BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
STATE OF KANSAS

TEAMSTERS UNION LOCAL 795, Petitioner, vs. CITY OF WICHITA, KANSAS (Wichita Airport Authority), Respondents.	)	Case No. 75-UDC-1-1992

INITIAL ORDER

ON the 18th, 19th and 20th day of February, 1992, the above-captioned matter came on for formal hearing pursuant to K.S.A. 75-4327(e) and K.S.A. 77-523 before presiding officer Monty R. Bertelli.

APPEARANCES

PETITIONER: Appeared by Richard D. Cordry; CORDRY, HUND & HARTMAN; Suite 145; 727 N. Waco; Wichita, Kansas 67201-7528.

RESPONDENT: Appeared by Stanley W. Churchill and Robert Dean Overman; MARTIN, CHURCHILL, OVERMAN, HILL & COLE; 500 N. Market Street; Wichita, Kansas 67214,
and
Joel Allen Lang; Acting City Attorney; CITY ATTORNEY'S OFFICE; 13th Floor; 455 N. Main; Wichita, Kansas 67202.

ISSUE PRESENTED FOR REVIEW

WHETHER THE WICHITA AIRPORT AUTHORITY IS A SEPARATE AND DISTINCT "PUBLIC AGENCY OR PUBLIC EMPLOYER" AS DEFINED BY K.S.A. 75-4332(f) REQUIRING AN AFFIRMATIVE VOTE TO BRING SUCH PUBLIC AGENCY UNDER THE PROVISIONS OF THE PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT PURSUANT TO K.S.A. 75-4321(c), OR SIMPLY A SUBDIVISION OF THE CITY OF WICHITA, KANSAS?

75-UDC-1-1992-D

SYLLABUS

1. ***UNIT DETERMINIATION*** *- Who Is An Employer - Joint employers.* Where two public agencies are identified as potential employers for purposes of PEERA unit determination petitions, a determination must be made as to which of two, or whether both, employers control the labor relations of the given group of employees.

2. ***UNIT DETERMINATION*** *- Who Is An Employer - Joint employers*. Where the evidence shows that seperate public agencies share or co-determine matters governing mandatorily negotiable terms and conditions of employment, they can be considered to constitute *"joint employers"* for application of the Kansas Public Employer-Employee Relations Act.

3. ***UNIT DETERMINATION*** *- Who is An Employer - Joint employers - Factors to be considered in making determination*. The facts to be considered in determining whether a public agency may be considered a joint employer of another public agencies employees, include whether that public agency has authority to hire and discharge those employees, to fix their compensation and fringe benefits, to adopt personnel rules and regulations affecting those employees, to tax and raise funds, and to approve the second public agency's budget and grant funding. The critical factor is the control which one public agency exercises over the labor relations of the other. Actual control is not necessary.

4. ***UNIT DETERMINATION*** *- Who is An Employer - Joint employers - Application of K.S.A. 75-4321(c) exemption - Test*. In joint employer situations where one joint employer is covered by PEERA and the other has not opted to be so covered, the test to be employed to determine whether PERB has jurisdiction is to look to the "degree of control" the covered joint employer exercises over the employees' terms and conditions of employment. If the covered employer assumes the dominate role in matters of labor relations, so as to be capable of effective bargaining with the employees' certified representatiave, PERB may assert jurisdiction.

FINDINGS OF FACT[1]

I. The Parties

1. Petitioner, the Teamsters Union Local 795, ("Teamsters") is an *"employee organization"* as defined by K.S.A 75-4322(i), and is seeking to become the exclusive bargaining representative, as defined by K.S.A. 75-4322(j), for all full and part-time Police, Fire/Safety Officers rank of Captain and below ("Safety Officers") employed by Respondent, Wichita Airport Authority ("Airport"), for the purpose of meeting and confering with the Respondent pursuant to the KansasPublic Employer-Employee Relations Act, with respect to conditions of employment as defined by the K.S.A. 75-4322(t).

2. Respondent, City of Wichita, Kansas ("City"), is a *"public agency or employer"*, as defined by K.S.A. 75-4322(f), which has elected to come under the provisions of the Public Employer-Employee Relations Act pursuant to K.S.A. 75-4321(c). Respondent is a municipality organized pursuant to the laws of the State of Kansas and is classified under those laws as a city of the first class. (Ex. B, Tr.p. 308).

