BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
STATE OF KANSAS

UNITED RUBBER WORKERS LOCAL UNION 851,	)	
Petitioner,	)	
vs.	)	Case No. 75-UDC-3-1994
WASHBURN UNIVERSITY OF TOPEKA,	)	
Respondent.	)	

INITIAL ORDER

ON the 10th day of May, 1994, the above-captioned matter came on for hearing pursuant to K.S.A. 75-4327(c) and K.S.A. 77-523 before presiding officer Monty R. Bertelli.

APPEARANCES

PETITIONER: Appeared by James A. Pope
United Rubber Workers International Representative
207 NW Second Street
Melcher, Iowa 50163

RESPONDENT: Appeared by Arthur E. Palmer, Attorney
Goodell, Stratton, Edmonds & Palmer
515 South Kansas Avenue
Topeka, Kansas 66603

ISSUES PRESENTED FOR REVIEW

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

1. WHETHER CUSTODIAN III'S BARNHILL, BOOSE, BULLOCK, CAMERON, FRY, HENDERSON, JACKSON, AND RANSOM SHOULD BE EXCLUDED FROM THE PROPOSED UNIT AS SUPERVISORS.

2. WHETHER THE POSITIONS OF SHOP MECHANIC II AND CUSTODIAL SUPERVISOR I SHOULD BE EXCLUDED FROM THE PROPOSED UNIT FOR LACK OF COMMUNITY OF INTEREST AND AS SUPERVISORY POSITIONS.

75-UDC-3-1994

SYLLABUS

1. **PUBLIC EMPLOYEE** - *Exclusions - Supervisors - Adoption of federal definition.* By adopting the federal definition of supervisor in the PEERA definition of *"supervisory employee,"* it can be inferred that the Kansas legislature signified its intention that certain well-established principles developed in federal cases for determining who are supervisory employees under the NLRA should be applied under K.S.A. 75-4322(b).

2. **PUBLIC EMPLOYEE** - *Exclusions - Supervisors - When established.* The supervisory functions performed by the individual must so ally the employee with management as to establish a differentiation between them and the other employees in the unit. For supervisory status to exist this identification must be substantial.

3. **PUBLIC EMPLOYEE** - *Exclusions - Supervisors - Independent discretion required.* 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.

4. **PUBLIC EMPLOYEE** - *Exclusions - Supervisors - Proceduralized responsibilities.* A responsibility can be so proceduralized that it becomes routine and does not involve the exercise of independent judgment.

5. **PUBLIC EMPLOYEE** - *Exclusions - Supervisors - Effective recommendation defined.* An *"effective"* recommendation is one which, under normal policy and circumstances, is made by a supervisor, and is adopted by higher authority without independent review or de novo consideration as a matter of course. A mere showing that recommendations were ultimately followed does not make such recommendations *"effective"* within the meaning of the statue.

6. **PUBLIC EMPLOYEE** - *Exclusions - Burden of proof.* The burden of proving that an individual should be excluded as a supervisor rests on the party alleging that supervisory status. Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, supervisory status has not been established, at least on the basis of those indicia.

7. **PUBLIC EMPLOYEE** - *Exclusions - Supervisors - Independent judgement required.* An employee is not a supervisor if he or she has the power to exercise, or effectively recommend the exercise of listed supervisory functions, unless this power is accompanied by authority to use independent judgment in determining how in the interest of management it will be exercised. Authority to perform one of the enumerated functions is not supervisory if the responsibility is routine or clerical.

8. **PUBLIC EMPLOYEE** - *Exclusions - Supervisors - Leadmen.* It is a question of fact in every case as to whether an individual is merely a superior worker who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management. minor supervisory authority is consistent with and analogous to that of a leadman or straw boss.

9. **PUBLIC EMPLOYEE** - *Exclusions - Supervisors - Position title not controlling.* The title a position carries has little bearing on whether it is supervisory. It is the function rather than the label which is significant.

10. **PUBLIC EMPLOYEE** - *Exclusions - Supervisors - Substitution for supervisor.* The test for determining whether a unit should include employees who substitute for supervisors is whether such part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant.

11. **APPROPRIATE BARGAINING UNIT** - *Determination - Purpose.* The basis of any bargaining unit determination *is to group together only those employees who have substantial mutual interests in wages, hours and other conditions of employment.* Commonly referred to as the community of interests doctrine, it stands for the proposition that in making a unit determination, PERB will weigh the similarities and differences with respect to wages, hours and other conditions of employment among the members of the proposed unit, rather than relying solely on traditional job classifications.

FINDINGS OF FACT[1]

General Findings of Fact

1. Petitioner, United Rubber Workers Local Union 851 ("Union") 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 public employees of Washburn University of Topeka ("University"). (Petition and Answer).

2. Respondent, Washburn University of Topeka ("University"), is a *"public agency or employer,"* as defined by K.S.A. 75-4322(f), which has voted to be covered by the Kansas Public Employer-Employee Relations Act in accordance with K.S.A. 75-4321(c). (Petition and Answer).

3. The procedure for terminating an employee once there is a problem justifying termination: a) the recommendation goes from the supervisor to the department head; (b) from the department head to the personnel office; and (c) from the personnel office to the Vice-president for Administration, Louis Mosiman, for final approval. (Tr.p. 9, 11-12).

4. Vacant positions are normally advertised and a screening process employed. After the initial screening, the department and persons involved make a recommendation to the personnel office. The recommendation is submitted to the Vice President for Administration and Treasurer for approval. (Tr.p. 10).

Custodian III's - Generally

5. There are 10 Custodian III's; nine in the Custodial Services department and one for the Memorial Union. (Tr.p. 100).

6. Robert Mitchell is Chief of Custodial Services, (Tr.p. 75), a unit of the Physical Plant department. Mitchell supervises six Custodian III's, two Custodian Supervisor I's and one Custodian Supervisor II. (Tr.p. 75-76).

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[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. Pittsburgh 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."

7. Thomas Ellis is employed as the Director of Memorial Union Operation and has the supervisory authority with reference to custodial workers. (Tr.p. 15). There are three custodial workers assigned to the Memorial Union, (Tr.p. 16, 21), but Harold Barnhill is the only Custodian III. (Tr.p. 16, 21; Ex. GG).

8. Not all Custodian III's supervise other custodians. (Tr.p. 81). The three Custodian III's who do not supervise subordinates are Art Chavez, Martha Martin and George Martinez. (Tr.p. 101). The Custodian III's claimed to be supervisors by the University are those Custodian III's in charge of a building that have other custodians working for them in the building. (Tr.p. 81). Custodian III's with supervisory responsibilities receive the same compensation and benefits as a Custodian III without supervisory responsibilities. (Tr.p. 138-40).

9. Custodian III's are working supervisors. (Tr.p. 159). They must make sure all areas are covered and the work is performed even if it means doing the work personally. (Tr.p. 133-34). Accordingly, Custodian III's divide their building into work areas, assign a custodian to each area, and plan the work of the custodian. (Tr.p. 131). Hal Kimmel, Assistant to the Director of the Physical Plant, testified that the work of the Custodian I and II is fairly routine. (Tr.p. 151). In assigning work for the Custodial I and II, typically the assignment designates the work and special cleaning to be done. Kimmel testified that this type of assignment does not require much independent judgment. (Tr.p. 153). Supervision by the Custodian III is generally making sure that the Custodian I and II's complete their work correctly. (Tr.p. 198).

