

2. WHETHER THE UNIT COMPOSITION PROPOSED BY THE TEAMSTERS LOCAL UNION #955 CONSTITUTES AN APPROPRIATE UNIT IN ACCORDANCE WITH K.S.A. 75-4327(e) AND K.A.R. 84-2-6.
3. WHICH EMPLOYEES IN THE UNIT PROPOSED BY THE TEAMSTERS LOCAL UNION #955 MAY BE EXCLUDED PURSUANT TO K.S.A. 75-4322(b), SUPERVISORY EMPLOYEE, OR 75-4322(c), CONFIDENTIAL EMPLOYEE.

SYLLABUS

1. **DETERMINATION OF APPROPRIATE UNIT** - Professional Employees - Inclusion in nonprofessional unit. If a nonprofessional unit is the appropriate unit for inclusion of professional classifications, pursuant to K.S.A. 75-4327(f) they may be so included only if a majority of the professional employees in each classification vote for inclusion in the unit.
2. **DETERMINATION OF APPROPRIATE UNIT** - Community of Interest Doctrine. The basis of any bargaining unit determination is commonly referred to as the community of interests doctrine, which stands for the proposition that in making a unit determination, the PERB will weigh the similarities and differences with respect to wages, hours and other conditions of employment among the members of the proposed unit, rather than relying solely on traditional job classifications.
3. **DETERMINATION OF APPROPRIATE UNIT** - Exclusions From Unit - Burden to establish. A party seeking to exclude an individual from a unit has the burden of establishing that ineligibility.
4. **DETERMINATION OF APPROPRIATE UNIT** - Supervisory Employees - Test for exclusion. The test for determining whether a unit should include employees who substitute for supervisors is whether such part-time supervisors spend regular and substantial portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant.

5. **DETERMINATION OF APPROPRIATE UNIT - Exclusions From Unit - Burden to establish - Sufficiency of evidence.** A party seeking to exclude an individual from a unit has the burden of establishing the ineligibility. Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, it will be found that supervisory status has not been established, at least on the basis of those indicia.
6. **DETERMINATION OF APPROPRIATE UNIT - Confidential Employees - Exclusion.** Confidential employees are those who work closely with the people who set the labor relations policies of the government employer. Those employees who merely have access to personnel or statistical information upon which an employer's labor relations policy is based or who have access to labor relations information which has become known to the union are not confidential employees.
7. **DETERMINATION OF APPROPRIATE UNIT - Confidential Employees - Test for exclusion.** The test for determining whether an employee possesses confidential status is whether that employee assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. This is termed the "labor nexus" test.

FINDINGS OF FACT¹

1. Petitioner, the Teamster Union Local 955 ("Teamsters") is an "employee organization" as defined by K.S.A. 75-4322(i). It is seeking to become the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for certain civilian employees of the Sheriff's Department employed by Respondent, Wyandotte County, Kansas ("County").
2. Respondent, Wyandotte County, Kansas, is a duly organized and existing county of the State of Kansas and therefore a "public agency or employer", as defined by K.S.A. 75-

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

4322(f), with numerous employees performing duties under various administrative departments.

3. There are two basic groups of employees within the Wyandotte County Sheriff's Department; sworn deputies and civilian employees. The civilian employee classifications and the persons within each classification at the time of the hearing are as follows: Clerk - Theresa Wilson, Vicki Rasnic; Clerk Typist - Kelly Vega; Receptionist - Shirley Reed; Mailroom Clerk - Joanne Trehey; Purchasing Agent - D. Hartang; Store Clerk - John Nicklin; Time Keeper - Esther McReynolds; Executive Secretary to the Sheriff - Debbie Mecom; Secretary/Receptionist to Jail Warden - Grace Slaughter, Donna Bardwell and Lucille Hush; Nursing Supervisor - Janet Durham; Nurse - Rosemary Holloway; Medical Records Clerk - Michelle Scott; Records Clerk - Kathy Tracey, Walsie Jones, Jody Warner, Michelle Palicious, Yvonne Stewart, Shirly Brown, Mary Tremble; Identification Technician - Matt Percifield; Head Cook - Wanda Maxwell; Cook - Karen Oyler, Irie Coppage; Classification Technician - Floyd Garner (lead), Sharese Bell, Mike Gochenour, Rebecca Rivers, Richard Zamora; Programs Coordinator - Helene Schweitzer; Laundry Clerk - Margaret Wetzell; Commissary Clerk/Manager - Keith Ketchell. (Ex. A).
4. The parties have stipulated that the following positions are appropriate for inclusion in the civilian unit of the Sheriff's Department: Receptionist, Clerk, Mail Clerk, Classification Technician, Warrants Clerk, Records Clerk, Identification Technician, Medical Records Clerk, Cook, Laundry Clerk and Stores Clerk. There is also agreement that the position of Programs Coordinator is properly excluded.
5. All the positions being sought for inclusion in the proposed unit are located in the same building. (Tr.p. 183).
6. Medical insurance, life insurance, vacations, retirement, sick leave, deferred compensation are benefits identical for all county employees. (Tr.p. 412).

Managerial Personnel

7. Owen Sully is the Sheriff of Wyandotte County. (Tr.p. 110).
8. Captain Bond is the warden of the Detention Center. (Tr.p. 320). Bond's duties are to oversee the operations of the Detention Center which includes supervision of both sworn and civilian employees. (Tr.p. 384).
9. Lieutenant Alvarado is second in command at the Detention Center. (Tr.p. 385).

Robert Pierce

10. Robert Pierce is a staff Sergeant in charge of Programs and Support Services at the Detention Center. (Tr.p. 319). Pierce's duties include overseeing the civilian and support services for the detention center. (Tr.p. 319). Included among the programs supervised by Pierce would be the medical unit, the records division, the food service division, classification technician, laundry clerk, commissary manager, and inmate programs coordinator. (Tr.p. 320).
11. Ketchell, Durham, Maxwell and Garner (before special assignment) attended weekly staff meetings with Pierce. (Tr.p. 349). All employees, not just supervisors, may attend the weekly staff meetings. (Tr.p. 382). Supervisors under Pierce are expected to attempt to adjust employee problems or grievances. (Tr.p. 335). There have been no transfers during the period Pierce has been in charge of Programs and Support Services, and usually a transfer would be "pretty much out of the question." (Tr.p. 334).

Dumovich

12. Dennis Dumovich is the Personnel Director for Wyandotte County. (Tr.p. 411). He has been in that position since September, 1989. (Tr.p. 411). Dumovich's responsibilities encompass all personnel functions for the county, including the Sheriff's Department, and involve administering the employment process, benefits, workers compensation, and disciplinary actions. (Tr.p. 411-12).

13. Dumovich testified that, as a member of the County's negotiating team for the F.O.P. contract, he had to accumulate data from a number of sources including the Sheriff's Auditor, Purchasing Agent and Timekeeper. He assumed the same would be required during negotiations with the Teamsters for the proposed unit. (Tr.p. 423-24). Dumovich stated he would also have to go to the immediate supervisor of each position in the unit to obtain information concerning that position for negotiation purposes. (Tr.p. 424). He testified that information so compiled relating to overtime, wages and positions was also given to the F.O.P. during negotiations. (Tr.p. 497).

Disciplinary Process

14. Typically, a Lieutenant or Captain will generate a conduct memorandum recommending disciplinary action for an officer or civilian employee which goes up the chain of command to the Sheriff for approval or disapproval. The memorandum then goes back down to the originating officer. If discipline is approved, the Captain or Lieutenant will then meet with the individual to notify him of the disciplinary action. As a result, those generating or receiving the disciplinary memorandum would be aware of proposed disciplinary action before the deputy involved. This could include any secretary typing or filing such memorandum. (Tr.p. 149-50, 166).

*Personnel Director
Sergeant Trumbo*

15. Maintenance of jail personnel records is the responsibility the Department Personnel Director, Sergeant Jack Trumbo. (Tr.p. 81). Sergeant Trumbo serves as the Personnel Director for the Sheriff's Department, and previously served as the Director of Programs and Support Services. (Tr.p. 530). Maintenance of jail personnel records is the responsibility the Department Personnel Director, Sergeant Trumbo. (Tr.p. 81).
16. Under a new policy, access to personnel files has been tightened so only authorized personnel will have access to the files. (Tr.p. 344, 346). Now only the Sheriff,

the Undersheriff and Sergeant Trumbo has unrestricted access to the personnel files, (Tr.p. 531), unless that person is so ordered by the Sheriff. In an emergency Under-Sheriff Dean Warner, Debbie Mecom, the Sheriff's Secretary, or Ester McReynolds, the timekeeper, may be used to access personnel records. (Tr.p. 119-20).