3. Respondent, Wichita Airport Authority ("Aiport Authority"), is a *"public agency or employer"*, as defined by K.S.A. 75-4322(f), which has not elected to come under the provisions of the Public Employer-Employee Relations Act pursuant to K.S.A. 75-4321(c). Respondent was created by City ordidance on September 5, 1975 pursuant to K.S.A. 3-162 et seq. to administer and operate the Wichita Mid-Continent Airport (Ex. D, E, Tr.p. 435).

II. The Witnesses

4. Rodney J. Baker is a Safety Officer Supervisor of the Airport Safety Division at the Wichita Mid-Continent Airport. He has been employed by the Airport Authority for 18½ years, and presently supervises the Safety Officers. (Tr.p. 17).

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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. 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."

5. John Brierly is the outgoing Chief of Airport Safety of the Safety Division at the Wichita Mid-Continent Airport. He has served as Chief since August, 1982. (Tr.p. 135).

6. Gary Sherrer is Senior Vice President for Fourth Financial Corporation, the holding company for the Bank IV system. He has been a member of the Wichita Airport Authority Since 1985, and is presently serving as its President. (Tr.p. 178-79, 221).

7. Guy McCormick is a Senior Personnel Technician in the Personnel Division of the City of Wichita. He has been in that position since 1982. (Tr.p. 232-33).

8. Chris Cherches is City Manager of the City of Wichita, having served in that position for 5½ years. (Tr.p. 271).

9. Bailis F. Bell is Director of Airports, having served in that position since 1984. He was the Airport Manager from 1975 to 1984. (Tr.p. 360).

10. Paul Moore has been a Safety Officer for approximately 1½ years. Before transferring to the Airport Authority he served as a police officer with the City of Wichita for approximately 8½ years. (Tr.p. 487).

11. Kelly Ann Carpenter is controller and acting assistant Director of Finance for the City of Wichita. She has been with the City for 14 years. (Tr.p. 511-12).

12. James Kilpatrick is a Safety Officer Supervisor, employed by the Airport Authority for 18½ years. (Tr.p. 550).

13. Gary E. Bauer is the incoming Chief of the Safety Division of the Safety Division at the Wichita Mid-Continent Airport. (Tr.p. 618).

14. Dwight W. Greenlee is the Director of Airport Administration, having been employed by the Airport Authority for approximately 20 years. (Tr.p. 663).

III. The Airport Authority

15. The Wichita Mid-Continent Airport was originally a component of the Park Commission of the City of Wichita. (Tr.p. 72, 308).

16. On September 5, 1975, pursuant to K.S.A. 3-162, the City established the Wichita Airport Authority by resolutions. K.S.A. 3-162 provides that "The governing body of any city having a population of more than 250,000 may establish, by ordinance, an airport authority." (Ex. D, E-1, E-2).

17. The Airport Authority holds the position of an "administrative Board" created by the City. Administrative boards carry out their own policy formulation and administration separate from other City operation for which the City Manager is the administrative authority. (Tr.p. 319).

18. Other administrative boards have included Board of Park Commissioners, Library Board, Art Museum and Metropolitan Transit Authority. The Park Board, pursuant to ordinance in 1990, is no longer an administrative board but is under the management of the City Manager. The City Commission could likewise abolish the Airport Authority. (Tr.p. 318, 357).

19. Based upon its interpretation of the City resolutions establishing the Airport Authority, it is the position of the City that the Airport Authority has the ultimate authority to control; to operate and manage the Wichita Mid-Continent Airport; to make bylaws, rules and regulations for transaction of Airport Authority business; to enter into contracts; to employ and discharge agents, consultants and employees; to fix duties and compensation for its employees; to create and appoint a safety force. These duties are exercised by the Airport Director. (Ex. 6, Tr.p. 315-17).

20. The Airport Authority administrative board is composed of nine members. Seven members of the Airport Authority are appointed by the Board of City Commissioners and two members appointed by the Sedwick County Commission for a term of four years, but each can be removed by the appointing authority at any time. (EX. D, F, G, Tr.p. 178-80).

21. The Airport Authority is responsible for the policy and the direction and operation of both the Wichita Mid-Continent Airport and the Colonel James Jabara Airport. The Airport

Authority meets two times a month. The day-to-day operation of the Airport Authority is the responsibility of the Airport Director and his staff. (Tr. p. 180-81).