10. The Custodian III's evaluate Custodian I's and II's. (Tr.p. 82; Ex. I, J, K, L, M). Thomas Ellis, Director of Memorial Union Operations, testified that the employee evaluations are based on the employee's performance, attendance records, behavior and attitudes toward work. (Tr.p. 118). Custodian III's perform the first evaluation and then the Custodian III's supervisor performs a review of that evaluation. (Tr.p. 42). An adverse evaluation can result in an employee not receiving a pay raise. (Tr.p. 160-61).

Custodian III - Memorial Union
Harold Barnhill

11. Thomas N. Ellis is director of Memorial Union operations at Washburn University. (Tr.p. 15). He supervises Harold Barnhill, a Custodian III, (Tr.p. 16; Ex. GG), the only Custodian III at the Memorial Union. (Tr.p. 16, 21; Ex. GG). Barnhill works from 6:45 a.m. to 3:15 p.m. (Tr.p. 19).

12. According to Barnhill's position description, 20% of his time is spent on supervision and 80% on custodial duties. (Ex. GG).

13. On August 9, 1993, after commencement of this unit determination action, Harold Barnhill signed a Position Description for Custodian III prepared by the University, which indicated he directly supervises Custodian I's and Custodian II's by assigning, training, scheduling, overseeing and reviewing their work. (Ex. GG). Mr. Ellis relies upon Barnhill to supervise the custodian staff, (Tr.p. 47), and holds him responsible for making sure things get done. Barnhill, in turn, holds his custodial staff responsible for seeing the work gets done. (Tr.p. 17).

14. Barnhill's duties include supervising the building and other staff; advising on needs to manage the building; organizing the work of the other custodians; and advising on the preparations and design for banquet and special event setups. (Tr.p. 16-17). Barnhill informs Mr. Ellis what supplies need to be in stock, what works, what needs to be repaired, and who needs to do it. (Tr.p. 35).

15. Barnhill arranges the setup and work assignments for special events held at the Memorial Union. Relative to conference room and special events setups, reservations are posted on a work sheet. Barnhill arranges the schedules and assigns duties to custodial staff so preparations are completed on time. (Tr.p. 23). Then he supervises the custodial staff during setup and sees that the building is clean and staffed at all times during the event. (Tr.p. 17).

16. Barnhill makes custodial assignments, (Tr.p. 17), and inspects the work of Custodian I's and II's. (Tr.p. 44). When overtime is necessary, Barnhill makes a recommendation to Ellis for staff overtime. His recommendations are usually followed. (Tr.p. 17). Barnhill also makes recommendations concerning the need for additional custodial help at special events, and Ellis relies upon these recommendations. (Tr.p. 18-19). Barnhill interviews applicants for custodian vacancies and

makes recommendations to Ellis. Ellis testified he could not remember when such recommendations were not followed. (Tr.p. 18). Barnhill has recommended termination of an employee and that recommendation was accepted by Ellis who recommended it to the Vice-president of Administration. (Tr.p. 20, 25, 28, 42; Ex. RR). Barnhill evaluates the custodial staff and can recommend termination for poor performance. Ellis makes no independent evaluations. (Tr.p. 24-26, 28, 29, 42-43; Ex. RR). He absolutely relies upon Mr. Barnhill's opinions and recommendations. (Tr.p. 19).

Custodian III - Custodian Services

17. If a Custodian III under Mitchell's supervision determines a need for overtime, he decides the amount of overtime required, when the overtime will be worked, and who will work it. The Custodian III submits a recommendation Mitchell for final approval. Mr. Mitchell generally approves the overtime recommended by the Custodian III. (Tr.p. 106).

18. Custodian III's are responsible for resolving employee problems in their buildings. If the problem remains unresolved, then Mitchell intervenes. (Tr.p. 81, 82). Custodian III's cannot suspend or terminate an employee. (Tr.p. 125-26). The Custodian III's can recommend termination and those recommendations are usually followed by Mitchell. (Tr.p. 83, 88, 89).

19. Head Custodian meetings are held by Mitchell and attended by Custodian III's that are in charge of a building, Custodian Supervisor I's and the Custodian Supervisor II. (Tr.p. 79; Ex. B, C, D, E, F, G). At these custodial meetings supervisor training is provided. (Tr.p. 80).

Jim Bullocks

20. James Bullock is employed as a Custodian III, and has been in that position for 10 years. He works from approximately 12:30 p.m. to 10:30 p.m. There are two other custodians on this night shift; Tom Underwood and James Luarks. Luarks is assigned to the Henderson Building which is supervised by Earl Jackson, and Underwood is assigned to the Stoffer Building supervised by Mike Boose. (Tr.p. 111-12, 127-28). Bullock is responsible for cleaning all the remaining unstaffed buildings. (Tr.p. 19-20; 195-96; Ex. II).

21. On February 14, 1994, after commencement of this unit determination action, James Bullock signed a Position Description for Custodian III prepared by the University, which indicated he directly supervises James Luarks and Tom Underwood by training, assigning, scheduling, overseeing and reviewing their work. (Ex. II). However, Bullock does not believe he is their supervisor. Bullock stated he does not directly supervise Tom Underwood or James Luarks since they are permanently assigned to buildings, and the head custodian of that building is responsible for assigning work to the night custodian. (Tr.p. 203). His only contact with the other night custodians comes if one of them requests assistance, (Tr.p. 197-98, 202), or seeks his advise on a problem. (Tr.p. 202). Bullock does not approve their overtime, assign them work, or do their evaluations. (Tr.p. 197).

22. Bullock testified that "leadman" rather than "supervisor" best described his position. (Tr.p. 205).

Mike Boose

23. Mike Boose is employed as a Custodian III at the Stoffer Science Hall and has been in the position since 1983. (Tr.p. 84, 188; Ex. HH).

24. On February 14, 1994, after commencement of this unit determination action, Mike Boose signed a Position Description for Custodian III prepared by the University, which indicated he directly supervises Tom Underwood by training, assigning, scheduling, overseeing and reviewing his work. (Ex. HH). Boose does not consider himself to be a supervisor. (Tr.p. 192). Prior to the February 14, 1994 job description, Bullock performed the same duties but had no such supervisory responsibilities. (Tr.p. 202).

25. Boose works from 4:00 a.m. to 12:30 p.m. at Stoffer Science Hall. The other person assigned to Stoffer, Tom Underwood, works 2:00 p.m. to 10:30 p.m. On occasion Boose leaves him notes on what to do, and twice in ten year received correspondence back, but, since Underwood has been employed longer than Boose, he knows what needs to be done without instruction. (Tr.p. 191-92, 193).

26. Boose testified that he could not suspend, lay-off, recall, adjust grievances of, reward, promoted, discipline or discharge any employee or effectively to recommend such action. (Tr.p. 189-90). He has never been involved in the

hiring process. (Tr.p. 188-89). While Boose has made one recommendation of transfer and that recommendation was not followed. (Tr.p. 189). Boose has evaluated Underwood. (Tr.p. 192).

Earl Jackson

27. Earl Jackson is employed as a Custodian III at the Henderson Learning Center. He is the head custodian over a crew of 4-5 custodians. (Tr.p. 81, 91, 164; Ex. MM).

28. On February 18, 1994, after commencement of this unit determination action, Earl Jackson signed a Position Description for Custodian III prepared by the University, which indicated he directly supervises Art Chavez, James Luarks, and W.D. Montgomery by training, assigning, scheduling, overseeing and reviewing their work. (Ex. MM).

29. According to Jackson, Most of his work he does is very routine. (Tr.p. 177). (Tr.p. 177). He does assign jobs to employees. (Tr.p. 166). According to Jackson, he cannot lay-off employees or effectively recommend who or when they should be laid-off, (Tr.p. 165); does not have the right to suspend or effectively recommend suspension, (Tr.p. 165); cannot adjust an employee's grievance, (Tr.p. 166); and has not participated in the interview or hiring process. (Tr.p. 179-80).