*Nursing Supervisor - Nurse
Janet Durham - Rosemary Holloway*

17. The Detention Center has an infirmary, staffed by nurses who provide basic medical services to the inmates. There are just two full-time nurses, Janet Durham and Rosemary Holloway. Janet Durham is a registered nurse (RN) certified by the State of Kansas. She is employed in the position of Nursing Supervisor, previously titled Head Nurse, and has worked in the Detention Center since November, 1989. (Tr.p. 211, 215, 230; Ex. A). Rosemary Holloway is a licensed practical nurse (LPN), licensed by the state of Kansas. (Tr.p. 269). There is also a Medical Records Clerk, Michelle Scott, assigned to the medical unit. (Tr.p. 211-12, 215; Ex. A, B).
18. A doctor is on call should assistance or consultation be needed. (Tr.p. 212). A dentist also comes to the Detention Center once each week and the nurses assist the dentist as part of their duties. (Tr.p. 213).
19. The infirmary is staffed 24 hours per day, seven (7) days per week. During the day shift there are two nurses on duty; one takes the third floor and the other the fifth floor. On the evening and night shifts there is only one nurse on duty to cover the entire facility. (Tr.p. 224). Both Holloway and Durham work the day shift. Durham works Monday through Friday, while Holloway works Tuesday through Saturday. The evening and night shifts, and the day shifts when either Holloway or Durham are off, are staffed by the temporary nurses provided by employment agencies. (Tr.p. 234). In the past, there were up to four full-time LPN's employed, in addition to Janet Durham, but now ten (10) temporary nurses are used to staff the infirmary. When the infirmary was staffed by full-time nurses Durham was their supervisor. (Tr.p. 274). Now she supervises the temporary nurses but the temporary agency nurses are not considered employees of Wyandotte county. (Tr.p. 235).

20. Rosemary Holloway's duties are set forth in Exhibit 14. (Tr.p. 268; Ex. D). Holloway does not supervise any county employees, (Tr.p. 279), and does not have authority to hire, suspend, promote, discipline or lay-off the medical records clerk. (Tr.p. 281). Neither can she recommend those actions. (Tr.p. 281). She assumes Durham's duties only in case of vacations and emergencies. (Tr.p. 284). Holloway has the same benefits as other county employees. (Tr.p. 279).
21. Hollaway listed Durham as her supervisor on her position description questionnaire, and her position description was signed by Durham as her supervisor. (Tr.p. 237). Durham does Hollaway's annual evaluation. (Tr.p. 274).
22. Janet Durham and Rosemary Holloway normally perform the same nursing functions, (Tr.p. 268, 532-33), except Durham's responsibilities also include administrative duties. (Tr.p. 283). During a regular day those nursing responsibilities include administering medications, counting medications, conducting sick calls for inmates, scheduling appointments, assisting the doctor or dentist, giving injections and performing medical tests. (Tr.p. 271-72). Both Hollaway and Durham can and do operate the infirmary equipment. (Tr.p. 227).
23. Durham testified she has no authority to hire, transfer, suspend, layoff, recall, promote, discharge, discipline employees or to adjust their grievances. (Tr.p. 235-36). Durham's budget responsibility is to put together a recommendation as to the cost to replace equipment and supplies for the coming year. (Tr.p. 217, 242). Durham can make recommendations on hiring. (Tr.p. 238). Her normal work hours are 8:00 a.m. to 4:30 p.m., but she is available 24 hours per day to respond to staff questions and emergencies. (Tr.p. 218-19).
24. Durham does not consider herself to be the supervisor of the Medical Records Clerk, instead she just watches over her, (Tr.p. 216), but is responsible for doing Scott's evaluation. (Tr.p. 336). She also, "to an extent," supervises Hollaway, the other full-time nurse. (Tr.p. 215), and
25. Durham stated both she and Rosemary Holloway desire to have their positions included in the proposed unit. (Tr.p. 235, 247).

*Warden's Secretary
Grace Slaughter*

26. Grace Slaughter is a Secretary/Receptionist in the Sheriff's Department, (Tr.p. 112, 155), and holds the position of Warden's Secretary. (Tr.p. 79, 386).
27. Slaughter is responsible for all monies and possessions taken from inmates upon incarceration, bond monies received, return of monies and possessions to inmates upon release, and clerical functions for Warden Bond, Lieutenant Alvarado and the administrative Sergeant. (Tr.p. 155, 159, 161, 173, 386). Slaughter's clerical responsibilities include typing and filing letters, memorandums and special orders. (Tr.p. 129). The letters include letters of discipline. (Tr.p. 386-87). Special orders do not deal with collective bargaining, and Slaughter only types, does not compose, such orders. (Tr.p. 396-97). Joanne Trehey is the mail clerk for the Sheriff's Department and Slaughter performs her duties when Trehey is not available. (Tr.p. 158).
28. Melissa Reed is a sworn deputy in the Warden's Office who performs the same work as Slaughter including typing for the Lieutenant and Captain. (Tr.p. 159-60, 397). Reed is a member of the F.O.P. and in the F.O.P. bargaining unit. (Tr.p. 173). No evidence was introduced of a conflict in Reed performing those duties even though she is a member of the F.O.P. bargaining unit. (Tr.p. 398). Warden Bond testified he would have no problem with Slaughter being in the bargaining unit. (Tr.p. 398).
29. The Warden supervises both commissioned deputies and civilian employees. (Tr.p. 80). Warden Bond is responsible for recommending disciplinary action directed toward both groups of employees. Disciplinary reports are usually brought directly to the Warden and do not pass through Slaughter. (Tr.p. 370). The Warden's recommendation for discipline to the Sheriff could be typed by either Slaughter or Sworn officer Melissa Reed, and any subsequent notice of discipline could be typed by same. (Tr.p. 390-91). Slaughter testified it was the practice of the Warden to discuss disciplinary matters with the employee involved prior to any recommendation being sent to the Sheriff. (Tr.p. 174). Slaughter's

involvement in preparing disciplinary memoranda is the typing of the formal notice of discipline after the deputy has been notified of the disciplinary action. (Tr.p. 80, 156).

30. Slaughter is not involved in the budget process, (Tr.p. 392), and does not have supervisory authority. (Tr.p. 113).
 31. No one has access to personnel records unless permission is given by Sergeant Trumbo. Grace Slaughter would only have access to personnel records if specific permission is given, and then only to put documents into or retrieve them from the personnel files. (Tr.p. 81, 82, 87). Slaughter does not ordinarily have such access to those confidential personnel files, (Tr.p. 112, 155-56, 168), or to other confidential information concerning the administrative operations of the Sheriff's Department, unless authorized by the Sheriff, (Tr.p. 78, 82, 112, 156), and that would be in the unusual situation of an internal affairs investigation in the jail. (Tr.p. 128-29, 131).
- Auditor
Kelley Krebs*
32. Kelly Krebs is employed as the Sheriff's Auditor but had held that position for only approximately one month at the time of the hearing. (Tr.p. 249). Krebs was originally hired as a Clerk/Typist but was assigned the duties of the Auditor. (Tr.p. 253). Krebs testified she is involved in the payment of obligations, (Tr.p. 76), and does basic bookkeeping or accounting for what is spent by the Sheriff's Department and what needs to be purchased. She described this as basically "a record keeping function." (Tr.p. 249). The Auditor works with the County Auditor in preparing the Sheriff's Departmental budget. (Tr.p. 76).
 33. The position of Sheriff's Auditor was previously filled by a sworn deputy who, as an administrative deputy, was a member of the F.O.P bargaining unit and covered by the F.O.P. Memorandum of Agreement. That deputy was Charles Lanning. (Tr.p. 70-71, 78, 114, 496). Neither the County nor the Sheriff objected to the administrative deputy being included in the F.O.P. bargaining unit, while

serving in the position of Sheriff's Auditor, on the basis of access to confidential information or access to information involved in negotiations. (Tr.p. 78-79). Corporal Lanning resigned and the position was filled with a civilian employee, Kelley Krebs, rather than another sworn deputy. (Tr.p. 72, 114).