22. The City does not participate in the day-to-day supervision of the employees of the Airport Authority. (Tr.p. 414).

23. The City does not participate in the direction of the day-to-day functions of the Wichita Mid-Continental Airport. (Tr.p. 420).

24. The Airport Authority owns approximately 4200 acres of property in its own name. (Tr.p. 408, 411).

25. The Airport Authority has its own administrative office separate from City Hall (Tr.p. 316).

26. The Airport Authority can be and is sued in its own name and can sue in its own name (Tr.p. 419), and carries its own liability insurance. (Tr.p. 441).

27. The Airport Authority is self funded. The primary sources of funds to operate the airports are user fees, leases and some federal grants, but no state, county or city monies are received. (Tr.p. 192, 411-12), and no taxes are levied to support its operations. (Tr.p. 166).

28. The full faith, credit and resources of the City have, in the past, been pledged for payment of existing General Obligation bonds of the Airport Authority. Should net income and revenues from the operation of the Wichita Mid-Continent Airport be insufficient to meet the bond obligations, the City would be required to levy and collect the necessary taxes to pay the principal and interest due on those bonds. (Ex. 1, Tr.p. 196-97). The City, by resolution, has determined not to guarantee future issues of Airport Authority General Obligation bonds. (Tr.p. 215).

29. Funds received from airport operations and federal grants are kept in the same accounts as the City's, but are kept seperate by accounting ledgers. (Tr.p. 369). The City cannot spend Airport Authority funds, and the Airport Authority receives the interest earned on monies deposited into City accounts. (Tr.p. 207, 424). The Federal Aviation Administration requires funds generated by the Airport Authority be spent only on airport operations. (Tr.p. 166, 207, 432).

30. To insure there are no idle funds, the Airport Authority has directed that certain short-term investments are to be made on a pooled cash basis with other funds of the City. (Ex. 1, Tr.p. 182, 207).

IV. Safety Officers

31. Safety Officers of the Airport Authority were notified on November 7, 1975 that effective November 1, 1975 they were members of a *"Safety Force, the members of which shall be appointed by the Airport Authority of the City of Wichita, Kansas."* (Ex. 19, Tr.p. 72).

32. There are approximately 27-30 Safety Officers employed by the Airport Authority. (Tr.p. 19, 409).

33. According to the City of Wichita organization chart, the Wichita Airport Authority has three divisions or departments; Finance, Operations and Maintenance, and Engineering. (Ex. 32).

34. Safety Officers are assigned to the Safety Division of the Operations and Mainenance Department of the Airport Authority. They are trained as police officers and firefighters, and also have first responder qualifications to handle medical emergencies at the airport. (Ex. 32, Tr.p. 18).

35. The Wichita Airport Authority pays for fire and police training received by the Safety Officers. (Tr.p. 103).

36. The City Administrative Personnel Policy and Procedure Manual contains job descriptions for Safety Officer I, Safety Officer II, Assistant Chief, Airport Safety, and Chief, Airport Safety. (Ex. 41, Tr.p. 51) The major responsibilities of the position of Safety Officer include:
    a. May ensure that public areas are properly lighted.
    b. May ensure that all hanger, runway, taxiway, and navaid lights are working properly.
    c. Controls cases of disturbance or public nuisance, requesting assistance when needed.
    d. Enforces traffic ordinances and provides police response to the passenger screening process.
    e. Keeps unauthorized persons out of restricted areas.
    f. Provides information to passengers and the public as needed.

g. May respond to aircraft emergencies and structural fires.
h. May assist in rescue/extinguishment related to aircraft.
i. May assist in fire prevention work by inspecting airport facilities. (Ex. 41).

37. Safety Officers prepare non-criminal Airport Safety Division incident reports, which are internal reports that stay at the airport. (Tr.p. 100-01).

38. The Airport Authority sets the hours of work for its employees. (Tr.p. 531-32, 645).

39. The command structure of the Safety Division does not include anyone outside the Airport Authority (Tr.p. 621). However, the organizational chart of the City of Wichita shows the Airport Authority under and reportable to the City Council. (Ex. 32).