30. Earl Jackson can recommend transfer of employees, recommend suspension, recommend promotions, recommend discharge, recommend assignments, recommend rewarding employees, recommend discipline. (Tr.p. 164-66). According to Jackson, *"We can recommend almost anything. . . . Some of it is used and a heck of a lot of it is not used, but we can recommend anything."* (Tr.p. 166). Jackson has recommended three individuals be promoted; Cameron, Large and Montgomery, but only Cameron was promoted. (Tr.p. 179). He also recommended an employee be transferred or terminated, and the employee was terminated as a result of that recommendation. (Tr.p. 94-95, 170; Ex. BB).

31. Mr. Jackson does evaluations of the custodians in his crew at the end of probation and once a year. (Tr.p. 91, 173; Ex. Q, R, S, T, U, V, W). W.D. Montgomery wrote Earl Jackson was a good supervisor on Montgomery's evaluation sheet. Montgomery was evaluated by Jackson. All of Jackson's workers wrote the same thing. (Tr.p. 171).

32. Mr. Jackson attends supervisory meetings where policy is discussed and established. He voices his opinions on university policies at those meetings. (Tr.p. 181-82). Mr. Jackson holds team meetings each week with his workers where he sits down and discusses with them things that need to be done. (Tr.p. 184).

Kelvin Cameron

33. Kelvin Cameron is Custodian III at the Law School. (Tr.p. 86-87).

34. On February 14, 1994, after commencement of this unit determination action, Kelvin Cameron signed a Position Description for Custodian III prepared by the University, which indicated he directly supervises TreMayne Smith, Douglas Smith and Phillip Montgomery by training, assigning, scheduling, overseeing and reviewing their work. (Ex. JJ).

35. Cameron evaluates the employees he supervises. (Tr.p. 87; Ex. M, N).

Don Fry

36. Don Fry is a Custodian III. (Ex. KK). Mr. Fry supervises a one-man building. (Tr.p. 149).

37. On February 14, 1994, after commencement of this unit determination action, Don Fry signed a Position Description for Custodian III prepared by the University, which indicated he directly supervises Harold Stonebraker by training, assigning, scheduling, overseeing and reviewing his work. (Ex. KK).

Robert Henderson

38. Robert Henderson is a Custodian III at Mabee Library. (Tr.p. 26, 84; Ex. LL).

39. On February 14, 1994, after commencement of this unit determination action, Robert Henderson signed a Position Description for Custodian III prepared by the University, which indicated he directly supervises Tony Henderson, Linda Green, and Stewart Porter by training, assigning, scheduling, overseeing and reviewing their work. (Ex. LL). He evaluates the other custodians on his crew. (Tr.p. 26, 84).

Rosa Ransom

40. Rosa Ransom is Custodian III at Morgan Hall. (Tr.p. 87; Ex. NN).

41. On February 14, 1994, after commencement of this unit determination action, Rosa Ransom signed a Position Description for Custodian III prepared by the University, which indicated she directly supervises Rocky Large, Dave McDonald and Craig Sizemore by training, assigning, scheduling, overseeing and reviewing their work. (Ex. NN). She performs employee evaluations. (Tr.p. 87).

Custodial Supervisors
Lonnie Ritchey

42. Lonnie Ritchey is a custodial Supervisor I at Garvey Fine Arts Center. (Tr.p. 76, 207; Ex. FF). His job classification was changed approximately 1 1/2 years ago from Custodian III, but is still performing the same job responsibilities. Ritchey was told the change was necessary because he was at the top of his salary scale and the only way he could receive a pay raise was to move him to another job classification. (Tr.p. 207-08).

43. On February 24, 1994, after commencement of this unit determination action, Lonnie Ritchey signed a Position Description for Custodian Supervisor I prepared by the University, which indicated he directly supervises Chandra Jackson, Ivory Wilson and Bruce Albert by training, assigning, scheduling, overseeing and reviewing their work. (Ex. FF). Ritchey testified he is the leader of the custodial crew composed of Bruce Albert, Ivory Wilson and one other person that cleans the Garvey Fine Arts Building and the President's residence. (Tr.p. 208-09).

44. Ritchey testified he does not hire, terminate, transfer, suspend, lay-off, recall, promote, discipline or adjust the grievances of employees. He can make suggestions but would not characterize the action as "effectively recommending." (Tr.p. 212-13, 219).

45. Ritchey does assign work to custodians in his crew, (Tr.p. 216); makes requests for overtime related to special events to Mitchell, who grants or denies the request, (Tr.p. 217); and evaluates the other members of the custodial crew, (Tr.p. 83-84, 216).

Francis David Greene

46. Dave Greene is employed as a Custodian Supervisor I, and has been in that position approximately 1 1/2 years. His job classification was changed approximately 1 1/2 years ago from Custodian III, but is still performing same job responsibilities. Greene was told the change was necessary because he was at the top of his salary scale and the only way he could receive a pay raise was to move him to another job classification. (Tr.p. 226-27, 228).

47. Greene is not assigned to any building. He describes himself as a "utility man" in that he delivers supplies, runs errands for Mitchell, serves as sound technician for football and basketball games, does setups for football games, and substitutes for or assists other custodians. (Tr.p. 227).

48. Greene does not consider himself a supervisor. He works by himself, (Tr.p. 190); no other employees work under his direction, (Tr.p. 228-29); he does not evaluate any employees; and does no hiring. (Tr.p. 230).

Shop Mechanic II
Don Parscal

49. Don Parscal is a Shop Mechanic II at Washburn. He reports to Hal Kimmel. (Tr.p. 55-56; Ex. EE). Kimmel is the Assistant Director of the Physical Plant. The areas of the heat plant, carpentry, paint crews, automotive crews and maintenance crews are under his supervision. (Tr.p. 55-56).

50. The shop mechanic department is responsible for repairs and services to university vehicles and custodial equipment, does welding and blacksmithing, and does metal fabrication and millwright work. (Ex. EE). Kemmel relies upon Parscal to take care of the shop. (Tr.p. 59).

51. On March 2, 1994, after commencement of this unit determination action, Don Parscal signed a Position Description for Shop Mechanic II prepared by the University, which indicated he directly supervises Shop Mechanic I's. His duties include training, assigning, scheduling, overseeing and reviewing the work of Shop Mechanic I's. (Tr.p. 57-58; Ex. EE). According to that position description, 10% of his time is devoted to supervisory responsibilities and 90% of the time he is doing mechanical repair work. (Tr.p. 62, 68; Ex. EE).

52. Mr. Parscal interviews applicants for Shop Mechanic I. He makes hiring recommendations which are heavily relied upon by Mr. Kemmel. (Tr.p. 56, 58). He is authorized to have the Shop Mechanic I work overtime on an as-needed basis. (Tr.p. 60-61). Mr. Parscal evaluates employees. (Tr.p. 63). Kemmel would also rely heavily upon a recommendation from Parscal to terminate an employee. (Tr.p. 59).

ISSUE 1

WHETHER CUSTODIAN III'S BARNHILL, BOOSE, BULLOCK, CAMERON, FRY, HENDERSON, JACKSON, AND RANSOM SHOULD BE EXCLUDED FROM THE PROPOSED UNIT AS SUPERVISORS.

