-08, 274, 657).
42. The department sets the time when classes will meet and determines the class room location, and the GTA cannot change either. (Tr.p. 211).
43. Generally, the faculty supervisor will determine the textbook to be used in a course, the materials to be covered, and the experiments to be performed in a lab, not the GTA.
44. GTAs go through a two day university-wide orientation program which covers grading, teaching, responsibilities, and constraints and guidelines as far as professional ethics. The individual departments may then have its own orientation program, e.g. two days in philosophy; four days in Western Civilization. The departments that do not have separate orientations require GTAs to meet with their faculty supervisors for individual training and

orientation. (Tr.p. 75-76, 169-71, 232-33, 286-89, 356, 491-92, 846; Ex. P-36, 37, 62; Ex. R-5).

45. GTAs may be disciplined and/or discharged for failing to satisfactorily perform their job duties. The GTA's contract provides that a GTA may be removed for failure to follow instructions or to meet regular obligations. Failure to maintain satisfactory academic standards is also just cause for dismissal.
46. The contract between the graduate student and the University relative to the GTA appointment includes a section titled "Conditions of Appointment for students employed as part-time graduate teaching assistants." The Physics and Astronomy Department refers to GTAs as departmental employees in its departmental handbook, and treats them as employees. (Tr.p. 291-92). The Philosophy Department views GTAs as both employees and students. (Tr.p. 159). Both the Senate Executive Committee of the University and the University Council passed motions in support of giving GTAs the opportunity to consider collective bargaining, and endorsing the position that GTAs are employees of the University. (Tr.p. 38-39; Ex. P-54, 55).

### **Goals of Graduate Study**

47. The broad goals of graduate study within the Graduate School of the University of Kansas, as stated in the Graduate School Catalog, are as follows:
  - a. independent scholarship;
  - b. competence in research; and
  - c. the nurture of teaching commitment and skill. (Ex. 3).
48. The first goal of graduate study (independent scholarship) is typically achieved through course work, seminars and individual instruction for students with faculty member supervision. (Tr.p. 469).
49. The second goal of graduate study (competency in research) is generally conducted in a laboratory in some areas and in performance in other areas. (Tr.p. 470).

50. The third general goal of graduate study (nurture of teaching commitment and skill) is typically achieved by experiences in classroom instruction. (Tr.p. 470).
51. In many academic disciplines it is probable that many of the students who earn graduate degrees will go on to teach in some capacity. (Ex. 3; Tr.p. 11, 473-74, 388, 614, 624, 755-56, 819, 845, 881, 885, 929, 955, 194, 912). At the University, the primary ways of offering graduate students teaching experience in the classroom are to provide opportunities for them to hold paid graduate teaching assistantships, or, in some programs, to require that students take unpaid teaching practicum courses for credit. (Tr.p. 472, 384, 590, 615-16, 756-57, 822, 885-86, 956, 1003; Supplemental information sent to hearing officer on October 19, 1993).
52. According to Anthony C. Genova, professor chair of the Department of Philosophy, a trend has developed whereby GTAs are increasingly hired to teach courses when a faculty vacancy occurs. This began when the University started experiencing budgetary underfunding while facing increased teaching demands. (Tr.p. 158, 221-22).

*"The university had to employ additional GTAs to cover teaching demands and were not funded adequately to replace or add faculty." (Tr.p. 195, 247).*

53. According to Jane Garrett, Administrative Officer I in the Department of English, who has prepared statistical reports annually for the Department of English showing utilization of GTAs and faculty, the reason the Department was hiring more GTAs and fewer faculty was because GTAs are much cheaper to hire. She never heard it stated that by using more GTAs the Department was providing an educational opportunity to a greater number of graduate students. (Tr.p. 456-57).

In the English Department for the academic years 1979 through 1993, upper level courses taught by GTAs and lecturers went from 0 to twenty-five (10 GTAs and 5 lecturers). The cost to the University of having these courses taught by GTAs and lectures was \$51,297.00 as compared to \$209,413.00 if faculty members had been hired. The University saved approximately \$150,000.00 per year in the English Department alone by using GTAs and lecturers to teach classes rather than hiring faculty. (Tr.p. 449-451; Ex. P-69).

54. The opportunity to fund one's education is a significant factor in the selection of the graduate school to attend. The importance of such programs as GTAs comes from their ability to assist a graduate student to support his education rather than because they enhance the education itself. Generally, GTA appointments satisfy an economic concern of graduate students rather than an academic concern. (Tr.p. 53-55). The Physics and Astronomy Department discovered that if graduate students were not offered a GTA they did not enroll at the University. It was the money that brought them to the University. (Tr.p. 305).
55. It is complained the accepting of a GTA appointment can actually interfere with academic work because of the amount of time required. The testimony reveals that graduate students are limited to the number of years they can receive GTA appointments to insure that they complete their graduate program in a timely manner. (Tr.p. 237).
56. According to Dean Stetler, Associate Professor of Biochemistry, the University's goal of "nurturing education" can be accomplished in ways other than by the graduate student teaching:
- "[T]o a certain extent, nurturing teaching even to graduate students could be considered by exposing them to good teachers during their graduate education.*
- "We also help them learn how to teach in other ways. We require them to give a seminar once a semester. Other departments have other requirements. I think that is for several different reasons and one is to help them learn how to teach in that type of situation. In that case, they are teaching either their own work or the research of some other individual. They're learning how to present material just like they would in a classroom.*
- "So we can nurture teaching in ways other than formal classroom instruction as a GTA." (Tr.p. 803).*
57. The Physics Department has in the past required all graduate students to have teaching experience as a GTA. That was done at a time when outside money for fellowships was plentiful and the Department had no other way to get enough GTA's to meet its course teaching requirements. (Tr.p. 305-06).