V. Policy 8

40. In one form or another, since establishing the Airport Authority, the City has had in force a "Policy 8." Apparently the last *"Policy 8"* was adopted by the City Commission on January 8, 1982, which provided, in pertinent parts:

> *"(1) All councils, boards and commissions* ***shall*** *operate under bylaws approved by the Board of City Commissioners. Prototype bylaws will be provided to each board upon which to base its bylaws.*
>
> *"(2) All councils, boards and commissions having an annual budget will have it approved by the Board of City Commissioners. . . . Budget adjustments . . . in excess of $10,000.00 will be approved by the Board of City Commissioners.*
>
> *"(3) All employee positions and salaries utilized by councils, boards and commissions . . . will be established by resolution of the respective councils, boards and commissions and approved*

by the Board of City Commissioners and will be eligible to enjoy all benefits as governed by the personnel procedures as established in the "City of Wichita Administrative Personnel Policy and Procedure Manual.

* * * * *

"(5) All employees of councils, boards and commissions . . . will be included in the employees' retirement program.

"(6) All existing applicable Administrative Regulations issued by the City Manager, as shown in the attachments to this policy, will be complied with by the respective councils, boards and commissions. . . .

"(7) All purchasing, accounting, treasury services, investments, payroll, personnel recruitment and records, and budget administration will be provided by the City Manager and the Department of Administration for all councils, boards and commissions unless specifically exempted and upon appeal to and approval by the City Commission. Appropriate charges may be made for the services provided.

"Administrative Coordination

"Administrative Regulation 13 provides detailed and additional procedures for implementation of this policy." (Emphasis added). (Ex. R).

41. According to City Manager Cherches the use of the word *"shall"* in Policy 8 means that the councils, boards and commissions *"really don't have an option"* but to do as Policy 8 requires. (Tr.p. 338).

VI. Airport Authority Implementation of "Policy 8"

42. Minutes of the Wichita Airport Authority for June 7, 1976 indicate adoption of a resolution implementing *"City of Wichita Policy No. 8 dated August 28, 1975, entitled 'Rules and Regulations for Appointive Boards and Commissions,'"*

obviously the forerunner of the Policy No. 8 adopted January 8, 1982. That resolution provided, in pertinent part:

> *"Section 1. The Wichita Airport Authority hereby agrees to operate under bylaws approved by the Board of City Commissioners.*
>
> *"Section 2. The Wichita Airport Authority hereby agrees to submit its annual budget to the Board of City Commissioners for review and approval.*
>
> *"Section 3. . . . All corresponding employee positions and salaries utilized by the Airport Authority will be established in accordance with employee positions and salaries established by City Ordinance. All employees will be eligible to enjoy all benefits available to City employees and the employees of the Airport Authority shall be governed by the Uniform Personnel Policies and Procedures as adopted by the City of Wichita.*
>
> * * * * *
>
> *"Section 5. All employees of the Airport Authority will be included in the Employees' Retirement Program of the City of Wichita, unless specifically excluded by Ordinance.*
>
> *"Section 6. All applicable Administrative Regulations and Administrative Policies of the City of Wichita will be complied with by the Airport Authority. . . .*
>
> *"Section 7. The Airport Authority will utilize the general services of the City of Wichita as outlined in Paragraph 7 of Policy No. 8 . . ."* (Ex. T, Tr.p. 363).

A. Positions

43. The Airport Authority is an *"appointing authority"* for purposes of filling vacant positions or creating new positions, and as such has final authority without the need to seek approval from the City Manager or Commission. (Tr.p. 254-55). It would also administer those personnel policies listed in the City's personnel manual which refer to administration

by the appointing authority. If no such provision appears in the policy, administration is reserved to the City Manager. (Tr.p. 256).

44. A person interested in applying for the position of Safety Officer must fill out an application for employment at the Office of Personnel at City Hall. (Tr.p. 18, 40, 73, 148, 241, 280, 362).

45. The Airport Authority uses the City employment application forms but could use their own form if so desired. McCormick admitted it would be clearer to a person applying for a position who the employer is if the Airport Authority's name appeared on the form. (Tr.p. 264).

46. The Personnel Division does the initial screening of applicants to establish minimum qualifications. (Tr.p. 246-47).

47. If a physical examination is required for the position, the applicant is sent to a doctor designated by the City. (Tr.p. 148).