The United Rubber Workers Local Union 851 ("Union") filed a unit determination and certification petition on January 21, 1994 seeking to represent a bargaining unit at Washburn University of Topeka ("University") composed of employees in the following positions:

Automobile Driver
Carpenter
Custodian I, II, and III
Custodian Supervisor I and II
Electrician
HVAC Mechanic
Laborer I and II
Painter I and II
Plant Op./Dispatcher
Plumber
Shop Mechanic I and II

The parties have stipulated to the following partial description of the bargaining unit:

INCLUDE: Automobile Driver
Carpenter
Custodian I, II, and III
Electrician
HVAC Mechanic
Laborer I and II
Painter I and II
Plant Op./Dispatcher
Plumber
Shop Mechanic I

EXCLUDE: Security Guards
Chief of Grounds Keeping Services
Custodian Supervisor II
Supervisory, Confidential and Professional employees in those positions
Temporary and part-time employees in those positions.

Washburn University of Topeka ("University") seeks to exclude the positions of Custodian Supervisor I and Mechanic II from the bargaining unit proposed by the Union based on a lack of community of interest with the positions stipulated to be in the unit, as well as those employees being "supervisory" personnel excludable pursuant to K.S.A. 75-4322(b). Similarly, while the position of Custodian III is stipulated to be included in the unit, the University seeks to exclude the following individuals in that position as "supervisory" personnel:

Harold Barnhill	Kelvin Cameron
Jim Bullocks	Don Fry
Mike Boose	Robert Henderson
Earl Jackson	Rosa Ransom

Custodian III - Supervisory Personnel

K.S.A. 75-4324 guarantees public employees the right to form, join, and participate in employee organizations. *"Public employee"* is defined in 75-4322(a) to mean *"any person employed by any public agency, except those persons classed as supervisory employees, professional employees or school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees."* An individual not in one of the five excluded categories is a public employee within the meaning of PEERA, if he works for a public employer. Conversely, because the right to participate in an employee bargaining unit organized for the purposes of engaging in meet and confer negotiations depends on the existence of public employee status, individuals who do not have that status are excluded from bargaining units. Of concern here are those Custodian III's in the category of supervisor.

[1] This Kansas PEERA exclusion of individuals with supervisory authority from employee status is similar to Section 2(3) of the National Labor Relations Act.[2] Likewise, the federal and Kansas statutes provide similar definitions of *"supervisory employee."* Compare K.S.A. 75-4322(b) which defines *"supervisory employee"* to mean:

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[2] Compare, K.S.A. 75-4322(a) which defines "Public employee" to mean "any person employed by any public agency, except those persons classed as supervisory employees, professional employees or school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees," and Section 2(3) of the NLRA which defines "employee" to include "any employee . . . but shall not include . . . any individual employed as a supervisor, . . ."

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

and with its federal counterpart, Section 2(11) which reads:

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

By adopting the federal definition of supervisor in the PEERA definition of *"supervisory employee,"* it can be inferred that the Kansas legislature signified its intention that certain well-established principles developed in federal cases for determining who are supervisory employees under the NLRA should be applied under our statute.[3]

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[3] Because the definition of supervisory employee in the Kansas statute is taken from the NLRA, we presume our legislature intended what Congress intended by the language employed. See Stromberg Hatchery v. Iowa Employment Security Comm., 33 N.W.2d 498, 500 (Iowa 1948). "[W]here . . . a state legislature adopts a federal statute which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense." Hubbard v. State, 163 N.W.2d 904, 910-11 (Iowa 1969). As a result, federal court decisions construing the federal statute are illuminating and instructive on the meaning of our statute, although they are neither conclusive nor compulsory. Peasley v. Telecheck of Kansas, Inc., 6 Kan.App.2d 990, 994 (1981)[Case law interpreting federal law after which Kansas law is closely modeled, although not controlling construction of Kansas law, is persuasive]; See also Cassady v. Wheeler, 224 N.W.2d 649, 652 (Iowa 1974).

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

It is a general rule of law that, where a question of statutory construction is one of novel impression, it is proper to resort to decisions of courts of other states construing statutory language which is identical or of similar import. 73 Am.Jur.2d, Statutes, §116, p. 370; 50 Am.Jur., Statutes, §323; 82 C.J.S., Statutes, §371. Judicial interpretations in other jurisdictions of such language prior to Kansas enactments are entitled to great weight, although neither conclusive nor compulsory. Even subsequent judicial interpretations of identical statutory language in other jurisdictions are entitled to unusual respect and deference and will usually be followed if sound, reasonable, and in harmony with justice and

(continued...)

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. It involves a case-by-case approach in which the Public Employee Relations Board ("PERB") gives practical application of the statute to the infinite and complex gradations of authority which may exist in public service. As recognized by the court in NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944):

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

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

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[3](...continued)
public policy. Cassady v. Wheeler, 224 N.W.2d 649, 652 (Ia. 1974); 2A Sutherland Statutory Construction, §52.02, p. 329-31 (4th ed. 1973); Benton v. Union Pacific R. Co., 430 F.Supp. 1380 (19)[A Kansas statute adopted from another state carries with it the construction placed on it by that state.]; State v. Loudermilk, 208 Kan. 893 (1972).

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

Historical Perspective

Understanding the underlying rationale for the exclusion of supervisors from a bargaining unit is essential to the determination of an appropriate bargaining unit. The supervisor 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. The exclusion is predicated upon the maxim *"No man can serve two masters."* As the Second District Federal Court of Appeals explained the legislative intent behind the exclusion of supervisors in the Taft-Hartley Act of 1947:

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

The goal of the Taft-Hartley Act was to assure the employer of a loyal and efficient cadre of supervisors and managers independent of the rank-and-file, thereby ensuring that employees who exercise discretionary authority on behalf of the employer do not divide their loyalty between employer and union. NLRB v. Yeshiva University, 103 LRRM 2526 (1980). Congress was concerned that if supervisors were allowed to affiliate with labor organizations that

represented the rank-and-file, they might become accountable to the workers, thus interfering with the supervisor's ability to discipline and control the employees in the interest of the employer. *See* H.R.Rep.No. 245, 80th Cong., 1st Sess., 14 (1974):

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

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

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

That objective is equally applicable to the public sector.

By the exclusion of supervisors, Congress also sought to protect the rank-and-file employees from being unduly influenced in

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

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

One additional underlying concept which emerges, whether in the public or private employment sector, is that representatives of the employer and the employees cannot sit on both sides of the negotiating table. Good faith negotiating requires that there be two parties confronting each other on opposite sides of the table. Obviously both employer and employee organizations need the undivided loyalty of their representatives and their members, if fair and equitable settlement of problems is to be accomplished.

Unless the participation is of that calibre, the effectiveness of both parties at the negotiations table would be sharply limited.

Factors Evidencing Supervisory Authority

The enumerated functions in the K.S.A. 75-4322(b) definition of supervisor, like those in Section 2(11), are listed disjunctively, *See* NLRB v. Elliott-Williams Co., 345 F.2d 460 (CA7, 1965); possession of any one of them is sufficient to make an employee a supervisor. NLRB v. Broyhill Co., 514 F.2d 655, 658 (CA 8, 1975). While it has been said that it is the existence of the power and not its exercise which is determinative, Jas. E. Matthews & Co. v. NLRB, 354 F.2d 432, 434 (CA 8, 1965), what the statute requires is evidence of actual supervisory authority *"visibly translated into tangible examples."* Oil, Chemical and Atomic Workers Int. U. v. NLRB, 445 F.2d 237, 243 (D.C.Cir. 1971). The power must exist in reality, not only on paper. NLRB v. Security Guard Service, Inc., 384 F.2d 143, 149 (CA 5, 1967). As explained in NLRB v. Griggs Equipment, Inc., 307 F.2d 275, 279 (CA5, 1962):

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

[2] Stated another way by the NLRB in Detroit College of Business, 132 LRRM 1081, 1083 (1989), the supervisory functions performed by the individual must *"so [ally] the individuals with management as to establish a differentiation between them and the other employees in the unit." See also* Adelphi University, 79 LRRM 1545 (1972); New York University, 91 LRRM 1165 (1975). The determination of supervisory status depends upon how completely the responsibilities of the position identify the employee with management. For supervisory status to exist this identification must be substantial. NLRB v. Doctor's Hospital of Medesto, Inc., 489 F.2d 772, 776 (CA 9, 1973); Ross Porta-Plant, Inc. v. NLRB, 404 F.2d 1180, 1182 (CA 5, 1968). Clearly, the exclusion from *"employee"* status applies only to supervisory personnel who are *"the arms and legs of management in executing labor policies."* Packard Motor Co. v. NLRB, 330 U.S. 485, 494 (Douglas, J. dissenting, 1947).