**Other Universities Where GTAs Recognized as Employees**

58. Graduate Teaching Assistants have been recognized for purposes of forming bargaining units at, (Ex. P-42):

University of California at Berkeley  
University of Florida at Gainesville  
University of South Florida at Tampa  
University of Iowa  
University of Massachusetts at Amherst  
University of Michigan at Ann Arbor  
University of Michigan at Dearborn  
University of Michigan at Flint  
Rutgers State University at Camden  
Rutgers State University at Newark  
Rutgers State University at New Brunswick  
University of Oregon  
University of Wisconsin at Madison  
University of Wisconsin at Milwaukee

and are seeking bargaining rights at:

State University of New York, Albany  
University of Chicago  
Yale University  
University of Illinois  
Purdue University  
City University of New York  
Cornell University  
Temple University  
University of California at Santa Cruz  
University of California at San Diego  
University of California at Davis.

59. The University of Oregon is one of the five or six peer institutions selected by the University of Kansas against which it compares itself on various educational and institutional criteria, (Tr.p. 34-35), and it recognizes GTAs to be employees with the right to collectively bargain. (Ex. P-42)



## *ISSUE 1*

WHETHER THE INDIVIDUALS IN THE POSITION OF GRADUATE TEACHING ASSISTANTS ARE "EMPLOYEES" OF THE UNIVERSITY OF KANSAS, AND THEREFORE, "PUBLIC EMPLOYEES" PURSUANT TO K.S.A. 75-4322(a).

The Kansas Association of Public Employees ("KAPE") has filed a petition seeking a determination as to the appropriate bargaining unit for Graduate Teaching Assistants ("GTAs") of the University of Kansas at Lawrence ("University"). The University, in response, has taken the position that the GTAs are not "*public employees*" but rather students, and therefore not covered by the Public Employer-Employee Relations Act ("PEERA"). Essentially, the University has raised a procedural question concerning the jurisdiction of the PERB to entertain KAPE's petition. This issue presents a jurisdictional question of first impression for PERB. If GTAs are not "*public employees*," then they enjoy none of the rights under K.S.A. 75-4324 of PEERA, and PERB does not have jurisdiction to entertain their unit determination petition.

### ***Statutory Definition of "Public Employee"***

K.S.A. 75-4324 grants the right to form, join and participate in the activities of employee organizations only to "*public employees*." "*Public Employee*" is defined in K.S.A. 75-4322(a) to mean:

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

[1] Unfortunately, the legislature failed to provide a definition for the word "employed" used in K.S.A. 75-4322(a). The task of determining the contours of the term "public employee," therefore, has been assigned primarily to the Kansas Public Employee Relations Board as the agency created by the legislature to administer PEERA. Rules of statutory construction, as set forth in K.S.A. 77-201, "Second," requires words and phrases be construed according to context and approved usage of the language. An "employee" according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, means someone who works for another for hire. Allied Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 167 (1971); See also Wallis v. KDHR, 236 Kan. 97 (1984); Crawford v. KDHR, 17 Kan.App.2d 707 (1992). Relying solely upon the language of K.S.A. 75-4322(a) and its common understood meaning, GTAs appear to be "public employees" since there is no dispute that GTAs work for the University for hire.

The language used to define "public employee" is very clear and concise. Nothing in the stated purpose or other provision of PEERA can be found that would indicate the legislature intended to exclude from PEERA coverage persons who are students but also

employees of the University. The supreme courts of Nebraska and Michigan reached the same conclusion when interpreting similar definitions under their respective public labor relations law, and, finding no statutory basis for denying GTAs the right to collectively bargain, found no further inquiry required. See House Officers Ass'n v. University of Neb. Med. Center, 255 N.W.2d 258, 262 (Neb. 1977); Regents of the Univ. of Mich. v. Mich. Employment Relations Comm'n, 204 N.W.2d 218, 226 (Mich. 1973).

PEERA specifically creates only four exclusions from its coverage for public employees, none of which applies to student/employees. According to the Kansas Supreme Court, PEERA extends to "all persons employed by the State of Kansas and its agencies, except supervisory employees, professional employees of school districts, elected and management officials, and confidential employees." (Emphasis added). Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 803 (1983). If the legislature had intended to exclude students/employees from the status of "public employee", it could have easily done so by adding such exclusion to the K.S.A. 75-4322(a) definition.<sup>2</sup> However, no

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<sup>2</sup> The legislature has seen fit to do so in other laws. K.S.A. 44-703(i)(3)(E) defines "employment" for purposes of the Kansas Employment Security Law to include:

"Service performed by an individual in the employ of this state or any instrumentality thereof, any political subdivision of this state or any instrumentality thereof, any instrumentality which is jointly owned by this state or a political subdivision thereof and one or more other states or political subdivisions of this or other states, provided that such services is excluded from employment as defined in the federal unemployment tax act by reason of section 3306(c)(7) of that act and is not excluded from "employment" under subsection (i)(4)(A) of this section."

such exclusion was provided in the PEERA definition. It appears that GTAs are "employed" and do not come within any of the statutory exclusions of K.S.A. 75-4322(a), and should therefore be found to be "public employees" with the rights afforded by K.S.A. 75-4324. To hold otherwise would be to judicially create exceptions which the Legislature apparently did not. However, such is the action the University is requesting PERB take.

The University maintains that there are situations in which the unique nature of the relationship between the individuals performing services and the institutions for which those services are performed, that provide a basis for excluding the individuals from laws creating employee organizational rights. It urges PERB to adopt the reasoning of the National Labor Relations Board ("NLRB") as set forth in Cedars-Sinai Medical Center, 91 NLRB 1398, 1402 (1976), and St. Clare's Hospital & Health Center, 95 LRRM 1180 (1977) for refusing to find the students to be employees of the University for purposes of meeting and conferring even though no exception for student/employees appears in the PEERA statute itself.