48. The division heads at the Wichita Mid-Continent Airport routinely receive notices of position vacancies within the departments or divisions of the City of Wichita. An employee of the Airport Authority can request a transfer to fill such a city vacancy. (Ex. 14, Tr.p. 28-41).

49. Notices of vacancy announcing openings in positions at the Airport Authority are circulated to all City departments. (Tr.p. 487). According to McCormick, the Airport Authority, unlike other City departments, may create new positions without first seeking approval from the City because the Airport Authority is considered an *"appointing authority."* (Tr.p. 243).

B. Budget

50. The Airport Authority adopts an annual operating budget for the two airports. The budget is submitted to the City for approval and it appears in the "department" section of the "City of Wichita annual budget. According to the *"Budget Highlights"* section of the Airport Authority portion of the budget, page 223, the Airport Authority budget *"has not been*

reviewed under the guidelines or policies utilized for budget analysis of other City departmental budgets or operations." (Ex. L, Tr.p. 187-92, 209).

51. The Airport Authority President Sherrer believes the Authority has final authority over its budget and the City cannot change it. (Tr.p. 230), but according to City Manager Cherches, if the Board of City Commissioners does not agree with the budget adopted by the Airport Authority it can change it. (Tr.p. 342).

C. Salaries

52. The Airport Authority, by resolution, adopts a salary schedule for employees at the airports. The salary schedule is originally developed and adopted by the City, and appears in the City Administrative Personnel Policy and Procedure Manual. (Ex. 31). The 1992 Salary Schedule incorporated a cost of living adjustment approved by the City council for the City of Wichita, including the Airport Authority employees. Essentially the City establishes the salary schedule and the Airport Authority adopts it. There is no evidence that the Airport Authority ever adopted a different schedule. (Ex. M, Tr.p. 194-95). In fact, on at least one occassion the Airport Authority adopted the City approved salary schedule even thought the Airport Authority questioned whether it could affort the dictated 10% salary increases. (Tr.p. 395-96).

53. The City does not have a position of Safety Officer in its departments or divisions. The position is unique to the Airport Authority. The City, however, sets the salary for that position. (Tr.p. 466). The Safety Officers are paid in accordance with the salary schedule adopted by the City that Tr.p. 48-49). According to Airport Authority President Sherrer, it is done so the Airport Authority will remain competitive with other potential employers. (Tr.p. 227-29).

54. According to Airport Director Bell, the purpose of Policy 8 provision requiring all salaries established by the Airport Authority to be approved by the Board of City Commissioners was "*the [the City] didn't want the Wichita Airport Authority to pay equipment operators twice as much as City of Wichita equipment operators.*" (Tr.p. 395).

55. While the City prepares the Airport Authority payroll and issues the pay checks to Airport Authority employees the Airport Authority pays the City all costs associated with the Airport Authority salaries and benefits. (Tr.p. 277).

56. Final determination of who is going to be hired or fired rests with the Airport Director. (Tr.p. 281, 361, 414).

57. Performance Appraisal form for range 62 and above is provided by the City Office of Personnel to be used to evaluate Safety Officers. (Ex. 4, Tr.p. 20). The Airport Authority supervisory personnel conduct the evaluations, (Ex. 4), and it is the Airport Authority which makes the final determination whether a Safety Officer should receive a promotion. (Tr.p. 573). The Airport Authority can deny incremental or merit pay increases to Airport Authority employees, and can give non-scheduled merit increases. (Tr.p. 175-76, 644, 660).

D. Benefits

58. Well day pay, sick pay and vacation pay rates are established by, and accrued totals for each are computed and maintained by the City, and printed out on an Accrual Report for distribution to all City employees, including the Airport Authority, indicating they are *"Active Employees of the City of Wichita."* (Ex. 55).

59. Safety Officers fill out a form to report sick leave taken. The form is titled *"City of Wichita Sick Leave Report"* and is submitted to the City Office of Personnel. (Ex. 66, Tr.p. 67).

60. Safety Officers can participate in the Wichita Group Life Insurance Plan which the insurance booklet states is provided by the City for its employees. All questions concerning the insurance and completed application forms are directed to the City's Office of Personnel. (Ex. 60).

61. The City Personnel Department establishes the list of holidays which the City employees may take with pay. This list also applies to the Safety Officers at the Airport Authority. (Tr.p. 169-70).

62. The Airport Authority employees are included in and protected by the provisions of the City merit system. (Tr.p. 260).