1. Normally performs different work from his or her subordinates"

To ascertain whether an individual so allies oneself with management as to establish a differentiation from the other employees in the unit, one must examine the factors evidencing supervisory authority present to determine the nature of the individual's alliance with management. The first factor set forth in K.S.A. 75-4322(b) is that the employee *"normally performs*

different work from his or her subordinates." A review of the position descriptions to Custodian III's in question reveals only an average of 15 per cent of their time is devoted to what is designated supervisory activities, with the remaining 85 per cent reserved for routine custodial duties.[4]

2. "Having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances."

The record shows the Custodian III does not have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees. The University argues the Custodian III's do direct the work of other custodians in their respective buildings, in that they divide their building into work areas, assign a custodian to each area, and plan the work of the custodian.

[3] [4] *"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. *"Moreover, the statutory words 'responsibility to direct' are not weak or jejune but import active vigor and potential vitality."* NLRB v. Security Guard Service, Inc., 384 F.2d 143, 147 (CA5, 1967). Authority to perform one of the

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[4] While Harold Barnhill's supervisory duties were placed at 20%, the remaining Custodian III's position descriptions set their supervisory duties at 15%. (Ex.EE, FF, GG, HH, II, JJ, KK, LL, MM, NN).

enumerated functions is not supervisory if the responsibility is routine or clerical. See NLRB v. Wentworth Institute, 515 F.2d 550, 557 (CA 1, 1975); NLRB v. Metropolitan Petroleum Co. of Mass., 506 F.2d 616, 618 (CA 1, 1974). 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). Additionally, a responsibility can be so proceduralized that it becomes routine and does not involve the exercise of independent judgment. NLRB v. Detroit Edison Co., 537 F.2d 239 (CA 6, 1976).

According to Robert Mitchell, Chief of Custodial Services, once an area assignment is made it remains unchanged until some adjustment is required, and, since the work is routine, assignment of cleaning tasks in the area on a daily basis is not required. It would appear that the custodians know what must be done in their assigned areas, and perform their duties with minimum direction. Similarly, Hal Kimmel, Assistant to the Director of the Physical Plant, testified that the work of the Custodian I and II is fairly routine, and stated the assignment of work areas and cleaning duties does not require much independent judgment. Additionally, Mitchell testified the Custodian III's are instructed by management on what to look for when inspecting the work of subordinate

custodians, and the level of cleanliness expected. These are also set forth in the document entitled "Levels of Cleanliness", (Exhibit B).

The University further argues Custodian III's attempt to resolve employee problems within their buildings. If unsuccessful, only then are the problems referred to Mitchell for action. Adjusting a grievance involves an inquiry into its validity, a determination on the merits, and the taking of corrective action when necessary. *See generally*, NLRB v. Browne and Sharpe Mfg. Co., 169 F.2d 331, 334 (CA 1, 1948). Preliminary efforts by an employee to resolve minor grievances do not make that employee a supervisor. *See* NLRB v. City Yellow Cab. Co., 344 F.2d 757 (CA 6, 1965). The type of grievances handled by Custodian III's appear to fall into this latter category. Formal grievances do not come up very often according to Thomas Ellis, Director of the Memorial Union.

3. "Effectively to recommend a preponderance of such actions."

[5] The University asserts that Custodian III's can effectively recommend hiring, transferring, suspending, layoff, recall, promotion, discharge, assignment, rewarding, or disciplining other subordinate custodians. An *"effective"* recommendation is one which, under normal policy and circumstances, is made by a supervisor, and is adopted by higher authority without

independent review or de novo consideration as a matter of course. City of Davenport v. PERB, 98 LRRM 2582, 2590-91 (Ia. 1978). This is an appropriate interpretation to be applied to this K.S.A. 75-4321(b) function of supervision. So viewed, a mere showing that recommendations were ultimately followed does not make such recommendations *"effective"* within the meaning of the statue. An employee will not be found to be a supervisor where he lacks the power to recommend effectively decisions respecting a preponderance of the supervisory indica of hiring, transferring, supervision, recall promotion, discharge, rewarding, or disciplining of other employees. *See* Iowa Electric Light & Power, 717 F.2d 433 (8 C.A. 1993).

Ellis testified he absolutely relies upon Barnhill's recommendations, and cannot remember when a recommendation on hiring was not followed. Earl Jackson testified that Custodian III's can recommend transfers, promotions, termination, discipline and rewards for subordinate custodians, and *"some of it is used and a heck of a lot or it is not used."* In his case, he had made three recommendations for promotion but only one employee was promoted. He also recommended one employee be terminated or transferred, and that employee was terminated. Mike Boose testified that he cannot effectively recommend action, has never been involved in the hiring process, and the only recommendation he made for an employee transfer was not followed. As to the other Custodian III's, no

specific evidence was produced that each could effectively recommend another employee be hired, transferred, suspended, laid-off, recalled, promoted, discharged, assigned, rewarded, or disciplined.

[6] In any proceeding where the composition of a bargaining unit is at issue under PEERA, the burden of proving that an individual should be excluded as a *"supervisor"* rests on the party alleging that supervisory status. *See* Teamsters Local Union #955 v. Wyandotte County, Kansas, Case No. 75-UDC-3-1992 (September 3, 1993); Ohio Masonic Home, 131 LRRM 1289, 1503 (1989). The burden is upon the University to produce evidence showing the Custodian III's sought to be excluded as supervisors could effectively recommend a preponderance of the actions set forth in K.S.A. 75-4321(b). While showing that recommended actions are generally followed in the case of Barnhill, the evidence relative to the recommendations of the other Custodian III's does not prove under normal policy and circumstances any recommendation made by the Custodian III's is adopted by higher authority without independent review or de novo consideration as a matter of course.

The University also points to the fact that the Custodian III's evaluate Custodian I's, II's and some III's. "Evaluation" is not one of the enumerated functions listed in the K.S.A. 75-4321(b), but can be viewed as taking the form of a *"recommendation"* for the enumerated actions. The authority simply to evaluate

employees without more is insufficient to find supervisory status. Geriatrics, Inc., 90 LRRM 1606 (1978); Texas Institute for Rehabilitation and Research, 94 LRRM 1513 (1977); *See* Valley Hospital, 90 LRRM 1411 (1975). The record does not prove that the evaluations constitute effective recommendations for promotions, wage increases or discipline. There is no evidence as to the frequency such recommendations have been made by Custodian III's, or how often such recommendations have been followed.

4. "If in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement."