34. Charles Lanning is presently employed by the Wyandotte County Internal Security Division, but was previously employed as the Auditor in the Sheriff's Department. (Tr.p. 483-84). The Auditor's duties performed by Lanning included keeping track of budgetary expenditures, approving expenditures, and providing financial information to the Sheriff upon request. (Tr.p. 485).
35. Lanning would also be called upon by the Sheriff to research and gather information in areas such as funds expended on overtime or amount of sick leave used, (Tr.p. 491), or the amount spent on a budget item. (Tr.p. 250). The Sheriff would request recommendations from Lanning on how staffing requirements could be arranged to meet County Commission set FTE allotments, (Tr.p. 487), or on how monies could be transferred from one line item to another to meet needs or fund special projects. (Tr.p. 490). The information compiled relating to overtime, wages and positions was also given to the F.O.P. during negotiations. (Tr.p. 497).
36. In preparing the annual budget for the Sheriff's Department, each division head would make a budget recommendation for that division, then the Auditor would be responsible for taking each of the division recommendations and assembling them into one budget document. (Tr.p. 488, 491, 497-98). The Auditor's position also assisted in the budget preparation process by providing financial history on revenues and expenses, and making recommendations. (Tr.p. 121). Lanning, when serving as Auditor, would make recommendations on allocation of funds for general purposes if he knew that an amount budgeted was not sufficient to meet contract requirements or overestimated. Such recommendations were usually followed. (Tr.p. 500-01). Lanning would attend staff meetings on the budget only when specific information at his disposal due to his position was required. (Tr.p. 499).

37. Krebs has the same terms and conditions of employment as other non-organized county employees, i.e. health insurance, vacation leave, grievance procedure, retirement, hours of work, over- and comp-time, and holidays. (Tr.p. 256).

Timekeeper
Esther McReynolds

38. Esther McReynolds is the Timekeeper in the Sheriff's Department. (Tr.p. 188). McReynolds duties include recording all hours worked per sworn and civilian employee; overtime earned; vacation, sick and comp time accrued and used; personal days used; and typing certain related correspondence. These are basically bookkeeping and clerical functions. (Tr.p. 120, 128, 188-89, 494-96; Ex. 12, H).
39. Ester McReynolds does not have unrestricted access to information concerning the administrative operations of the Sheriff's Department, (Tr.p. 190), or to personnel records. Those duties under the heading "file all papers pertaining to" on her position description were transferred to Sergeant Trumbo's Clerical Secretary because McReynolds no longer has access to personnel files. (Tr.p. 190).

Head Cook
Wanda Maxwell

40. At the time of the hearing Wanda Maxwell had been in the position of Head Cook for the Detention Center approximately six (6) months, having served two (2) years as one of the civilian cooks at the Detention Center. (Tr.p. 286). The Head Cook's duties include ordering food, taking care of repairs, and supervising the three civilian cooks and 32 inmate cooks. (Tr.p. 290-91; Ex.F). She also assists with cooking or assumes the duties of a civilian cook when one of them is absent. (Tr.p. 286-87, 361). The Head Cook receives a higher salary than the civilian cooks because of the added responsibilities. (Tr.p. 297). Wanda Maxwell reports to Michael McDonald, Food Service Director. McDonald had previously been employed as Head Cook. The Head Cook assumes the duties of the Food Service Director in his absence. (Tr.p. 292).

41. Maxwell testified she does not hire, fire, promote, suspend, layoff or discipline civilian cooks, (Tr.p. 288). Her involvement in the disciplinary process is to investigate any alleged inappropriate conduct and file an incident report with Pierce. That report could include a recommendation on discipline. (Tr.p. 380). Pierce would then independently interview the employee involved, and send the report and his recommendation up the chain of command. Pierce is the person responsible for advising the employee of any disciplinary action. (Tr.p. 321-332). The recommendation of the Head Cook for discipline is not always followed. (Tr.p. 321-32).

*Executive Secretary
Debra Mecom*

42. Mecom is the Executive Secretary to the Sheriff. (Tr.p. 111, 416; Ex. J). Mecom does typing and filing, takes notes and minutes, answers the telephone, and serves as a receptionist; basically all of the responsibilities of the front office. (Tr.p. 111-12). Most of the correspondence coming to or being sent by the Sheriff or Under Sheriff would go through Mecom who does most of their typing and filing. (Tr.p. 117-18).
43. Mecom does not have supervisory authority over any employees, (Tr.p. 111); does not have unrestricted access to confidential personnel files, (Tr.p. 111); and does not have unrestricted access to other information concerning the administrative operations of the Sheriff's Department. (Tr.p. 111). Mecom states on her position description questionnaire that she makes suggestions on transfers and discipline, and attends staff meetings. (Tr.p. 420; Ex. J). She ordinarily types notes from the staff meetings at which subjects concerning operations of the office, disciplinary matters, budgetary matters and matters involving labor negotiations are discussed. (Tr.p. 115-16). Ms. Mecom can initial the Sheriff's signature. (Ex. J).
44. Sheriff Sully has no objection to inclusion of his Secretary's position in the employee unit. (Tr.p. 112).

*Lead Classification Technician
Floyd Garner*

45. Floyd Garner is a civilian employee in the position of Classification Technician. (Tr.p. 90-91, 99-100). He was the first person to be trained for and to hold the position, accounting for his designation as Lead Classification Technician. (Tr.p. 145, 147-48). There are four other Classification Technicians; Richard Zamora, Rebecca Rivers, Mick Gochenour, and Sharese Bell who is on temporary assignment. (Tr.p. 99-100). Garner has been on special assignment since May, 8 1992 to work on research and development projects. (Tr.p. 228, 259). Classification Technicians interview inmates as they are admitted to determine which security classification, minimum, medium or maximum, should be assigned. (Tr.p. 90-92). Rebecca Rivers and Michael Gochenour both indicated on their description questionnaires that they report to the Lead Classification Technician. (Tr.p. 374; Ex. O, P).
46. Prior to his special assignment Garner was called Lead Classification Technician. In addition to the duties set forth in # 45 above, he was responsible for reviewing and overseeing the operations of the classification unit. (Tr.p. 90-92, 131-32, 146, 147, 339). According to Robert Pierce, this required only that Garner serve as a "proof reader", insuring the forms completed by the other Classification Technicians were prepared correctly. (Tr.p. 377). Sheriff Tully testified Garner was only a lead technician in the sense that he was there to assure everything was done right and on time, a "spell checker," and not to serve as a supervisor. (Tr.p. 123, 124-25, 127, 145). Garner once held the title of supervisor but that title was removed by the Sheriff, and any supervisory responsibilities Garner had were transferred to his supervisor, Robert Pierce. (Tr.p. 229-40, 360; Ex. 6). When Garner returns from the special assignment his duties will be the same as the other Classification Technicians. (Tr.p. 260). According to Pierce, Garner is not a supervisor. (Tr.p. 235).
47. Garner has no authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline the other Classification Technicians, or to adjust their grievances. (Tr.p. 146, 376). He has no

authority to recommend discipline for other Classification Technicians. (Tr.p. 124, 144-45).

48. A New classification plan being prepared for the Sheriff's Department includes a new Classification Supervisor position. (Tr.p. 381).

*Purchasing Agent
Dee Hartang*

49. Dee Hartang is the purchasing agent for the Sheriff's Department who does the clerical work involved with paying bills. (Tr.p. 89). She is part of the auditing process for handling of monies through the Sheriff's Department. (Tr.p. 100). Her position is essentially a clerical and bookkeeping position responsible for matching bills to invoices. (Tr.p. 99, 503). Hartang describes her duties as including ordering items, auditing and reviewing all incoming bills, issuing purchase orders and answering questions from suppliers. (Tr.p. 100).
50. Hartang does not supervise any employees, does not have unrestricted access to personnel files and does not have unrestricted access to information concerning the administrative operations of the Sheriff's Department. (Tr. 89-90). She does not take an active part in development of the budget. (Tr.p. 96).