63. On June 18, 1974 the City amended its merit system of personnel administration to create an *"Employees' Council"* to represent, among other employees, *"those employees of such boards of the city which have not elected to come under the Kansas Public Employer-Employee Relations law."* This council serves in an advisory role on personnel matters. The resolution established the composition of the board, how its members are selected and its powers and responsibilities. Such was done without the input or prior approval of the boards or employees affected. (Ex. C, Tr.p. 309-10).

E. Retirement

64. The Wichita Employees' Retirement System, Plan No. 1 booklet indicates employees eligible include those "who are regularly employed on a full-time basis by the City of Wichita, the Library Board, the Wichita Airport Authority, the Art Museum, the Administrative staff of the Metropolitan Transit Authority, and the employees under the City Manager. (Ex. 62, Tr.p. 87-88).

65. Included among the membership of the Retirement Board are seven members elected at large by all employees of:
    1). The Library Board
    2). The Park Board
    3). The Airport Authority
    4). The Art Museum
    5). The administrative staff of the Metropolitan Transit Authority
    6). The employees who serve under the City Manager

    There is nothing in the record to establish that the Library Board, Park Board or Art Museum are independent governmental agencies within the definition of the Public Employer-Employee Relations Act rather than a department or division of the City. (Ex. 8, Tr.p. 85-87).

66. Any questions by Airport Authority employees concerning retirement are referred to the City Office of Retirement and Insurance. The Airport Authority has no separate Retirement and Insurance division. (Ex. 8, Tr.p. 27-29).

F. Administrative Rules and Regulations

1. City Administrative Personnel Policy and Procedure Manual

67. Personnel matters affecting the Safety Officers are controlled by the City Administrative Personnel Policy and Procedure Manual. The Airport Authority does not have a personnel manual of its own. (Tr.p. 170).

68. Supervisors at the Airport Authority receive a *"Supervisor's Bulletin"* from the Office of the City Manager with information concerning personnel matters which *"is intended as a unilateral expression of the general policies, procedures and guidelines of the City's personnel program,"* and further that the *"City Manager reserves the right to change the provisions of personnel programs."* (Ex. 63).

69. There are separate rules and regulations for the Safety Division. Section C on page 8 of the rules and regulations sets forth discipline, ethics and conduct for the Safety Officers. The supervisor does not have to seek approval from the City Office of Personnel to enforce those rules and regulations. (Tr.p. 80). (Must conform to Policy Manual?) The Rules and Regulations were drafted by the Chief of Airport Safety Brierly. (Tr.p. 170-73).

70. The Safety Officers are required by the Safety Division Rules and Regulations to comply *"with the current residence requirements of the city of Wichita's Personnel Policy and Procedure Manual."* (Ex. H, Tr.p. 131-32).

2. Demeaning language policy

71. On April 10, 1984 the City, through the office of the City Manager, issued a *"Department Head Letter"* entitled *"Notice of City Policy Regarding Racially Demeaning Language."* It indicated that the policy of the City of Wichita was not to tolerate racially demeaning language, written or spoken. Further, the policy would be vigorously enforced, and any employee violating the policy would be *"promptly and severely disciplined."* The policy was read to all Safety Officers. (Ex. 12, Tr.p. 34-35).

72. A second *"Notice"* from the office of the City Manager concerning derogatory language, setting forth examples and a

disciplinary schedule, was also read to all Safety Officers. (Ex. 13, Tr.p. 36-37).

3. Grievances

73. The employees at the Wichita Mid-Continent Airport follow the procedures set forth in the City Administrative Personnel Policy and Procedure Manual for filing grievances. According to the Manual the final level of the grievance procedure is appeal to the City Manager. While no evidence was presented indicating a different procedure for Airport Authority employees, it would appear from past practice the final step in the grievance procedure for Airport Authority personnel would be an appeal to the Airport Director. (Tr.p. 169, 399).

G. USE OF GENERAL SERVICES

1. General Information

74. The City has a service pool from which services are provided by various city departments, such as purchasing, budget, legal and personnel, to other departments, divisions or administrative boards and commissions. An administrative charge or fee is determined by a Cost Allocation Plan for those services. Funds to pay the services are transferred between the accounts of the separate departments or boards to the City in the accounting records maintained by the City. (Ex. V, Tr.p. 516, 593-95, 695-97).