[7] Even where supervisory functions are being performed by an employee, K.S.A. 75-4322(b) expressly insists that a supervisor 1) have authority, 2) to use independent judgment, 3) in performing such supervisory functions, 4) in the interest of management. These latter requirements are conjunctive. *See* International Union of United Brewery v. NLRB, 298 F.2d 297, 303 (1961). Consequently, an employee is not a supervisor if he or she has the power to exercise, or effectively recommend the exercise of listed functions unless this power is accompanied by the authority to use independent judgment in determining how in the interest of management it will be exercised. The mere fact that one is responsible for an operation does not, in and of itself, transform than individual into a supervisor, absent some showing that the

person is required to exercise independent judgment or responsibility in directing employees in their work tasks. *"Moreover, the statutory words 'responsibility to direct' are not weak or jejune but import active vigor and potential vitality."* NLRB v. Security Guard Service, Inc., 384 F.2d 143, 147 (CA5, 1967). As observed in NLRB v. Security Guard Service, Inc., 384 F.2d 143, 149-51 (CA 5, 1967):

> *"[T]o point to one act as supervisorial is pertinent and relevant but is not irrefutable. Nearly every employee at some time, under certain conditions, tells someone else what to do. A supervisor may be vested with plenary power and rarely exercise it, but one who engaged in an isolated incident of supervision is not necessarily a supervisor under the Act. If this were the criterion and hallmark of supervision, then practically all employees would be supervisors. This Congress did not intend."*
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> * * * *
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> *"If any authority, no matter how insignificant, made an employee a supervisor, our industrial composite would be predominately supervisory. Every order-giver is not a supervisor. Even the traffic director tells the company president where to park his car."*[5]

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. Repetitive or rote tasks are not considered supervisory. See e.g. NLRB v. Griggs Equipment Inc., 307 F.2d 275 (CA 8, 1962). Nor are functions requiring little more than use of common sense. Spector Freight System, Inc., 88 LRRM 1442 (1975). An individual who

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[5] It should be noted that in reviewing the position description of Robert Carcock, Custodian II at the Memorial Union, it indicates that he has supervisory authority over the Custodian I.

merely serves as a conduit for orders emanating from supervisors acts routinely. See, e.g. Screwmatic, Inc., 89 LRRM 1508 (1975); Samuel Liefer, 93 LRRM 1069 (1976), enforced, NLRB v. Samuel Liefer, 95 LRRM 3011 (CA 2, 1977). A mere *"straw boss"*[6] with no independent discretion will not be deemed a supervisor. Volt Information Services, Inc., 118 LRRM 1474 (1985).

In Gulf Bottlers, Inc. v. NLRB, 369 U.S. 843 (19), the court stated:

> *"It has seemed to us that if a mere employee at some stage may become a supervisor, the transition becomes an actuality when he is found to possess real power 'in the interest of the employer' to take meaningful action with respect to the statutory tests. It is not alone that he may hire or fire or lay off or discipline. He must do so in the interest of the employer. He must then, when acting, become in effect a part of management, not simply a lead man or straw boss. The entire work force from the president down to the messenger boy in one sense acts in the interest of the employer, as Congress well knew. Surely it contemplated some other test than is afforded by a sheerly literal reading of section 2(11).*
>
> *"We recently spelled out various criteria to be applied by the Board in an individual, case-by-case approach. We had in mind particularly that there must be a determination of status based upon the 'nature' of the supervisory position and 'how completely the responsibilities of the particular position identify the holder of the position with management,' all 'because of the infinite possible variations in responsibilities enumerated in §2(11)."*

Instructive in considering the purposes that underlay the formulation of the federal language defining supervisor is the

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

passage from G.A.F. Corporation v. NLRB, 524 F.2d 402, 404 (CA5 1975) which explains the legislative intent behind that language:

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

Accordingly, supervisory status is not to be construed so broadly that persons are denied employee rights which the statute is designed to protect. NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (1974); GAF Corp. v. NLRB, 524 F.2d 492, 495 (CA 5, 1975); Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (CA 7, 1970) ["*the Board has a duty to employees to be alert not to construe supervisory status too broadly*"]. As noted previously, Congress sought to exclude from employee status only those employees who were "*the arms and legs of management in executing labor policies*." NLRB v. Security Guard Service, Inc., 384 F.2d 143, 147 (CA 5, 1967) [Emphasis added]. A statement from the Senate Committee report shows this was the intent of Congress:

> *"[T]he committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in the act. It has therefore distinguished between straw bosses, leadmen, set-up men and other minor supervisory employees on the one hand, and the supervisor vested with such genuine management prerogatives as to the right to hire or fire, discipline, or make effective recommendations with respect to*

> *such action."*[7] Sen.Rep.No. 105, on S.1126, 80th Cong., 1st Sess., p.4.

Clearly Section 2(3) created and Section 2(11) defined an exception carved out of a general provision.

One cannot believe the Kansas legislature meant to do anything less for the Kansas professional employee when it passed PEERA to allow organization by public employees. It must be concluded that the PEERA line between those eligible to participate in employee bargaining units and those not is drawn to exclude only those who are truly supervisory personnel of the public employer. The expressed policy of PEERA endorses this belief. That policy is to foster harmonious working relationships between public employees and employers by allowing the employee to bargain collectively while protecting the rights of the employee in choosing to join or refusing to join the union and its activities. *See* K.S.A. 75-4321(a); City of Davenport v. PERB, 2 PBC ¶ 20,201 (Iowa 1976).

[8] It is a question of fact in every case as to whether an individual is merely a superior worker who exercises the control of a skilled worker over less capable employees, or is a supervisor

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

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

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

who shares the power of management. NLRB v. Griggs Equip., Inc., 307 F.2d 275, 279 (CA5, 1962). The directing and assigning of work by a skilled employee to less skilled employees does not involve the use of independent judgment when it is incidental to the application of the skilled employee's technical or professional know-how. In such a situation the skilled employee does not exercise independent judgment as a representative of management within the meaning of the statutory requirement. Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1157 (CA 7, 1970); Arizona Public Service Co. v. NLRB, 453 F.2d 228 (CA 9, 1971); Beth Israel Medical Center, 95 LRRM 1052 (1977); Kaiser Steel Corp., 90 LRRM 1608 (1975); Trustees of Noble Hospital, 89 LRRM 1806 (1975); I-O Services, Inc., 89 LRRM 1893 (1975). *See also* NLRB v. W.C. McQuaide, 552 F.2d 519 (CA 3, 1977) [assignments made on basis of dockworkers' availability held routine]; NLRB v. Harmon Industries, Inc., 565 F.2d 1047, 1050 (CA 8, 1977) [assignment of work on basis of availability of employee time held to be routine]; Precision Fabricators, Inc., 204 F.2d 567 (CA 2, 1953); Doctor's Hospital, 89 LRRM 1525 (1975) [assignment made either on a first-come basis or on a rotating basis among members of a team held to be routine].

A review of the record leads to the conclusion that Jim Bullocks', Mike Boose's, Earl Jackson's, Kelvin Cameron's, Don Fry's, Robert Henderson's, and Rosa Ransom's minor supervisory authority over subordinate custodians is consistent with and

analogous to that of a leadman or straw boss. *See* Tucson Gas & Elect. Co., 100 LRRM 1489, 1496 (1979). While they possesses some attributes of power and independent judgment unlike subordinate custodians, and had greater responsibility and authority than those custodians, such is not sufficient to find them in possession of supervisory powers for the authority was exercised in a routine and clerical manner. *See* American Coach Co., 169 NLRB No. 153 (1968); Welch Farms Ice Cream, Inc., 161 NLRB No. 167 (1966); Ross Porta-Plant, Inc. v. NLRB, 404 F.2d 1180 (CA5 1968); Leland Stanford, Jr. University Employer and I.A.F.F Local 1-12, 194 NLRB 121 (1971). Their leadership role appears to rest on their skill and experience rather than on a need for them to be in that position to carry out the University's labor policy. *cf.* NLRB v. Detroit Edison Co., 537 F.2d 239 (CA 6, 1976). These Custodian III's direction of subordinate custodians' work was done in connection with their custodial duties, and did not go beyond into personnel authority which more directly promotes the interest of the employer[8] and which are not motivated by the necessity of meeting established cleanliness levels.