*Commissary Clerk / Manager
Keith Ketchell*

51. Keith Ketchell is the Commissary Clerk/Manager. He is responsible for running the commissary for inmates at the County Detention Center. (Tr.p. 88). The commissary is a small store where inmates can purchase health care and non-perishable food items. (Tr.p. 347). There is some dispute as to whether Keith Ketchell's position is that of Commissary Clerk or Commissary Manager. During the time Trumbo was Director of Programs and Support Services Ketchell was referred to as Commissary Clerk and did not hold the position of Commissary Manager. (Tr.p. 531). Ketchell's position on the organizational chart for the Sheriff's Department is titled Commissary Manager. (Ex. A). Ketchell controls inmate accounts, orders products

and does the selling. (Tr.p. 347-48, 357). Most of Ketchell's functions are clerical in nature. (Tr.p. 258). The position of Commissary Clerk used to be held by a sworn deputy. (Tr.p. 93).

52. Ketchell does not supervise any county employees but does supervise prisoners who work in the commissary. (Tr.p. 98-99, 113, 357, 438, 532). The prisoners are not considered employees of the County. (Tr.p. 89). Ketchell does not have authority to hire, transfer, suspend, lay-off, promote, discharge, assign, reward or discipline employees. (Tr.p. 98-99).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE 1

WHETHER, PURSUANT TO K.S.A. 75-4321(c), THE GOVERNING BODY OF A PUBLIC EMPLOYER CAN VOTE TO COME UNDER THE JURISDICTION OF THE PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT FOR ONLY ONE EMPLOYEE UNIT BUT NOT FOR ITS REMAINING PUBLIC EMPLOYEES.

This issue was thoroughly addressed in Carpenters District Council of Kansas City and Vicinity v. Wyandotte County, Kansas, Case No. 75-UDC-3-1992 (August 6, 1993). Since the facts relied upon by the parties in this case are the same facts as presented in the Carpenters case, the Findings of Fact, Conclusions of Law and Discussion set forth in the Carpenters case, as they relate to this issue, are adopted here. Accordingly, the County is determined to have opted to be covered by the Kansas Public Employer-Employee Relations Act ("PEERA") pursuant to K.S.A. 75-4321(c), and the Kansas Public Employee Relations Board ("PERB") has jurisdiction to entertain the Teamsters' petition.

ISSUE 2

WHETHER THE UNIT COMPOSITION PROPOSED BY THE TEAMSTERS LOCAL UNION #955 CONSTITUTES AN APPROPRIATE UNIT IN ACCORDANCE WITH K.S.A. 75-4327(e) AND K.A.R. 84-2-6.

The parties have stipulated to the positions to be included in the civilian unit. The main issue appears to revolve around whether individuals within those stipulated positions can be excluded from the unit because of their supervisory or confidential status which is discussed under Issue 3 below.

Professional Employee Status

[1] The County argues that the Nursing Supervisor and Nurse are "professional employees" and as such must be excluded from a unit composed mainly by "nonprofessional employees." The Teamsters maintain that the nurses are not "professional employees" and therefore appropriately included in the proposed unit. Neither party is correct in its position.

K.S.A. 75-4327(f) provides, in pertinent part, that:

"A recognized employee organization shall not include:
(1) Both professional and other [non-professional] employees, unless a majority of the professional employees vote for inclusion in the organization."

A reading of K.S.A. 75-4327(f) reveals no prohibition to inclusion of "professional employees" and "nonprofessional employees" in the same unit, as the County contends, but only a condition precedent to that inclusion, i.e. an election by the "professional employees" to be included in the unit. This is the same conclusion reached by

the Board in Kansas Association of Public Employees v. Department of Social and Rehabilitation Services, Rainbow Mental Health Facility, Case No. 75-UCA-6-1990 (Feb. 4, 1991):

"[E]ven if it is determined that the Rainbow Mental Health Facility Non-professional Unit is the appropriate unit for inclusion of these [professional] classifications, pursuant to K.S.A. 75-4327(f) they may be so included only if a majority of the professional employees in each classification vote for inclusion in the unit."

It is also consistent with NLRB decisions.²

If it is determined that the Nursing Supervisor and the Nurse are "professional employees" pursuant to K.S.A. 75-4321(d), and if it is determined that it would be appropriate to include those positions in the unit composed of nonprofessional employees, then an election will be required to determine if those professional employees desire to be included in the proposed nonprofessional unit.

K.S.A. 75-4321(d) defines "Professional Employee" to include:

"any employee: (1) Whose work is predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; involves the consistent exercise of discretion and judgment; requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning; or (2) who has completed courses of prolonged study as described in paragraph (1) of this subsection, and is performing related work under the supervision of a

² As explained in Ojai Valley Hosp., 106 1278 (1981); "[E]ven assuming that these three groups of employees possess sufficient community of interest to constitute single, appropriate unit, inclusion of registered nurses would be prohibited unless they are given the opportunity to vote as to whether they wish to be included in unit with nonprofessional employees."

professional person in order to qualify as a professional employee as defined in paragraph (1) of this subsection; or (3) attorneys-at-law or any other person who is registered as a qualified professional by a board of registration or other public body established for such purposes under the laws of this state." (Emphasis added).

The K.S.A. 75-4321(d) definition is similar to that found in Section 2(12) of the National Labor Relations Act ("NLRA") except for the PEERA "board registration" provision.

As is readily apparent, an employee may qualify as a "professional" by satisfying any one of the three enumerated K.S.A. 75-4321(d) alternatives. The first alternative is composed of three elements which must all be satisfied before an employee can qualify as a professional under this criteria. Under this alternative the statute requires, first, that the work must be "predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work," and second, that the position must require "the consistent exercise of discretion and judgement in its performance." The record adequately supports that the RN's work is intellectual in nature and requires the use of discretion and judgement. The majority of these tasks fall within the following categories; assessing the medical conditions and needs of inmate patients, developing a patient care program to meet those needs and implementing that program once developed, and monitoring the condition and continuing needs of inmate patients. The record shows that the RN exercises

considerable discretion in choosing the exact methods by which to accomplish the tasks within each category, relying not only on the direction of doctors and the guidance of detention center policies, but on their own experience and training as well.

The third element of alternative (1) provides that the position must require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning." According to K.S.A. 65-1113(d) the practice of nursing means:

"the process in which substantial specialized knowledge derived from the biological, physical, and behavioral sciences is applied to: the care, diagnosis, treatment, counsel and health teaching of persons who are experiencing changes in the normal health processes . . ." (Emphasis added).

The State of Kansas requires RN's to successfully complete the basic professional curriculum in an accredited school of professional nursing. That curriculum must include education in the areas of biological, physical and social sciences; instructions in the concepts of wellness and illness in all stages of the life cycle; and regularly scheduled theoretical and clinical instruction, K.A.R. 60-2-101(e)(1). An RN must then pass a State Board of Nursing examination and is additionally required to complete 30 hours of continuing education every 2 years as a condition of license renewal, K.A.R. 60-9-106. Such regulatory

mandates clearly constitute a prolonged course of specialized instruction in a field of science contemplated by K.S.A. 75-4321(d). An RN must, therefore, be considered a "professional employee." This is the same conclusion reached by the National Labor Relations Board ("NLRB") in determining RN's were professional employees under the National Labor Relations Act ("NLRA"). Ojai Valley Hosp., 106 LRRM 1278 (1981).

Additional support for this conclusion is found in K.S.A. 65-1131 et seq. wherein RNs are consistently referred to as "registered professional nurse" (emphasis added) as compared to references to LPNs where the "professional" designation is conspicuously missing. The differentiation seemingly related to the additional education and training requirements for obtaining the RN license.

This lower level of academic achievement has been found sufficient to deny the LPN the "professional employee" designation under the NLRA. For purposes of the NLRA the LPN is not a professional but a technical employee. St. Luke's Memorial Hospital, 118 LRRM 1545, 1546 (1985); Highview, Inc., 92 LRRM 1088 (19). Technical employees, according to the NLRB, are individuals "who do not meet the Act's definition of professional employees . . . but whose work involves independent judgement and training." NLRB v. Sweetwater Hosp. Ass'n, 604 F.2d 454 (6 C.A. 1979).

Unlike the NLRA, PEERA adds to the definition of professional employee a third alternative; ". . . (3) attorneys-at-law or any other person who is registered as a qualified professional by a board of registration or other public body established for such purposes under the laws of this state." K.S.A. 65-114 makes it illegal for any person to "practice professional nursing in this state" or to "practice practical nursing in this state" unless the person is duly licensed. K.S.A. 65-1115 (a) requires an applicant for a nursing license to have successfully completed the basic curriculum in an accredited school of nursing, and provides for the state Board of Nursing to administer examinations and issue licenses to RN's and LPN's.