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K.S.A. 44-703(i)(4)(N) then specifically excludes from the definition of employment:

"service performed, in the employ of a school, college, or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college or university."

The NLRB first addressed the issue of student/employee status in Cedars-Sinai. Over a strong dissent, the NLRB held that housestaff, (students participating in graduate medical training programs), were not employees under the NLRA, since "*they are primarily engaged in graduate education training*" and thus are in "*an educational rather than an employment relationship.*" Id. at p. 1400.

In arriving at that determination, the NLRB focused primarily on the purpose of housestaff participation in such programs. The NLRB paid little attention to the actual services performed. It found that housestaff participate in such programs to gain an education, not to earn a living, and that their selection of programs is "*primarily motivated*" by the quality of the training they will receive, rather than the amount of compensation. Further, it stated that while housestaff did perform much unsupervised patient care, this was merely a part of the training they must receive to develop practical skills. Accordingly, students who perform services for their educational institution that are directly related to their educational program act primarily as students and not as employees. St. Clare's Hospital & Health Center, 95 LRRM 1180 (1977).

NLRB member Fanning vigorously dissented from the majority's approach. He argued that the fact that "*hospitals are instructed to view the primary purpose of housestaff programs as educational*

has no bearing on whether the housestaff ultimately performs a service for compensation. . . " Cedars-Sinai at p. 1403. Nor did Fanning find any relevance in "the fact that an individual desirous of becoming an orthopedic surgeon chooses a residency program based on its quality and the opportunity for extensive training." "That is," Fanning observed, "not a unique approach in any field of endeavor, particularly professional ones." Id. at p. 1404. Instead, Fanning thought the Board's inquiry should focus on the services actually performed by housestaff.

Fanning was not alone in his criticism of his colleagues' ruling. See e.g. Drake, Labor Problems of Interns and Residents: The Aftermath of Cedars-Sinai, 11 U.S.F.L.Rev. 694, 1977; Maute, Student-Workers or Working Students? A Fatal Question for Collective Bargaining of Hospital House Staff, U.Pitt.L.Rev. 762, (1977); Brownstein, Medical Housestaff: Scholars or Working Stiffs? The Pending PERB Decision, 12 Pacific L.J. 1127 (1981).

Notwithstanding the NLRB line of cases, the vast majority of states addressing the question of student/employee bargaining rights have held that the students are also employees within the meaning of their respective collective bargaining statutes and thus eligible to bargain collectively. See e.g. University of Massachusetts v. International Union, SCR-2215, 16-17 (April 15, 1994); State of New York v. New York State Public Employment Relations Board, 586 N.Y.S.2d 662 (N.Y. 1992); Regents of the

University of California v. Public Employment Relations Board, 715 P.2d 590, 603 (Cal. 1986); University of Oregon Graduate Teaching Fellows Federation v. University of Oregon, Case No. C-207-75 (1977); State of Iowa (University of Iowa) v. Campaign to Organize Graduate Students, Case No. 4959, (January 31, 1994; House Officers Ass'n v. University of Neb. Med. Center, 255 N.W.2d 258 (Neb. 1977); City of Cambridge, Cambridge House Officers Ass'n, M.L.C. 1450 (Mass. 1976); Regents of the Univ. of Mich. v. Mich. Employment Relations Comm'n, 204 N.W.2d 218 (Mich. 1973); Wychoff Heights Hospital, 34 S.L.R.B. No. 81 (N.Y. 1971); Albert Einstein College of Med. of Yeshiva Univ., 33 S.L.R.B. No. 86 (N.Y. 1970); Bronx Eye Infirmary, 33 S.L.R.B. No. 41 (N.Y. 1970); Long Island College Hosp., 33 S.L.R.B. No. 32 (N.Y. 1969); Brooklyn Eye & Ear Hosp., 32 S.L.R.B. No. 21 (N.Y. 1969). *But see e.g. Willis Eye Hospital v. Pennsylvania Labor Relations Board*, 328 A.2d 539 (Penn. 1975) and Interns & Einstein Med. Center, 369 A.2d 711 (Penn. 1976). Specifically, in City of Cambridge, Cambridge House Officers Ass'n, M.L.C. 1450 (Mass. 1976), the Massachusetts Labor Commission explicitly chose not to adopt the Cedar-Sinai characterization of housestaff as students, and accepted the premise that dual employee/student status is not inimical to collective bargaining rights.

In Cedars-Sinai and St. Clare's the NLRB basically adopted a "primary purpose" test which gave paramount consideration to the

student's subjective intent in participating in the housestaff programs. "Our conclusion that housestaff are 'primarily students' rather than employees connotes nothing more than the simple fact that when an individual is providing services at the educational institution itself as part and parcel of his or her educational development the individual's interest in rendering such services is more academic than economic." St. Clare's, at 95 LRRM 1184.

The University places great emphasis upon Board of Trustees, University of Massachusetts and Graduate Student Employees Union, 5 MLC 1896 (1979) in which the Massachusetts Labor Relations Commission adopted the NLRB approach in refusing GTAs, research associates, teaching assistants, and teaching associates at the Amherst campus "employee" status. Commissioner Wooters, while acknowledging that the graduate student's relationship to the university definitely looked like, and in fact was, an employment relationship, found the fact that the graduate students were also students at the university altered that relationship in such a way as to bring it outside the scope of the Massachusetts labor relations law. As Commissioner Wooters explained:

" [M]y conclusion is grounded in large part on the fact that these student employees are students at the same institution which also 'employs' them. Thus, normal employer/employee relationships are altered by such considerations as recruitment, academic policy, and financial aid. These additional facets or the relationship between graduate assistants and the University convince me that the establishment of a collective bargaining relationship would not foster the best interest of any of the parties involved." (Id. at p. 1904).