75. The Airport Authority paid to the City approximately $140,000.00 in 1991 for services used by the Airport Authority. These included legal services, payroll services, Board of Bids, and others. (Tr.p. 212). The Airport Authority believes it has the authority to obtain those services elsewhere should it so choose. (Tr.p. 434), although Policy 8 indicates to the contrary.

76. No other municipal governments contract with the City for similar services. (Tr.p. 262).

2. Purchasing

77. When the Airport Authority seeks to purchase items a request form is filled out and sent to the City Purchasing Department on a Purchase Requisition form supplied by the City. The

Purchasing Department sends back a Purchase Order indicating what has been purchased. (Ex. 6,64, Tr.p. 23-24).

78. The Purchase Requisition form contains the statement:

> *"Originating Department may suggest vendors and products, but purchasing manager reserves the right of final selection."*

The Purchasing Manager is employed by the City, and the City, through the Purchasing Manager, has the authority to override purchase requests of the Airport Authority. (Ex. 64, Tr.p. 110-11).

79. After a purchase request is completed and sent to the City Purchasing Agent, even though approved by the Airport Authority, the City can reject the purchase request. (Tr.p. 110, 652).

80. Equipment used by the Safety Officers, determined to be needed by the division director and purchased by the City, receive a City requisition number. (Ex. 22, Tr.p. 45-46).

81. The Airport Authority may use the City Board of Bids to solicit quotations for providing certain services or equipment at the airport. Other bids are handled by the Airport Authority. (Tr.p. 199-200, 214-15). Even though a bid is handled through the Board of Bids, the Airport Authority and not the City decides whether to accept the bid. (Tr.p. 213-14).

82. The Airport Authority sets the specifications on all large projects, sends them out for bid, and has final authority to go forward with the project without first seeking approval of the City. (Tr.p. 230).

83. The Airport Authority contracted for some $20 million dollars worth of goods and services in 1991. Only about $500,000 were purchased through the City Purchasing Department. (Tr.p. 415).

84. The official personnel files for employees of the Airport Authority are maintained at the City Office of Personnel, although all departments and administrative bodies such as the Airport Authority maintain routine personnel records also. (Tr.p. 264).

3. Travel

85. The Airport Authority uses the Travel Authorization and Expense Report form prepared and supplied by the City. (Ex. 16, Tr.p. 556-57). The Airport Authority, however, must approve the requested travel, and ultimately is responsible for payment of the associated expenses. (Tr.p. 218).

VII. SUMMARY ON VESTING

86. By adopting the resolution implementing Policy 8, (Ex. T), the Airport Authority vested the ultimate authority to accept or reject rules and regulations to the City, (Tr.p. 452); vested the ultimate authority to adopt or reject the Airport Authority budget to the City, (Tr.p. 452-53); and vested the ultimate authority to establish employee positions, salaries and benefits with the City, (Tr.p. 454-55).

VIII. SHARED ACTIVITIES

A. Transfers

87. If an employee of the Airport Authority wants to transfer to another position with a department or division of the City, the employee would fill out a City of Wichita Request for Transfer form, and if selected for the position can transfer. Upon transfer all vacation and sick leave accrued while working at the Airport Authority would transfer to the new position, and the same retirement and insurance benefits would continue. Likewise, City employees can transfer to the Airport Authority. (Ex. 68, Tr.p. 69, 71, 120, 148, 248, 487, 657).

88. It had been the policy that all requests for transfer had to be approved by the chain of command. The procedure was recently changed by the City Personnel Department to abolish this requirement. (Tr.p. 165, 248).

89. The transfer policy does not allow for to or from any other governmental entity. (Tr.p. 120-21).

B. Direct Deposit

90. Safety Officers can participate in a direct deposit plan for their pay checks. Those wishing to participate or to terminate participation must notify the City Office of Personnel. (Ex. 21, P.44).

C. Workers Compensation

91. The Airport Authority participates in a self-insured fund, administered by the City, for the purpose of providing workers compensation insurance. (Tr.p. 446).

92. Safety Officers injured while on duty must be taken to one of the authorized physicians designated by the City. (Ex. 29, 42, Tr.p. 47-48, 53-55). The procedures to be followed after an accident are set forth in the City Administrative Personnel Policy and Procedure Manual. (Tr.p. 512-13).