This licensing [registering] function of the Board of Nursing qualifies it as a "board of registration" under K.S.A. 75-4321(d), thereby placing the RN and LPN licensees into the category of "professional" under PEERA, even though the LPN would not meet the "knowledge of an advanced type" criteria that precludes the LPN from inclusion under the NLRA. Accordingly, both the RN and the LPN are professional employees pursuant to K.S.A. 75-4321(d), and may vote to be included in the nonprofessional, civilian unit in the Sheriff's Department, if it is determined that inclusion of those positions in the unit is appropriate and that neither of the employees should be excluded as supervisory employees pursuant to K.S.A. 75-4321(d).

Appropriate Unit

The only question remaining to be determined relating to the appropriateness of the unit concerns the inclusion of the nurse positions, the Purchasing Agent, and the Auditor in the proposed civilian unit. The County asserts it inappropriate to include the nurse positions in the unit containing primarily ministerial clerical positions since they are engaged in the provision of medical services requiring the use of independent judgment. As to the Purchasing Agent and Auditor positions the County argues only that these are not homogeneous with the proposed unit without citing any evidence to support that position.

A bargaining unit is a group of employees who may properly be grouped together for the purposes of participating in a PERB election and for meeting and conferring relative to terms and conditions of employment. The PERB's role in determining the appropriateness of a unit arises only when there is an unresolved disagreement over the proposed unit or when such a unit is contrary to the policies of PERRA. It is the board's duty to determine whether the unit set out in a petition for unit determination is "appropriate." It has been a long-standing rule that there is nothing which requires the bargaining unit approved by the Board be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be an appropriate unit. Friendly Ice

Cream Corp., 110 LRRM 1401 (1982), enforced, 705 F.2d 570 (1st Cir. 1983).

The source of the PERB's authority to determine the scope of the proper unit is founded in K.S.A. 75-4327(c).³ Because of the number of factual considerations that must be taken into account in deciding upon an appropriate bargaining unit, the PERB has not found it possible to enunciate a clear test. The legislature has provided some guidance in K.S.A. 75-4327(e):

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

This list of factors is further supplemented by K.A.R. 84-2-6(a)(2):

"In considering whether a unit is appropriate, the provisions of K.S.A. 75-4327(e) and whether the proposed unit of the public employees is a distinct and homogeneous group, without significant problems which can be adjusted without regard to other public employees of the public employer shall be considered by the board or

³ K.S.A. 75-4327(e) provides; "When a question concerning the designation of an appropriate unit is raised by a public agency, employee organization, or by five or more employees, the public employee relations board, at the request of any of the parties, shall investigate such question and, after a hearing, rule on the definition of the appropriate unit in accordance with subsection (e) of this section."

presiding officer, and the relationship of the proposed unit to the total organizational pattern of the public employer may be considered by the board or presiding officer. Neither the extent to which public employees have been organized by an employee organization nor the desires of a particular group of public employees to be represented separately or by a particular employee organization shall be controlling on the question of whether a proposed unit is appropriate."

Unit determinations are made based on all relevant factors on a case-by-case basis:

"In determining whether group of employees constitutes appropriate bargaining unit, the NLRB is not bound to follow any rigid rule. Since each unit determination is dependent on factual variations, the Board is free to decide each case on an ad-hac basis." Id. at 576. Friendly Ice Cream Corp., 110 LRRM 1401 (1982), enforced, 705 F.2d 570 (1st Cir. 1983).

While the applicable statute and regulations enumerate specific factors to be considered in making the unit determination, the list is not exclusive, and the weight to be assigned each factor is within the sole discretion of PERB. Kansas Association of Public Employees v. Depart. of S.R.S, Rainbow Mental Health Facility, Case No. 75-UCA-6-1990 (February 4, 1991).

[2] The basis of any bargaining unit determination has been stated as follows: *"The Board's primary concern is to group together only those employees who have substantial mutual interests in wages, hours and other conditions of employment."* See Speedway Petroleum, 116 LRRM 1101 (1984). Commonly referred to as the "community of interests" doctrine, it stands for the proposition

that in making a unit determination, the PERB will weigh the similarities and differences with respect to wages, hours and other conditions of employment among the members of the proposed unit, rather than relying solely on traditional job classifications.⁴ See Speedway Petroleum, 116 LRRM 1101 (1984),

While it is not necessary that all of the following elements be present, they are the "touchstones" frequently considered in determining whether inclusion of a classification in a unit is appropriate: functional integration; common supervision; skills and job functions; interchangeability and contact among employees; work situations (where members of the proposed unit work in the same physical area, the PERB is more likely to find a community of interests; working conditions (this criteria refers to the degree of similarity in working conditions of the members of the proposed unit. For example, employees who were paid at an hourly rate, had the same starting time, punched the same timeclocks, were subject to the same rules of conduct and disciplinary procedures were considered to have substantially the same conditions of employment); wages (a great disparity in wages between different job classifications may lead to a finding of separate interests); payment of wages (the frequency and manner of payment); fringe

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

benefits (if all the members of the proposed unit receive the same fringe benefits, such as vacations, holiday pay, life insurance, hospitalization and medical insurance, and profit sharing benefits, there is a greater likelihood of a finding of common interests); geographical proximity (closely related to the concepts of work sites and interchangeability or contact among employees is the actual distance between the work facilities); history of bargaining; and employee preferences.

The County proffered no evidence to show a Sheriff's Department or county practice of administration dealing with the nurses, Purchasing Agent or Auditor separately from its dealings with the other employee positions to be included in the proposed unit. To the contrary, these positions are subject to the same personnel policies and procedures (e.g. procedures for discipline, grievance processing, hiring), health and life insurance, sick and vacation leave, days and hours of work, holidays, deferred compensation and retirement benefits. The employees all work in the same geographical area, i.e. the Detention Center building. Their administration and management is centralized. There is also regular contact between the employees in these positions and the employees in positions included in the proposed unit. Keokuck Area Hospital, 121 LRRM 1168, 1169 (1986).

It has not been established that sharper than usual differences exist between the nurses, Purchasing Agent and Auditor

and the other employees in the proposed unit. Moreover, the foregoing evidence indicates that these employees share common policies and procedures, geographical location, centralized management, benefits, hours of work and payment of wages to warrant a finding that the smallest appropriate unit for bargaining is the civilian unit proposed by the Teamsters. See Keokuck, supra. The inclusion of these positions also serves to limit proliferation and fragmentation of bargaining units. Accordingly, it is determined that inclusion of the nurses, Purchasing Agent and Auditor in the civilian unit is appropriate.

ISSUE 3

WHICH EMPLOYEES IN THE UNIT PROPOSED BY THE TEAMSTERS LOCAL UNION #955 MAY BE EXCLUDED PURSUANT TO K.S.A. 75-4322(b), SUPERVISORY EMPLOYEE, OR 75-4322(c), CONFIDENTIAL EMPLOYEE.

Supervisory Employee Exclusion

K.S.A. 75-4321(a) defines "public employee" to mean:

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

It may be assumed that a person not in one of the five specifically excluded categories is a public employee within the meaning of PEERA if he works for a public employer. Because the right to

engage in meet and confer negotiations depends on the existence of public employee status, persons who do not have that status are excluded from bargaining units containing those who are defined as public employees. Of concern here are those public employees in the category of supervisor. This exclusion is necessary to avoid a conflict of interest the supervisor may have between his role of union member and that of management representative. Rhyne & Drummer, The Law of Municipal Labor Relations, p. 41.

[3] The County alleges the positions of Nursing Supervisor, Head Cook, Commissary Clerk/Manager and Lead Classification Technician are supervisory in nature, and should be excluded from the civilian unit of the Sheriff's Department. A party seeking to exclude an individual from a unit has the burden of establishing that ineligibility. Ohio Masonic Home, 131 LRRM 1503 (1989).

Under the terms of K.S.A. 75-4321(b) a "supervisor" is any person:

*"who normally performs different work from his or her subordinates, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."*⁵

⁵ Supervisors are not employees under the NLRA, and no employer may be required to bargain with his supervisors. Beverly Enterprises v. NLRB, 108 LRRM 2749, 2749 (6 C.A. 1981). [Also need to add footnote on Section 2(11) and use of NLRB precedent.]