It should be noted that the Board of Trustees case relied upon by the University was decided in 1979. In 1994, the Massachusetts Labor Relations Commission revisited the student/employee issue relative to GTAs at Amherst and reversed its 1979 decision:

*"In Board of Trustees, Commissioner Wooters stated that policies concerning financial aid, academics and admissions could not be separated from the employment relationship without restricting the scope of collective bargaining and that collective bargaining was an improper format for making determinations that could affect those policies. Both Commissioner Wooters and Chairman Cooper inferred that collective bargaining would negatively impact academic concerns. We do not share this view . . ." University of Massachusetts v. International Union, SCR-2215, 16-17 (April 15, 1994).*

In reversing the Commission's previous position in Board of Regents the Commission explained:

*"Moreover, since Board of Regents issued, the Commission has favored giving employees the opportunity to decide for themselves whether to engage in collective bargaining when the subjects of bargaining are limited or otherwise affected by outside parties or requirements. (Citations omitted). As we stated in ITT Jobe Training Services, 19 MLC at 1030, '[o]ur direction of a representation election in this case guarantees to employees the freedom to choose whether to engage in collective bargaining, despite the constraints applicable here."*

Concluding that the GTAs were public employees within the meaning of the Massachusetts act, the Commission stated:

*"Moreover, we find that the assistant's status as University students is not inconsistent with their status as public employees." University of Massachusetts v. International Union, SCR-2215, p. 12 (April 15, 1994).*

In Medical Housestaff: Scholars or Working Stiffs? The Pending PERB Decision, 12 Pacific L.J. 1127, 1143 (1981), the author urged the "primary purpose" test used by the NLRB be disregarded in favor

of the contrary conclusion reached by a majority of the courts and administrative agencies across the nation:

*"The [primary purpose] test has been criticized as virtually meaningless and leads to absurd results if carried to its logical conclusion: two persons working side by side in the same profession may have different motivations for working for a particular employer, but if the interest of one is primarily pecuniary and the interest of the other predominately educational, the primary purpose test would lead to calling one an employee and the other a student." Id.*

[2] Following the lead of the majority of state PERBs addressing the issue of student/employee status, the "primary purpose" test is rejected for use under the Kansas PEERA. If one is not to accept the "primary purpose" test employed by the NLRB and the Pennsylvania PERB, what test should be used? The author of Medical Housestaff: Scholars or Working Stiffs? The Pending PERB Decision, 12 Pacific Law Journal 1128 (19 ), recommends a two-step test to resolve the student/employee issue in determining coverage under an public employee relations act:

*"The first part of the process involves a balancing test to weigh the significance of the educational objectives against the importance of the services rendered. On the "educational objectives" side of the scale, the Board should consider: (1) the subjective motivation of the residents' for participating in the University's graduate medical training program; (2) the employer's treatment of housestaff as students as evidenced by faculty and administrative statements and conduct;<sup>3</sup> and (3) indicia of student status.<sup>4</sup> On the "services" side of the scale, PERB should consider the following: (1) indicia of employee status; (2) the employer's treatment of housestaff as*

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<sup>3</sup> Are the assignments made to further educational training of the student employee or for the convenience of the employer in achieving its institutional responsibilities?

<sup>4</sup> Examples of student indicia are that student/employees spend some time in didactic activities, attend conferences, are evaluated by supervising faculty, and are eligible for student financial assistance and loans.

employees as shown by faculty and administrative statements and conduct; and (3) agency principles of master-servant.

"If this balancing test shows housestaff educational objectives to be subordinate to the services they perform, PERB should proceed to the second step of the process: an assessment of whether granting collective bargaining rights to housestaff would further the purposes of the Act. In making this assessment PERB should consider that in denying housestaff the right to bargain collectively may have serious ramifications on health care in the public sector.

**"Balancing of Interest" Test**  
**Step One**  
**"Educational Objectives" side of the Scale**

**1). Subjective Motivation of Students**

The University looks for support for its position in the broad goals of graduate study within the Graduate School as set forth in the Graduate School Catalog: a) independent scholarship; b) competence in research; and c) the nurture of teaching commitment and skill. According to the University, the third general goal of graduate study (nurture of teaching commitment and skill) is typically achieved by experiences in classroom instruction. It is maintained that by holding teaching assistantships, "students are able to gain experience as practitioners within their academic disciplines, and are provided an experience that gives them the opportunity to fulfill one of the general goals of graduate education." (Respondent's Brief p. 18).

In House Officers Ass'n v. University of Neb. Med. Center, 255 N.W.2d 258 (Neb. 1977), Regents of the Univ. of Mich. v. Mich. Employment Relations Comm'n, 204 N.W.2d 218 (Mich. 1973), and

Regents of the University of California v. Public Employment Relations Board, 715 P.2d 590, 603 (Cal. 1986) the Supreme Courts of Nebraska, Michigan and California addressed this argument and minimized the importance of the educational aspect of the program. The Michigan court stated that learning-while-doing is common to all professions:

*"We do not regard these two categories as mutually exclusive. Interns, residents and post-doctoral fellows are both students and employees. The fact that they are continually acquiring new skills does not detract from the findings of the MERC that they may organize as employees under the provisions of PERA. Members of all professions continue their learning throughout their careers. For example, fledgling lawyers employed by a law firm spend a great deal of time acquiring new skills, yet no one would contend that they are not employees of the law firm." 204 N.W.2d at 226.*

The "nurture of teaching" rationale is also not supported by the degree requirements of the graduate programs. Of the approximately ninety-one Masters degree programs and sixty-five Ph.D degree programs listed in the Graduate School Catalog, (p.18-21), fourteen programs have teaching requirements that must be satisfied either by holding a GTA position or by completing the VAE 99c, College Teaching Practicum, to obtain a Ph.D. degree but not a Masters degree, and only two programs have teaching requirements that must be satisfied either by holding a GTA position or by completing the VAE 99c, College Teaching Practicum to obtain a Masters degree. It is significant that seven programs have teaching requirements that may only be satisfied by completing the VAE 99c, College Teaching Practicum to obtain a Ph.D. degree. So,

in summary, only two of approximately ninety-one Master degree programs have a teaching requirements, and only fourteen of the approximate sixty-five Ph.D. programs have such a requirement which may be met by holding a GTA appointment.