Further, Bullock does not directly supervise Tom Underwood or James Luarks since they are permanently assigned to buildings, and the head custodian of that building is responsible for assigning

[8] "Personnel authority which more directly promotes the interest of the employer" can be described as authority associated with personnel matters including approving vacation and sick leave, initialing time cards, assigning overtime, or transferring employees. See Beverly Convalescent Centers v. NLRB, 661 F.2d 1095 (CA 6, 1981).

work to each as night custodian. His only contact with either Underwood or Luarks comes if one of them requests assistance or seeks his advise with a problem. Bullock does not approve their overtime, assign them work, or do their evaluations.

Boose works from 4:00 a.m. to 12:30 p.m. at Stoffer Science Hall. The only other person assigned to Stoffer, Tom Underwood, works 2:00 p.m. to 10:30 p.m. On occasion Boose leaves him notes on what to do, and twice in ten year received correspondence back, but, since Underwood has been employed longer than Boose, he knows what needs to be done without instruction.

As to Kelvin Cameron, Don Fry, Robert Henderson, and Rosa Ransom, the only evidence of supervisory status is their respective position descriptions which indicate supervisory authority over other custodians assigned to their particular building. It should be noted that on those position descriptions the following appears:

> *"22. a. If work involves leadership, supervisory, or management responsibilities, check the statement which best describes the position:*
>
> *_X_ Lead worker assigns, trains, schedules, oversees, or reviews work of others.*
>
> *___ Plans, staffs, evaluates, and directs work of employees of a work unit.*
>
> *___ Delegates authority to carry out work of a unit to subordinate supervisors or managers."*

On each of their position descriptions, as well as on the position descriptions of Jim Bullocks, Mike Boose, and Earl Jackson, the *"lead worker"* statement was checked.

The conclusion that these individuals enjoy "lead man" status does not ignore the fact that certain attributes of supervisory power exist but rather that the power accorded was exercised in a routine and clerical manner. American Coach Co., 169 NLRB No. 153 (1968); Welch Farms Ice Cream, Inc., 161 NLRB No. 167 (1966); Ross Porta-Plant, Inc. v. NLRB, 404 F.2d 1180 (CA5 1968); Leland Stanford, Jr. University Employer and I.A.F.F Local 1-12, 194 NLRB 121 (1971). Accordingly, Jim Bullocks, Mike Boose, Earl Jackson, Kelvin Cameron, Don Fry, Robert Henderson, and Rosa Ransom will not be excluded from the proposed bargaining unit as supervisors pursuant to K.S.A. 72-5413(d).

As for Harold Barnhill, this is a close call but the evidence supports the conclusion that he is a supervisor. The record shows that he has greater responsibility relative to direction of subordinate custodians, and that the University, through Thomas N. Ellis, places great reliance upon Barnhill's supervision of subordinate custodians and absolutely relies upon his personnel recommendations. It should be further noted that the Union did not offer testimony to refute the University's evidence nor did Barnhill testify in his own behalf.

Barnhill's position appears more analogous to that of a foreman rather than leadman or straw boss. A *"foreman"* is generally the first line of management in the operation of the plant or facility. He is the individual who, in the eyes of the

production worker, represents management and authority. The foreman is generally the immediate supervisor of a group of workers and has the responsibility to recommend suspension, discharge or promotion. He also has the direct responsibility for seeing to it that the work is performed and the production schedule met. He carries out management policy on the operating level and acts as an intermediary between the workers and middle management. Robert's Dictionary of Industrial Relations, p. 114 (1966).

ISSUE 2

WHETHER THE POSITIONS OF SHOP MECHANIC II AND CUSTODIAL SUPERVISOR I SHOULD BE EXCLUDED FROM THE PROPOSED UNIT FOR LACK OF COMMUNITY OF INTEREST AND AS SUPERVISORY POSITIONS.

Custodian Supervisor I - Supervisory Authority

The University further opposes the inclusion of the Custodian Supervisor I and Shop Mechanic II position in the proposed bargaining unit because they are allegedly supervisory positions.

[9] The title a position carries has little bearing on whether it is supervisory. It is the function rather than the label which is significant. Phillips v. Kennedy, 542 F.2d 52 (CA 8, 1976); Arizona Public Service Co. v. NLRB, 453 F.2d 228 (CA 9, 1971); Int'l Union of Elec., Radio and Machine Workers v. NLRB; 426 F.2d 1243 (D.C.Cir. 1970). As stated in NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d 235 (CA4, 1958):

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

According to the testimony of Lonnie Ritchey and David Greene their job classification was changed approximately 1 1/2 years ago because they were at the top of their salary scale and the only way they could receive a pay raise was to move to another job classification. There is nothing to indicate that their job classification is indicative of added supervisory responsibility. In fact, Ritchey testified before the reclassification he was a Custodian III, but afterward he is still performing the same job responsibilities, i.e. cleaning the Garvey Fine Arts Building and the President's residence.

Ritchey testified he does not hire, terminate, transfer, suspend, lay-off, recall, promote, discipline or adjust the grievances of employees. He can make suggestions but would not characterize the action as "*effectively recommending.*" The University produced no evidence to prove under normal policy and circumstances any recommendation made by Ritchey is adopted by higher authority without independent review or de novo consideration as a matter of course.

A review of the record leads to the conclusion that Lonnie Ritchey's minor supervisory authority over subordinate custodians is, like that of the Custodian III's discussed above, consistent

with and analogous to that of a leadman or straw boss. *See* Tucson Gas & Elect. Co., 100 LRRM 1489, 1496 (1979). While he possesses some attributes of power and independent judgment unlike subordinate custodians, and had greater responsibility and authority than those custodians, such is not sufficient to find him in possession of supervisory powers for the authority was exercised in a routine and clerical manner. *See* American Coach Co., 169 NLRB No. 153 (1968); Welch Farms Ice Cream, Inc., 161 NLRB No. 167 (1966); Ross Porta-Plant, Inc. v. NLRB, 404 F.2d 1180 (CA5 1968); Leland Stanford, Jr. University Employer and I.A.F.F Local 1-12, 194 NLRB 121 (1971). His leadership role appears to rest on his skill and experience rather than on a need for him to be in that position to carry out the University's labor policy. *cf.* NLRB v. Detroit Edison Co., 537 F.2d 239 (CA 6, 1976). Lonnie Ritchey will not be excluded from the unit as a supervisor.

David Greene works by himself. No other employees work under his direction. He does not evaluate any employees and does no hiring. Greene does not consider himself a supervisor. The only basis for the University's position that he is a supervisor appears to be the fact that he occasionally substitutes for Custodian III's in their absence.

[10] The test for determining whether a unit should include employees who substitute for supervisors is whether such part-time supervisors spend a 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). The University has failed to produce evidence on the frequency or regularity with which Greene substitutes for Custodian III's. Accordingly, no determination can be made that such substitution is to be considered so regular or substantial as to require exclusion of Greene from the bargaining unit as a *"supervisor."* Additionally, since it has been determined that all Custodian III's in the Custodial Services department for whom Greene would substitute do not qualify as supervisors, when Greene temporarily assumes their duties, he would likewise not qualify as a supervisor. David Greene will not be excluded from the bargaining unit as a supervisory.