The exercise of any one of these is sufficient to confer supervisory status. Phelps Community Medical Center, 131 LRRM 1522 (1989). Regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgement in the employer's interest before such exercise of authority becomes that of a supervisor. NLRB v. City Yellow Cab Co., 344 F.2d 575, 580-83 (6 C.A. 1964). Such authority, however, must be exercised "with independent judgment on behalf of management and not in a routine or sporadic manner." Somerset Welding & Steel, 130 LRRM 1135 (1988).

Moreover, supervisory status does not necessarily depend upon the frequency of the exercise of supervisory authority, but rather the existence of the power to direct other employees. NLRB v. Medina County Publications, Inc., 735 F.2d 199 (6 C.A. 1984). Finally, it has been held that the authority to exercise or actual exercise of any of the above functions may cause one to be classified a supervisor even though the balance of that individual's time is spent in activities performed by others in the unit. NLRB v. St. Mary's Home, Inc., 690 F.2d 1062 (4 C.A. 1982); NLRB v. Brown & Sharpe Mfg. Co., 169 F.2d 331 (1 C.A. 1948). Thus, it is the person's power to act as an agent of the employer in relations with other employees, and his exercise of independent judgement of some nature, that establish his status as a "supervisor."

The question of supervisory status is "a mixed one of fact and law." See NLRB v. Yeshiva University, 444 U.S. 672, 691 (1980). However, as should be evident from the array of criteria within K.S.A. 75-4321(b), the inquiry is predominately factual. Further,

"[e]very experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question of who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944)."

The following criteria are looked to in determining whether an employee is a supervisor. "Responsibility to direct" includes the exercise of judgement, skill, ability, capacity and integrity, and it may be implied by the amount of supervisory power possessed by an individual. A worker may direct other employees and still not lose his employee status if his responsibility and authority to direct is not within his independent discretion, but rather is of a routine nature governed by guidelines or standards established by the employer. Lovilia coal Co., 120 LRRM 1005 (1985).

The "power to recommend effectively" requires an individual's recommendations or suggestions to management be considered and generally followed. Where the power to recommend effectively exists, the employee may be deemed a supervisor even though he may

lack the power to implement the recommendations without approval. As a corollary, an employee will not be found to be a supervisor where he lacks the power to act or to recommend effectively decisions respecting the hiring, transferring, supervision, recall promotion, discharge, rewarding, or disciplining of other employees. Iowa Electric Light & Power, 717 F.2d 433 (8 C.A. 1993).

The exercise of or authority to "*exercise independent judgement*" is an important factor to be considered in determining whether an employee is acting in a supervisory capacity. In order for an individual to be classified as a supervisory, the exercise of judgment must be genuine and not merely routine or clerical. A mere "*straw boss*" with no independent discretion will not be deemed a supervisor. Volt Information Services, Inc., 118 LRRM 1474 (1985).

The third criteria is "*authority as perceived by other employees.*" Here the focus is on whether the employee in question is reasonably perceived by the other employees as continuing to perform supervisory functions. See Sears Roebuck de Puerto Rico, Inc., 125 LRRM 1173 (1987).

Other criteria which may be considered includes whether the employee (1) is considered by himself and his fellow workers to be a supervisor; (2) attends management meetings; (3) receives a

higher wage or salary than other workers or has substantially different benefits.

Lead Classification Technician

Floyd Garner is a civilian employee in the position of Classification Technician. He was the first person to be trained for and to hold the position, and that was the apparent reason why he held the lead position. The evidence reveals Garner's responsibility as Lead Technician were mainly to insure the paperwork prepared by the other technicians was completed correctly and on time. He was variously referred to as a "proof reader" and "spell checker." The remainder of his work hours were devoted to the same duties performed by the other Classification Technicians.

Garner had no authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline the other Classification Technicians, or to adjust their grievances. There is conflicting testimony as to whether he can recommend discipline, transfers, lay-off, or recall, but even assuming, arguendo, that he possessed such authority, the record is void of any evidence that such recommendations were effective in that they were relied upon or accepted by management.

Additionally, the uncontradicted testimony was that any supervisory authority Garner may have possessed was transferred to Sergeant Pierce, Director of Programs and Support Services. Upon

returning from his special assignment, his duties will only be those performed by the Classification Technicians.

It would appear, at most, Garner was serving in a "leadman" rather than supervisory capacity. Leadman are not supervisors where they perform the same work as other employees in the unit, do not formulate or effectuate management policy, resolve personnel problems, fire or discipline employees or schedule their hours, Jerry's United Super, 131 LRRM 1064 (1988); any directing of employees is routine and does not require independent judgment, and the responsibility was given based upon a higher level of skill and greater seniority, Sears, Roebuck & Co, 130 LRRM 1212 (1989); Somerset Welding, 130 LRRM 1135 (1988); and the leadman functions as a quality control employee in inspecting the work of others in the same department. Somerset Welding, Id.

The above clearly describes Garner's position. Garner must be considered as serving as the leadman for the Classification Technicians not as their supervisor. As such, he should not be excluded from the unit.

Head Cook

The leadman designation also appears applicable to the duties performed by the Head Cook, Wanda Maxwell. Maxwell does not hire, fire, promote, suspend, layoff or discipline the civilian cooks,

nor is there any evidence that she can effectively recommend such actions. Maxwell is involved in the disciplinary process in that she investigates and files an incident report. However Sergeant Pierce, upon receiving the report, does an independent interview and sends his recommendation on discipline up through the chain of command. The testimony reveals that Sergeant Pierce does not consistently rely upon Maxwell's reports or accepts her recommendation.

Maxwell assists with the cooking. The remainder of her duties, i.e. ordering food and taking care of repairs, appear to be routine in nature, requiring little independent judgment. Also, there was a passing reference to Michael McDonald, Food Service Director, to whom Maxwell reports, but there was no indication whether she takes such actions independently or must seek prior approval from McDonnald.

[4] Finally, Maxwell assumes the duties of the Food Service Director in his absence. No evidence was introduced detailing how frequently such absence occurred or whether they were regular or isolated occurrences. The test for determining whether a unit should include employees who substitute for supervisors is whether such part-time supervisors spend regular and substantial portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant. N&T Associates, Inc., 116 LRRM 1155 (1984). The primary consideration is whether

the substitution is on a regular or substantial basis or whether it involves only infrequent and isolated occurrences. See Lovilia Coal Co., 120 LRRM 1005 (1988).

[5] As stated previous, a party seeking to exclude an individual from a unit has the burden of establishing the ineligibility. Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, it will be found that supervisory status has not been established, at least on the basis of those indicia. Phelps Community Medical Center, 131 LRRM 113 (1990). Here the County has failed to provide evidence as to the frequency of such substitution upon which a determination can be based. Consequently, as to this indicia supervisory status has not been established.

From the evidence in the record, Maxwell must be considered the leadman of the cooks and not a supervisor. Any true supervisory duties most probably are performed by the Food Service Director. Accordingly, she should not be excluded from the unit.

Commissary Clerk / Manager

There is some dispute as to whether Keith Ketchll's position is that of Commissary Clerk or Commissary Manager. The supervisory status of an employee is determined by an employee's actual duties; his title or job classification is of probative value but is not

conclusive. See e.g. Passaic Daily New, 120 LRRM 1147 (1985). There is no dispute that Ketchell does not supervise any county employee. He does supervise one inmate trustee who works in the commissary, but that individual is not considered an employee of the county. Since he has no subordinates to supervise, Ketchell does not have authority to hire, transfer, suspend, lay off, promote, discharge, assign, reward or discipline employees.

The record shows Ketchell's duties are mostly of a clerical nature. There is no evidence that he is consulted about or carry's out managerial policies that would in any manner impact upon the interests of employees in the civilian unit. There is nothing in Ketchell's duties and responsibilities that would place him "so allied with management as to establish a differentiation between him and the other employees in the proposed unit." See Detroit College of Business, 132 LRRM 1081, 1084 (1989). Accordingly, Ketchell should not be excluded from the unit.

Nursing Supervisor

The record reveals Janet Durham, as the Nursing Supervisor, has no authority to hire, transfer, suspend, lay off, recall, promote, discharge or discipline employees, or to adjust their differences. Durham normally performs the same nursing duties as Rosemary Holloway and the temporary agency nurses. In addition,

she performs certain administrative duties which include ordering supplies, scheduling the temporary agency nurses, preparing staff reports, preparing estimated supply and equipment costs for inclusion in the Sheriff's Department budget, and doing the evaluations of Holloway and medical records clerk Michelle Scott.