The record reveals the opportunity to fund one's education is a significant factor in the selection of the graduate school to attend. The importance of such programs as teaching assistantships comes from their ability to assist a graduate student to support his or her education rather than because it enhanced their education. Generally, GTA appointments satisfy an economic concern of graduate students rather than an academic concern. For example, the Physics and Astronomy Department discovered that if graduate students were not offered a GTA they did not enroll at the University. It was the money that brought them to the University, not the teaching opportunity.

According to John Davidson, professor in the Department of Physics and Astronomy:

*"[I]t's my opinion that people who enter the graduate program in physics and astronomy, are interested in doing research in the area, that's why they come to a research university, and they look upon being teaching assistants as a chore that they have to do in order to support themselves. . ."* (Tr.p. 316-17).

This is corroborated by the testimony of Daniel J. Murtaugh, GTA in the English Department:

*"I teach for money here is what I do. I perform certain services. I'm paid for those services. If I do my job, I keep my job. If I don't do my job, I get fired . . ."*

Finally, GTA appointments are not the sole way the University can accomplish its goal of nurturing teaching. According to Dean Stetler, Associate Professor of Biochemistry, the goal can be accomplished in ways other than by the graduate student teaching:

*"[T]o a certain extent, nurturing teaching even to graduate students could be considered by exposing them to good teachers during their graduate education.*

*"We also help them learn how to teach in other ways. We require them to give a seminar once a semester. Other departments have other requirements. I think that is for several different reasons and one is to help them learn how to teach in that type of situation. In that case, they are teaching either their own work or the research of some other individual. They're learning how to present material just like they would in a classroom.*

*"So we can nurture teaching in ways other than formal classroom instruction as a GTA."*

## ***2) Employer's Treatment of GTAs as students***

As noted above this refers to whether assignments are made to further educational training of the student/employee or for the convenience of the employer in achieving its institutional responsibilities.

GTAs have become an integral part of University operations, and teach an ever-increasing quantity of University classes. A large number of the classes taught by GTAs are required undergraduate courses, i.e. freshman and sophomore 100 and 200 level courses and labs. GTAs, however, are also beginning to teach 300 and 400 level courses. By way of example, in the Philosophy Department, GTAs teach sixty percent of the 100 and 200 level

courses. They are teaching an ever increasing number of 300 level courses, and their use is expanding into 400 and 500 level courses. According to Howard Mossberg, Vice Chancellor for Research, Graduate Studies and Public Service, GTAs are teaching approximately one-fourth of the credit hours of instruction offered by the University, in some departments it may be in excess of fifty percent, and in at least three departments the GTAs teach more classes than the faculty.

Reports prepared by the University's Office of Institutional Research and Planning indicate GTAs accounted for approximately twenty-eight percent of the staff devoted to teaching organized classes at the University in the 1990 academic year. GTAs taught approximately twenty-seven percent of organized class credit hours as compared to sixty-three percent for the faculty, i.e. professors, associate professors, assistant professors and other instructors. The GTAs also taught the same percentage of organized class sections. In the English Department, for example, from 1978 through 1992, the GTAs went from teaching thirty-nine percent of the courses offered to fifty-two percent. For that period the faculty went from teaching a high of one hundred twelve 100 and 200 level courses in 1982 to only eight for the 1993 academic year.

The motivation for use of GTAs is not only to fill needed teaching positions but to do so economically. According to Anthony C. Genova, professor chair of the Department of Philosophy, a trend

has developed whereby GTAs are increasingly hired to teach courses when a faculty vacancy occurs. This began when the University started experiencing budgetary underfunding while facing increased teaching demands. According to professor Genova:

*"The university had to employ additional GTAs to cover teaching demands and were not funded adequately to replace or add faculty."*

Jane Garrett, Administrative Officer I in the Department of English, who has prepared statistical reports annually for the department of English showing utilization of GTA and faculty, testified the reason the Department was hiring more GTAs and fewer faculty was because GTAs are much cheaper to hire. She never heard it stated that by using more GTAs the Department was providing an educational opportunity to a greater number of graduate students.

Ms. Garrett's statistics reveal, in the English Department for the academic years 1979 through 1993, upper level courses taught by GTAs and lecturers went from 0 to twenty-five (10 GTAs and 5 lectures). The cost to the University of having these courses taught by GTAs and lectures was \$51,297.00 as compared to \$209,413.00 if faculty members had been hired. The University saved approximately \$150,000.00 per year in the English Department alone by using GTAs and lecturers to teach classes rather than hiring faculty. Since GTAs are paid approximately one-fourth the salary of a faculty member, e.g. \$8000/yr and no fringe benefits for a GTA in philosophy as compared to \$30-40000/yr plus benefits



for a faculty member, given the large number of courses being taught by GTAs which would otherwise have to be taught by faculty, the financial benefit to the University through the use of GTAs to meet its teaching responsibilities is readily apparent.

***(3) Indicia of Student Status***

As noted above, examples of student indicia include that student/employees spend some time in didactic activities, attend conferences, are evaluated by supervising faculty, and are eligible for student financial assistance and loans. There is no question but that GTAs, in their dual positions of student and employee exhibit these, and other, indicia of student status at the University.