Shop Mechanic II - Supervisory Authority

Don Parscal is a Shop Mechanic II at Washburn. Hal Kemmel, the Assistant Director of the Physical Plant, relies upon Parscal to take care of the maintenance shop. The Position Description for Shop Mechanic II indicates he directly supervises Shop Mechanic I's. His duties include training, assigning, scheduling, overseeing and reviewing their work. Parscal interviews applicants

for Shop Mechanic I, and makes hiring recommendations which are heavily relied upon by Kimmel. Kemmel similarly relies heavily upon a recommendation from Parscal to terminate an employee. Parscal is also authorized to have the Shop Mechanic I work overtime on an as-needed basis. Finally, Parscal evaluates the employees he supervises.

As with Harold Barnhill, this is a close call but the evidence supports the conclusion that Parscal is a supervisor. The record shows that he has greater responsibility relative to direction of subordinate employees, and that the University, through Hal Kemmel, places great reliance upon Parscal's operation of the maintenance shop and his supervision of subordinate employees. Certainly, Kemmel appears to rely heavily upon Parscal and Parscal's personnel recommendations. It should be further noted that the Union did not offer testimony to refute the University's evidence nor did Parscal testify in his own behalf. Like Barnhill, Parscal's position appears more analogous to that of a foreman rather than leadman or straw boss. The position of Shop Mechanic II will be excluded from the proposed bargaining unit.

Community of Interest

The University further opposes the inclusion of the Custodian Supervisor I position in the proposed bargaining unit on the basis of lack of a community of interest with the other employees

stipulated to be in the unit. 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 PEERA. 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 PERB be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be an appropriate unit. Teamsters Local Union #955 v. Wyandotte County, Kansas, Case No. 75-UDC-3-1992 (September 3, 1993); *See also* 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).[9] Because of the number of factual considerations that must be taken into account in deciding upon an appropriate bargaining unit, the PERB has not

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

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 furthers supplemented by K.A.R. 84-2-6(a)(2):

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

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-hoc 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).

[11] 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."* Commonly referred to as the community of interests doctrine, it stands for the proposition that in making a unit determination, PERB will weigh the similarities and differences with respect to wages, hours and other conditions of employment among the members of the proposed unit, rather than relying solely on traditional job classifications.[10] *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 Board 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

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

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 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.

Lonnie Ritchey and David Greene are generally performing custodial related duties. The University proffered no evidence to show a practice of administration dealing with the Custodian Supervisor I's 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 set forth in the university policy and procedures handbook, (Exhibit OO), (e.g. procedures for discipline, grievance processing, hiring). The employees all work in the same

geographical area, i.e. the Washburn University campus. 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 Custodian Supervisor I's and the other employees in the proposed unit. Moreover, the foregoing evidence indicates that these employees share similar job responsibilities, as well as 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 custodian unit proposed by the Union. See Keokuck, supra. The inclusion of this position also serves to limit proliferation and fragmentation of bargaining units. Accordingly, it is determined that inclusion of Custodian Supervisor I's in the custodial unit is appropriate.

ORDER

IT IS THEREFORE ADJUDGED, that Custodian III's Jim Bullocks, Mike Boose, Earl Jackson, Kelvin Cameron, Don Fry, Robert Henderson, and Rosa Ransom should not be excluded from the proposed bargaining unit as supervisors pursuant to K.S.A. 75-4322(b).

IT IS FURTHER ADJUDGED, that the position of Custodian Supervisor I shares a community of interest with the employees stipulated for inclusion in the custodial bargaining unit, and that the inclusion of that position in the unit is appropriate.

IT IS FURTHER ADJUDGED, that Custodian Supervisors Lonnie Ritchey and David Greene should not be excluded from the proposed bargaining unit as supervisors pursuant to K.S.A. 75-4322(b).

IT IS FURTHER ADJUDGED, that Custodian III Harold Barnhill and Shop Mechanic II Don Parscal should be excluded from the proposed bargaining unit as supervisors pursuant to K.S.A. 75-4322(b).

IT IS THEREFORE ORDERED, that the appropriate custodial bargaining unit shall be composed as follows:

INCLUDE:
Automobile Driver
Carpenter
Custodian I, II, and III
Electrician
HVAC Mechanic
Laborer I and II
Painter I and II
Plant Op./Dispatcher
Plumber
Shop Mechanic I

EXCLUDE:
Security Guards
Chief of Grounds Keeping Services
Custodian Supervisor II
Shop Mechanic II
Supervisory, Confidential and Professional employees in the included positions
Temporary and part-time employees in the included positions.

Dated this 16th day of September, 1994.

Monty R. Bertelli

Monty R. Bertelli, Presiding Officer
Labor Conciliator III
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 Employer-Employee Relations Board, either on its own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on October 4, 1994 addressed to: Public Employee Relations Board, Employment Standards and Labor Relations, 512 West 6th Avenue, Topeka, Kansas 66603.

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 16th day of September, 1994, a true and correct copy of the above and foregoing Initial Order was served upon each of he 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:

James A. Pope
United Rubber Workers International Representative
Northwest Second Street
Melcher, Iowa 50163

Arthur E. Palmer, Attorney
Goodell, Stratton, Edmonds & Palmer
515 South Kansas Avenue
Topeka, Kansas 66603

And to the members of the PERB.

Sharon Tunstall

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
FOURTH DIVISION

WASHBURN UNIVERSITY OF TOPEKA,

Petitioner,

v.

THE PUBLIC EMPLOYEE RELATIONS BOARD OF THE KANSAS DEPARTMENT OF HUMAN RESOURCES,

Respondent,

and

UNITED RUBBER WORKERS LOCAL UNION No. 851,

Intervenor.

Case No. 94-CV-1287

75-UDC-3-1994

JOURNAL ENTRY OF JUDGMENT

NOW on this 2nd day of Dec., 1996, this matter comes on for hearing on the joint motion of Petitioner and the Union for approval of a compromise settlement of the issues. The Petitioner Washburn University of Topeka appears by Arthur E. Palmer and Marta Fisher Linenberger of Goodell, Stratton, Edmonds & Palmer, L.L.P., its attorneys. The Intervenor appears by Carolyn T. Wonders, Assistant General Counsel, and Charles Schwartz of Blake & Uhlig, P.A., its attorneys. Respondent Kansas Department of Human Resources appears by Don Doesken, staff attorney. There are no other appearances.

Thereupon the Petitioner and Union stipulate and agree that the Court should enter judgment herein as follows:

"The October 19, 1994, Order of the Public Employee Relations Board is modified by modifying the Initial Order dated September 16, 1994, to provide that the following positions shall be included in the bargaining unit:

Automotive Driver;
Carpenter;
Custodial Worker;
Custodial Crew Leader;
Electrician;
Mechanic (HVAC);
Laborer I & II;
Painter I & II;
Plumber;
Shop Mechanic I;
Storekeeper; and
Plant Operator/Mechanic;

The following positions shall be excluded from the bargaining unit:

Security guards;
Chief of Groundskeeping Services;
Custodial Supervisor;
Shop Mechanic II;
Supervisory and confidential employees; and
Temporary and part-time employees in the included positions.

Except as herein expressly modified, the Order is affirmed".

After hearing the stipulation of the parties and being fully advised the Court approves and accepts the stipulation.

IT IS THEREFORE ORDERED AND ADJUDGED that the Order of the Public Employee Relations Board as set forth in the Initial Order of September 16, 1994, is modified in part and affirmed in part as herein stipulated.

/s/ Eric S. Rosen

The Honorable Eric S. Rosen
Judge of the District Court

APPROVED AND STIPULATED:

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