The first four administrative duties are routine or clerical, and there is no evidence of the exercise of independent judgment in their performance necessary to the determination that an employee is acting in a supervisory capacity.

The evaluation of Holloway and Scott occur once each year. As determined above, an RN is considered a professional employee pursuant to K.S.A. 75-4321(d). When the supervisory duties of a professional are sporadic or do not significantly set him or her apart from colleagues, the NLRB and the courts have been reluctant to exclude such professionals from the protections afforded them under the NLRA. Preparation of an annual evaluation certainly falls within the category of "*sporadic*," and there is no evidence that such a responsibility sufficiently sets her apart from Holloway and Scott to require excluding Durham from the unit.

The record reveals that Durham does provide direction to the temporary agency nurses and "*to an extent*" supervises Holloway. She testified she did not consider herself to be the supervisor of the Medical Records Clerk, instead she "*just watches over her.*"

The supervisory authority over the temporary agency nurses presents a problem in that these nurses are not considered employees of the County and are not members of the proposed unit. In Adelphi University, 79 LRRM 1545 (1972), wherein the supervising professional's duties were of the same character as those of other unit employees, the NLRB reasoned that it would be inequitable to exclude him solely because he happened to exercise sporadic supervisory authority over non-unit employees. The NLRB reasoned:

"The issue of supervisory status usually arises where authority is regularly exercised on the employer's behalf, over employees sought by the union. . . To include in such a unit persons who exercise statutory supervisory authority would clearly create a conflict of interest which Congress intended to avoid. This does not mean, however, that a similar conflict of interest is necessarily created whenever persons occasionally exercise some authority over other employees of the employer. . . ."

"The underlying rationale of this body of precedent is that an employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over nonunit personnel. No danger of conflict of interest within the unit is present nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more generalized conflict of interest of the type envisioned by Congress in adopting Section 2(11) of the Act."

Additionally, the character of the supervision exercised by Durham over the temporary agency nurses and Holloway is different from that existing in the usual workplace. As Durham testified, the direction provided relates to questions concerning patient condition and appropriate course of treatment. Supervisory status

will not be conferred on professional employees who exercise authority which is intrinsic to their professional responsibilities and which does not fall within the ambit of authority as expressed in K.S.A. 75-4321(d). In the course of patient-care duties RNs may direct subordinates in the performance of patient related duties, but such routine supervision or assignment of duties is of a routine professional nature and emanates from the RNs high level of training and experience in caring for patients. As explained in Extendico Professional Care, 117 LRRM 1930 (1984):

"[D]iscretion . . . exercised in accordance with a professional judgment as to the best interests of the patient rather than a managerial judgment as to the employer's best interests, . . . is not supervisory under the statute."

Additionally, the evidence leads to the conclusion that the RN is employed and compensated primarily for her occupational skill and knowledge rather than supervisory skills. See Belmont Admin. & Clerical Ass'n, 3 State Laws, CCH Lab.L.Rep., ¶49,999, at p. 40. (The Massachusetts PERB found such professional employees not supervisors). As the NLRB pointed out in New York University, 91 LRRM 1165 (1975), professional employees:

"[f]requently require the ancillary services of non-professional employees in order to carry out their professional, . . . responsibilities. But that does not change the nature of their work from professional to supervisory, nor their relation to management. They are not hired as supervisors but as professionals. The work of employees that may be 'supervisory' by professionals in this category is merely adjunct to that of the professional and is not the primary work product."

The NLRB emphasized that just because an employer provides his professional employees with support personnel, it was not Congress' intention to exclude them from the Act "by rote application of the statute without any reference to its purpose or the individual's place on the labor-management spectrum." Id.

Finally, supervisory status will not be found where the work of the department is routine, and where the employees require little, if any, direction in completing their tasks. Williamson Piggly Wiggly, 124 LRRM 1053 (1986). As the record reveals, the temporary agency nurses work those shifts neither the RN or LPN are on duty. Any direction given by Durham relates to patient-care and only on an "as needed" basis from her home or when called in to the Detention Center on an emergency basis. No evidence was introduced concerning the type or extent of direction the Medical Records Clerk by Durham. The testimony showed the working relationship between Durham and Holloway to more resemble co-workers or leadman than supervisory-subordinate.⁶

Based upon the above, Janet Durham should not be excluded from the proposed unit as a supervisor.

⁶ The testimony shows that Durham previously held the title of "Head Nurse" but the title was changed, not to reflect her duties, but because Durham was the target of lewd and derogatory remarks based upon the "Head" nurse designation.

Confidential Employee Exclusion

As previously explained, K.S.A. 75-4321(a) defines "public employee" to include any person employed by a public agency except those persons classified as "confidential employees." K.S.A. 75-4321(c) then defines "confidential employee" to mean:

"any employee whose unrestricted access to confidential personnel files or other information concerning the administrative operation of a public agency, or whose functional responsibilities or knowledge in connection with the issues involved in meet and confer process would make his or her membership in the same employee organization as other employees incompatible with his official duties."

[6] Confidential employees are those who work closely with the people who set the labor relations policies of the government employer. They are excluded because of the potential conflict of interest between their role as employee and as a union member. Rhyne & Drummer, The Law of Municipal Labor Relations, p. 45. The basis for excluding confidential employees is that "[i]t would be patently unfair to require the company to bargain with a union that contain[ed] such an employee." NLRB v. Quaker City Life Insurance Co., 319 F.2d 690 (4 C.A. 1963).

The NLRA does not contain a definition of "confidential employee" but the NLRB and the courts have consistently excluded confidential employees from collective bargaining units. The NLRB does not exclude all confidential employees from unit inclusion; it only excludes those employees who act in a confidential capacity to

persons who formulate management policies in the field of labor relations or who regularly have access to confidential information concerning anticipated changes resulting from collective bargaining negotiations. Pullman Standard Div. of Pullman, Inc., 87 LRRM 1390 (1974); Swift & Co., 44 LRRM 1527 (1957). Those employees who merely have access to personnel or statistical information upon which an employer's labor relations policy is based or who have access to labor relations information which has become known to the union are not confidential employees. Crest Mark Packing Co., 125 LRRM 1139 (1987).

[7] The NLRB's long-established test for determining whether an employee possesses confidential status is whether that employee "assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. B.F. Goodrich Co., 37 LRRM 1383 (1956). This is termed the "labor nexus" test and its validity as an appropriate measure of confidential status was endorsed by the Supreme Court in NLRB v. Hendicks County Rural Electric Membership Corp., 454 U.S. 170 (1981). Therein the Court held there is a reasonable basis in law for the NLRB's application of its "labor nexus criteria" which limits the term "confidential" to embrace "only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." Id. at 180-81. The Court thereby rejected the

Seventh Circuit's broader definition of confidential employee which would have excluded any employee with access to any confidential information from the definition of employee in Section 2(3) of the Act. The confidential status of an employee will depend on the nature of his or her tasks and whether or not those tasks gave him or her access to confidential information concerning labor relations. The NLRB exclusion of confidential employees is consistent with the PEERA statutory exclusion, and the test equally applicable.

The County maintains the positions of Time Keeper, Purchasing Agent, Auditor, Sheriff's Executive Secretary and the Warden's Secretary should be excluded from the proposed unit because they are confidential employees. In order to evaluate the County's claim that these employees should be excluded, it is necessary to examine the relationship between the employee and his or her management representative as well as that representative's responsibilities. This involves a two-pronged inquiry. First, whether the management representative is a person who exercises managerial functions in the field of labor relations. If the answer is in the affirmative, then the second inquiry is whether the employee assists or acts in a confidential capacity to that management representative. In this case it is incumbent on the County to provide the evidence on which it has based its assertion that each individual is a confidential employee.

Time Keeper, Purchasing Agent, and Auditor

The reason advanced by the County for exclusion of the Time Keeper, Purchasing Agent, and Auditor from the proposed unit is that they may be required "to acquire information needed for negotiations." The record shows that in the past the Sheriff and/or County Personnel Director Dumovich have requested the Auditor and Time Keeper provide information concerning salary, use of sick leave, hours of work, work schedules, uniform expense, purchases, dollars spent on previous budgets and comparisons of positions for salary purposes, and generate reports and comparative analysis for collective bargaining negotiations.⁷

Under the above-cited definition and test for confidential employees it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor relations policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it. Intermountain Rural Elec. Ass'n, 120 LRRM 1245, 1248 (1985).