***"Services" Side of the Scale***

***(1) Indicia of Employee Status***

The record establishes that the GTAs possess other traditional indicia of employee status like reported taxable income, Worker's Compensation coverage pursuant to K.S.A. 44-501 et seq.<sup>5</sup>, imposition of ethical provisions and a Code of Conduct upon GTA's which exactly duplicates those placed upon faculty members, and the required signing of a State of Kansas employee oath. See e.g., University of Massachusetts v. International Union, SCR-2215, p. 12

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<sup>5</sup> K.S.A. 44-508(b) defines "employee" to mean "any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer." The definition provides no exclusion for student/employees.

(April 15, 1994). The University furnishes the W-2 forms required by the Internal Revenue Service for all employees. The compensation is paid by State of Kansas checks in the same manner as state employees are paid. The GTAs spend at least 20 hours per week providing educational services to students for which the University is compensated. In particular, they are entrusted with many responsibilities that students are not, e.g. teaching classes, preparing a course syllabus, preparing assignments, and grading papers. See Regents of the Univ. of Mich. v. Mich. Employment Relations Comm'n, 204 N.W.2d 218, 225 (Mich. 1973).

**(2) Employer's Treatment of GTAs As Employees**

The contract between the graduate student and the University relative to the GTA appointment includes a section titled "*Conditions of Appointment for students employed as part-time graduate teaching assistants.*" The Physics and Astronomy Department refers to GTAs as departmental employees in its departmental handbook, and treats them as employees. The Philosophy Department views GTAs as both employees and students. Both the Senate Executive Committee of the University and the University Council passed motions in support of giving GTAs the opportunity to consider collective bargaining, and endorsing the position that GTAs are employees of the University.

**(3) Agency Principles of Master-Servant**

The NLRB has found that both the agency concept of servant ("a person employed to perform services in the affairs of another, and who . . . is subject to another's control or right to control") and the conventional concept of "employee" ("someone who works or performs a service for another from whom he or she receives compensation") are applicable to the labor relations arena to determine employee status. Cedars-Sinai Medical Center, 91 NLRB 1398, 1402 (1976).

Agency principles have historically been applicable to determining employee status under labor relations statutes. See e.g. NLRB v. United Ins. Co., 390 U.S. 254 (1968); Leland Stanford, 214 NLRB No. 82 (1974). The question has typically been whether workers were employees or independent-contractors, but the master-servant test can be modified to determine whether student-workers are primarily employees or students.

A master is a principal who employs another to perform service for him and who controls or has the right to control the physical conduct of the other in the performance of such service, and the servant is the person so employed. See Houdek v. Gloyd, 152 Kan. 789 (19 ). Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of

employment. Yellow Cab, Inc., 72 LRRM 1514, 1515 (1969). An employer's right to direct and control the method and manner of doing the work is the most significant aspect of the employer-employee relationship, although it is not the only factor entitled to consideration. Crawford v. Kansas Dept. of Human Resources, 17 Kan.App. 707, 710 (1989).

The twenty-factor test is the one usually employed in determining "right of control" and thereby, employee status. See e.g. Crawford v. Kansas Dept. of Human Resources, 17 Kan.App. 707, 710 (1989); Wallis v. KDHR, 236 Kan. 97 (1984). These factors include:

1. ***The existence of the right of the employer to require compliance with instruction.***

The contract between the graduate student and the University relative to the GTA appointment provides that the GTA is expected to perform their responsibilities "in accordance with instructions," and failure to follow instructions can result in termination.

2. ***The extent of any training provided by employer.***

GTAs go through a two day university-wide orientation program which covers grading, teaching, responsibilities, and constraints and guidelines as far as professional ethics. The individual departments may then have their own orientation program.

3. ***The degree of integration of the worker's services into the business of the employer.***

The teaching of undergraduate courses and labs is an integral part of the University's service of educating its enrolled students.

4. *The requirement that the services be performed personally by the worker.*

The GTA cannot hire anyone else to perform the teaching responsibilities of the GTA appointment.

5. *The existence of hiring, supervision, and paying of assistants by the workers.*

Inapplicable to this situation.

6. *The existence of a continuing relationship between the worker and the employer.*

GTAs usually may expect continued employment if their academic progress meets the criteria set out by the department and their prior work has been satisfactory.

7. *The degree of establishment of set work hours.*

The department sets the time when classes will meet and the GTA cannot change it unilaterally.

8. *The requirement of full-time work.*

Not applicable to this situation because the GTA position is only part-time.

9. *The degree of performance of work on the employer's premises.*

Classes and labs are taught on the University campus. The department determines the class room location and the GTA cannot change it unilaterally.

10. *The degree to which the employer sets the order and sequence of work.*

Generally, the faculty supervisor will determine the textbook to be used in a course, the materials to be covered, and the experiments to be performed in a lab, not the GTA.

*evidence to support the Board's finding that educational objectives are subordinate to the services they perform."*

***Step Two***  
***Will the Purposes of PEERA Be Furthered***

Having determined that the educational objectives are subordinate to the services GTAs perform, the second step of the process is to assess whether granting collective bargaining rights to GTAs would further the purposes of PEERA. This determination necessarily involves questions of fact and policy. The purposes of PEERA can be found in K.S.A. 75-4321:

- "(a) The legislature hereby finds and declares that:
- (1) The people of this state have a fundamental interest in the development of harmonious and cooperative relations between government and its employees;
  - (2) the denial by some public employers of the right of public employees to organize and the refusal by some to accept the principle and procedure of full communication between public employer and public employee organizations can lead to various forms of strife and unrest;
  - (3) the state has a basic obligation to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government; . . ."

In addition, PERB has stated, in enacting PEERA, the Legislature established as the public policy of this state promoting harmonious and cooperative relationships between government and its public employees by permitting such employees to organize and bargain collectively. Junction City Police Officers Association v. City of Junction City, Case No. 75-CAE-4-1992 (July 31, 1992).

The students-are-employees conclusion finds strong support when considered in the context of the entirety of the Public

18. *Whether the services of the worker are made available to the general public.*

See #17 above.

19. *Whether the employer has the right to discipline the worker.*

GTAs may be disciplined for failing to follow instructions or satisfactorily perform their job duties.

20. *Whether the employer has the right to terminate the worker.*

GTAs may be discharged for failure to satisfactorily perform their job duties. The GTA's contract provides that a GTA may be removed for failure to follow instructions or to meet regular obligations.

GTAs, exhibiting almost every traditional indicia of employment status, precisely fit the classical definition of employee. They use University facilities while rendering substantial services which the University is in the business of providing to the public and for which the University is compensated, and are subject to the University's supervision and control. Application of the balancing test shows GTA educational objectives to be subordinate to the services performed. This is consistent with the conclusion reached in Regents of the University of California v. Public Employment Relations Board, 715 P.2d 590, 603 (Cal. 1986), wherein the California Supreme Court stated:

*"[A]lthough housestaff obviously receive intensive professional training through their work, there is substantial*

**11. *The necessity of oral or written reports.***

Inconclusive, except that the faculty supervisor and the GTA meet regularly to discuss the course including problems, coming assignments, and critique of teaching techniques.

**12. *Whether payment is by the hour, day or job.***

Not applicable to this situation.

**13. *The extent of which the employer pays business or travel expenses of the worker.***

Not applicable to this situation.

**14. *The degree to which the employer furnishes tools, equipment, and material.***

The GTAs are generally furnished office space, materials, supplies and secretarial assistance required to perform their teaching duties.

**15. *The incurrence of significant investment by the worker.***

Since the University provides all equipment and materials for teaching the course or laboratory, little if any investment is required by the GTA to prepare him or her to assume the responsibilities of the position.

**16. *The ability of the worker to incur a profit or loss.***

Not applicable in this situation.

**17. *Whether the worker can work for more than one firm at a time.***

There is nothing to prevent a GTA from working outside the University, but the testimony would indicate that between teaching and their own studies, the GTA's time is fully occupied.



Employer-Employee Relations Act. Although it is necessary to consider the meaning of "public employee" and "employed" in terms of the usual indicia of that status, it is especially relevant to consider the statutory terms in light of the purpose of this particular Act. Indeed, as Judge Learned Hand said in NLRB v. Federbush Co., Inc., 121 F.2d 954, 957 (CA2 1941):

*"Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . ."*

In this regard, the analysis of the United States Supreme Court in NLRB v. E.C. Atkins & Co., 331 U.S. 398 (1947), is highly persuasive. That case considered whether certain guards employed at a defense plant, who were required to be civilian auxiliaries of the military police of the United States Army, were employees of the defense contractor within the meaning of the NLRA. In sustaining the NLRB's conclusion that the guards were employees of the contractor, the Court wrote:

*"[T]he terms 'employee' and 'employer' in [the National Labor Relations Act] carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.*

*"And so the Board in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. This does not mean that it should disregard the technical and traditional concepts of 'employee' and 'employer.' But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations.*

\* \* \*

*"The most important incidents of the employer-employee relationship - wages, hours and promotion - remained matters to be determined by respondent rather than by the Army. Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards are free to negotiate and bargain individually or collectively on those items. It is precisely such a situation to which the National Labor Relations Act is applicable. It is a situation where collective bargaining may be appropriate and where statutory objectives may be achieved despite the limitations imposed by militarization. Under such circumstances, the Board may properly find that an employee status exists for purposes of the Act.*

*". . . As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire or fire or the power to control all the activities of the worker. In other words, were the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present." Costigan v. Local 696, 90 LRRM 2328, 2331 (Penn. 1974).*

The Kansas Legislature has declared that it is the public policy of the state and the purpose of PEERA to promote orderly and constructive relationships between all public employees and their employers. Unresolved disputes between the public employer and its employees are injurious to the public and the legislature was aware that adequate means must be established for minimizing them and providing for their resolution. The legislature determined that the overall policy may best be accomplished by (1) granting to public employees the right to organize and choose freely their representatives; (2) requiring public employers to negotiate and bargain with employee organizations representing public employees and to enter into written agreements evidencing the result of such

bargaining; and (3) establishing procedures to provide for the protection of the rights of the public employee, the public employer and the public at large.

This statement of policy is the reiteration of the lessons of recent history. Though the relationship between those who manage a public enterprise and those who labor in its behalf is fraught with potential for conflict, it is a relationship which affects the rest of society so directly that a continuing means of conflict avoidance and resolution must be devised. Meeting and conferring concerning public employment, as set forth in PEERA, is the method chosen by the legislature *"to make appropriate collective action of employees an instrument of peace rather than of strife."* See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34 (1937).

It cannot be doubted that the citizens of this state have a legitimate interest in the smooth operation of its institutions of higher learning. As one commentator has noted, *"Disruptions [in the flow of essential public services] are minimized where workers providing essential services have an adequate system for resolving disagreements over wages, hours or working conditions."* Comment, Labor Law - Exclusion of Hospital Housestaff from Public Employee Collective Bargaining in Pennsylvania, 11 Suffolk U.L.Rev. 1172, 1185 (1977). Nor can it be doubted, based on the record, that the GTAs provide services necessary to the normal education first and second year students at the University of Kansas by teaching core

classes and laboratories. It is clear that the relationship of the GTAs to the University Administration can spawn problems of the type embraced in the public policy objects of PEERA. It is equally clear that the legislature has provided, by the terms of PEERA, a means for the resolution of these differences, and has created only limited specific exceptions to the statutory definition of employee. The legislature has not excluded this class of employees. It is difficult to accept the University's position that this class of people, vested with the usual and typical employee status, should be excluded from the provisions of PEERA based on an unarticulated policy judgment that an employee with some student status should not be able to deal with this employer in the manner which the legislature has deemed desirable.