⁷ It should be noted that Sergeant Lang performed these tasks while a member of the F.O.P. bargaining unit, and there is no evidence that a conflict of interest existed, or that any problems in negotiations developed due to his being in that position while a member of the F.O.P. unit. There is no indication that the County ever sought his exclusion from the unit on the basis that he was a confidential employee.

Here the most the evidence reveals is that the Purchasing Agent, Time Keeper and Auditor may be involved in compiling and analyzing information in their position which may be used in formulating the County's position during negotiations. There is nothing in the record to indicate that any of these three individuals was involved in formulating negotiating positions or labor relations policy, or was privy to such information before it was made known to the employee organization. There is also no evidence to support a finding that a close working relationship existed between the Sheriff and the Purchasing Agent, Time Keeper, or Auditor. The evidence in the record fails to establish that any of these three positions acted in a confidential capacity to anyone having the responsibility of formulating, determining or effectuating labor policy for the County.⁸ See Brodert, Inc., 107 LRRM 1512 (1981)(Employees who worked in the employer's payroll office were not confidential employees, since a payroll employee is not confidential merely because he or she has access to payroll records and runs financial data that the employer might eventually use to determine the nature of its economic package of offerings in labor negotiations); Crest Mark Packing Co., 125 LRRM 1139 (1987)(Bookkeeper involved in general bookkeeping duties with only

⁸ Sergeant Lang testified as to what he did when in the position of Auditor but there was not evidence that Ms. Krebs would or could continue to perform those same services. The different levels of educational achievement and experience between that possessed by Lang and that possessed by Krebs certainly brings into question Ms. Krebs' ability to continue to perform as did Sergeant Lang.

minor involvement in labor relations matters not confidential employee). Accordingly, the Purchasing Agent, Time Keeper and Auditor should not be excluded from the proposed unit as confidential employees.

Secretary to the Warden

There is little argument that the Warden of the Detention Center is in a managerial position that formulates, determines or effectuates labor relations policies. The question then becomes whether Grace Slaughter, the Secretary to the Warden, assists or acts in a confidential capacity to the Warden in the field of labor relations.

According to the evidence, the Warden's secretary is generally involved in taking care of inmate monies, writing checks for cash bonds, making out deposit slips, and the clerical requirements of the Warden and Lieutenant Alvarado. These duties are shared with sworn administrative deputy, Melissa Reed.⁹ Slaughter does not have unrestricted access to personnel files or other information concerning the administrative operation of the Sheriff's Department.

⁹ There is some question as to whether the potential for a conflict of interest based upon access to information by individuals doing clerical work for the Warden is of concern to the County. Deputy Reed is a member of the F.O.P. bargaining unit and there is no evidence of a conflict of interest due to her being in that position and a member of the unit, nor has the County sought to exclude her from the F.O.P. unit as a confidential employee.

Except for disciplinary correspondence¹⁰, there is no evidence that she typed memoranda or correspondence concerning labor relations matters; that she accompanied the Warden to meetings concerning labor relations or negotiations; that she typed minutes of such meetings; or that the Warden ever discussed or sought her opinions concerning labor relations policy or negotiation strategy. The evidence fails to establish that Slaughter assisted or acted in a confidential capacity in the field of labor relations. See Hendricks County, supra, (A personal secretary to a corporate chief executive was found not to be a confidential employee where she was precluded from access to confidential information concerning labor relations); Auto Workers Local 980, 124 LRRM 1102 (1981)(Secretary to the President is not a confidential employee where secretary does not play role in labor relations matters); Honeycomb Plastics Corp., 130 LRRM 1511 (1988)(Secretary to sales manager is not confidential employee since the fact that she had access to personnel files, standing alone, is not sufficient); Intermountain Rural Elec. Ass'n, 120 LRRM 1245 (1985). Accordingly, the Secretary to the Warden should not be excluded as a confidential employee from the proposed unit.

¹⁰ It is possible to have the administrative deputy type any disciplinary correspondence involving unit members thereby relieving any potential conflict that may exist by the Warden's secretary typing such correspondence.

Sheriff's Executive Secretary

Certainly, the Sheriff is a manager who formulates, determines or effectuates labor relations policies. Debra Mecom stated on her position description questionnaire that she makes suggestions on transfers and discipline, and attends staff meetings. She ordinarily types notes from the staff meetings at which subjects concerning operations of the office, disciplinary matters, budgetary matters and matters involving labor negotiations are discussed. Additionally, Mecom wrote that she can initial the Sheriff's signature.

While she does not have unrestricted access to confidential personnel files or information concerning the administrative operations of the Sheriff's Department, the record shows a sufficiently close working relationship to exclude the Sheriff's Executive Secretary from the unit. See Carolina Telephone & Telegraph, 108 LRRM 1185 (1981).

ORDER

IT IS HEREBY ADJUDGED that the Kansas Public Employer-Employee Act Local Option provision is an "all or nothing" provision, with the election by the public employer directed only to the question of whether the public employer should be covered by PEERA.

IT IS FURTHER ADJUDGED that the Commission's Resolutions 2615 and 2616, when considered in relation to the record as a whole, are sufficient to bring Wyandotte County under PEERA, and thereby grant jurisdiction to the Public Employee Relations Board to entertain the unit determination and certification petition filed by the Carpenters' District Council of Kansas City and Vicinity.

IT IS FURTHER ADJUDGED that the positions of Nursing Supervisor and Nurse are "professional employees" and are entitled to a separate vote to determine whether they desire to be included in the proposed nonprofessional civilian unit.

IT IS FURTHER ADJUDGED that the positions of Nursing Supervisor, Nurse, Purchasing Agent and Auditor are appropriately included in the proposed unit.

IT IS FURTHER ADJUDGED that the positions of Nursing Supervisor, Commissary Clerk/Manager, Head Nurse, and Lead Classification Technician are not supervisory employees and should not be excluded from the proposed unit pursuant to K.S.A. 75-4322(a).

IT IS FURTHER ADJUDGED that the positions of Time Keeper, Purchasing Agent, Auditor, and Secretary to the Warden are not confidential employees and should not be excluded from the proposed unit pursuant to K.S.A. 75-4322(a).

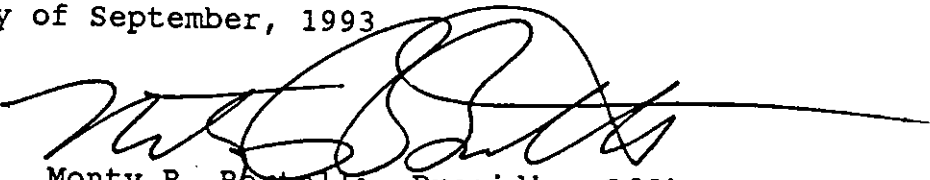
IT IS FURTHER ADJUDGED that the position of Sheriff's Executive Secretary is a confidential employee and should be excluded from the proposed unit pursuant to K.S.A. 4322(a).

IT IS THEREFORE ORDERED that the appropriate civilian unit for the Sheriff's Department shall be composed as follows:

INCLUDE: Auditor
Classification Technician
Clerk
Clerk Typist
Commissary Clerk/Manager
Cook
Head Cook
Identification Technician
Laundry Clerk
Mailroom Clerk
Medical Records Clerk
Nurse
Nursing Supervisor
Purchasing Agent
Receptionist
Records Clerk
Secretary/Receptionist to the Warden
Stores Clerk
Time Keeper
Warrants Clerk

EXCLUDE: Executive Secretary to the Sheriff
Programs Coordinator
All other civilian positions not specifically included.

Dated this 3rd day of September, 1993



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

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on September 21, 1993 addressed to: Public Employee Relations Board, Employment Standards and Labor Relations, 512 West 6th Avenue, Topeka, Kansas 66603.

CERTIFICATE OF SERVICE

I, Monty Bertelli, Senior Labor Conciliator for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 3rd day of September, 1993, a true and correct copy of the above and foregoing Initial 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: Steve A.J. Bukaty
BLAKE & UHLIG, P.A.
475 New Brotherhood Bldg.
753 State Avenue
Kansas City, Kansas 66101.

Respondent: Daniel B. Denk
McANANY, VAN CLEAVE & PHILLIPS, P.A.
707 Minnesota Ave., 4th Floor
P.O. Box 1300
Kansas City, Kansas 66117

Members of the PERB