### ***Guiding Purpose test***

It would also appear that one could use, with some modification, the "*guiding purpose*" test set forth in Local Union 1106 v. Goodwill Ind., 413 N.W.2d 67, 69 (Mich.App. 1987). Under this test one looks to the "*guiding purpose*" of the program, here the teaching assistantship program. The focus is on factors which indicate the program is operating to benefit the student, (i.e. is educational), as opposed to such benefit being more for the employer and only incidental to the student, (i.e. business based). See Local Union 1106 v. Goodwill Ind., 413 N.W.2d 67, 69 (Mich.App.

1987); See also NLRB v. Lighthouse for the Blind of Houston, 696 F.2d 399 (CA5, 1983); Key Opportunities, Inc., 265 NLRB 1371 (1982); Goodwill Industries of Southern California, 231 NLRB 536 (1977). Where the "guiding purpose" is educational (i.e. primarily oriented toward providing education), the students are not "public employees" within the PEERA definition. However, where the "guiding purpose" is typically business-based, (i.e. where the educational purposes are subordinate to routine business considerations), the students are employees. See Local Union 1106 v. Goodwill Ind., 413 N.W.2d 67, 69 (Mich.App. 1987).

The factors to be considered have been thoroughly examined above under the "Educational Objectives" side of scale of the Balancing Test, and need not be repeated here. Suffice it to say, there is substantial evidence that the educational objectives of the teaching assistantship program are subordinate to the business considerations of the University for using GTAs, e.g. financial savings and teaching requirements.

Whether one uses the "balancing of interests" test or the "guiding purpose" test, the conclusion is the same. The GTAs possess a dual student/employee status with the educational component of the teaching assistantship not significant enough to negate their public employee status. Accordingly, GTAs enjoy the rights afforded pursuant to K.S.A. 75-4324.

### ***Interference with Academic Policy***

There is some concern expressed by the University that to allow the GTAs to organize and bargain collectively could interfere with academic policy. However, any such interference can be no greater than when faculty are allowed to collectively bargain concerning their terms of employment. The faculty of at least two Regents institutions, i.e. Pittsburg State and Kansas State, have been engaging in meet and confer negotiations for many years without interference in academic policy becoming an issue. Additionally, fourteen other universities, including the University of Oregon which the University considers a peer university, bargain collectively with their GTAs with apparently no detriment to academic policy. The University presents no evidence that GTA bargaining at the University of Kansas would somehow present a greater threat.

Also, the dichotomy in the Law between mandatory and permissive subjects of bargaining and the provisions of K.S.A. 75-4326 ensures that core management decisions, whether they concern academic, financial aid, admissions or other policies, which only marginally impact terms and conditions of the GTAs' employment, will not be subject to the meet and confer process. In this matter, PEERA shields certain educational policies from any potential negative effect that the University fears. PEERA further

safeguards educational policies by providing that neither party is compelled to agree to a bargaining proposal or make a concession. AFSCME v. Dept. of Corrections, Case No. 75-CAE-1992 (Dec. 30, 1993); KAPE v. State of Kansas, Adjutant General's Office, Case No. 75-CAE-9-1990 (March 11, 1991). Thus, the University's ability to reject, in good faith, any bargaining proposal can prevent the collective bargaining process from adversely affecting academic, admissions or financial aid policies.

Finally, pursuant to K.S.A. 75-4332, if the GTAs and the University are unable to come to an agreement concerning terms and conditions of employment after reaching impasse in negotiations and completing the meet and confer process, the University retains the power to unilaterally set the terms and conditions of employment, and, since public employees do not possess the right to strike, the GTAs will have to accept those conditions. Given the above, the University's fear is misplaced, because there is adequate protection in PEERA to safeguard against interference with purely academic policy.

### ***Other Issues***

The University seeks to have the position of senior instructor in the Western Civilization department excluded from the GTA bargaining unit as a confidential or supervisory employee pursuant to K.S.A. 75-4322(a), should the GTAs be found to be employees.

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The issue is one more appropriate to the determination of the bargaining unit and eligibility to vote in a certification election. Since the issue here is one solely of jurisdiction with the unit determination question yet to be addressed, the University's request is premature and will not be addressed at this time. Any exclusions the University seeks to make from the bargaining unit will be taken up during the unit determination phase of the certification process.

### **ORDER**

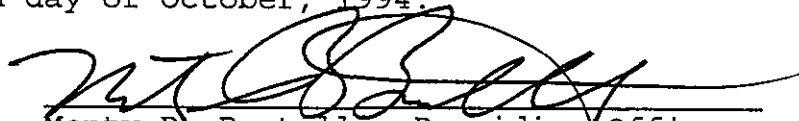
**IT IS ADJUDGED**, that the Graduate Teaching Assistants at the University of Kansas are "*public employees*" as defined in K.S.A. 75-4322(a) entitled to the rights set forth in K.S.A. 75-4324, and therefore the Kansas Public Employee Relations Board has jurisdiction over the Kansas Association of Public Employees' petition of unit determination.

**IT IS THEREFORE ORDERED**, that the process of unit determination shall proceed with a determination an appropriate bargaining unit for GTAs. To that end, a pre-hearing conference is set for November 17, 1994 at a time and place to be announced later.



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Dated this 17 th day of October, 1994.



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

#### CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 18<sup>th</sup> day of October, 1994, 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:

PETITIONER: Scott A. Stone  
Kansas Association of Public Employees  
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Topeka, Kansas 66612

RESPONDENT: Karen A. Dutcher  
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University of Kansas  
Strong Hall  
Lawrence, Kansas 66045-1752

Members of the PERB.