D. Excise Tax

93. The Airport Authority uses the same Federal Excise Tax number as the City. (Tr.p. 470).

E. Seniority

94. Years of employment with the Airport Authority are added to years of employment with other departments of the City to obtain the total years of service for purposes of seniority in case of layoff, service awards and vesting of benefits.

95. Paul Moore, a Safety Officer employed by the Airport Authority, received a letter from the City Office of Personnel stating in part:

> *"Congratulations! In a few months you will complete the ten years of career employment with the City of Wichita. To show our appreciation, we would like you to select an award so your dedication and efforts can be recognized.*

At the time, Moore had only been with the Airport Authority for 1½ years after serving 8½ years as a City employee. (Ex. 2, Tr.p. 487, 489).

96. The layoff procedures followed by the Airport Authority are established by the City and set forth in the City Administrative Personnel Policy and Procedure Manual. (Tr.p. 582). If a layoff occurs at the Airport Authority total service with the City as computed in Finding of Fact # 69 rather than years of service with the Airport Authority would be used to determine seniority for purposes of bumping. For example, if a safety officer had 10 years of service with the Airport Authority he could be bumped by another Safety Officer with only two years of employment with the Airport Authority but 10 years of additional employment with the City for a total service of 12 years. (Tr.p. 582-83).

F. Funds for Education

97. The Safety Officers can apply to the City for funding to pay the cost of educational courses that would assist them *"in preparing for jobs with more responsibility."* The Airport Authority does not have a similar program. (Ex. 49, p. 144-46).

IX. CITY REFERECNCES TO AIRPORT AUTHORITY EMPLOYEES

A. Employee Newsletter

98. Airport Authority employees receive a copy of the *"City News,"* the *"City of Wichita Employees Newsletter"* each pay period with their pay check. The newsletter is prepared by the City and contains information of interest to employees. (Ex. 37, Tr.p. 50). Safety Officer Baker's name has appeared in the *"City News"* as being a new City employee when he began work at the Airport Authority. (Tr.p. 126).

99. The December 27, 1991 issue of the City News listed City employees who received *"Service Awards"* for ten years of employment with the City. Three of the listed employees were employees of the Airport Authority. (Ex. 37).

100. A copy of the City News has a section discussing the City's 1992 Safety Program. Included in the article was the following statement:

> *"Listed below are the names and numbers of the* ***City's Safety Officers****. To find out more about the program just ask your safety officer:*
>
> * * * * *
>
> *"Airport Authority . . . . . .James Loomis"*

(emphasis added). (Ex. 60).

B. Training of Supervisors

101. Supervisors at the Wichita Mid-Continent Airport are required by the City to attend and complete an *"Effective Supervisory Class"* presented by the City. Upon completion the supervisor receives an ICMA certificate. Rodney Baker received a letter from City Manager Chris Cherches requesting he attend a City Commission meeting to receive his certificate. The letter states, in pertinent part:

> *"The type of training you recently completed is a great beginning in bringing excellence to City government and within your department. . . .*
>
> * * * * *
>
> *"Again, accept our congratulations in this personal achievement and for your interest in expanding your abilities to better serve your department and the City. We are proud of you."* (Ex. 44, Tr.p. 56-57, 123-24).

C. W-2 Forms

102. Safety Officers receive W-2 forms from the City of Wichita indicating the City of Wichita as the employer. (Ex. 9, 10, Tr.p. 490). These forms are prepared by the payroll department of the City. (Ex. 9, Tr.p. 114, 222-23, 490). Any Airport Authority desiring to make changes in the amount of their withholding taxes must contact the City Office of Personnel. (Tr.p. 29-30). The evidence indicated that when Pat Bolte, of the Airport Authority administrative office, was contacted concerning such matters she indicated a lack of knowledge on the subject and referred questions to the City Office of Personnel. (Tr.p. 89).

D. Employment Security Fund Contributions

103. All employers are required pursuant to K.S.A. 44-710(a) to contribute to the employment security fund for unemployment benefits. The Wichita Airport Authority as a governmental entity is required to report and make benefit cost payments based upon total wages paid during each calendar quarter, K.S.A. 44-710d(d) and 44-703(g) & (h).

104. The records of the Department of Human Resources reveal that the Airport Authority does not appear as an employer for purposes of contributions to the employment security fund.

105. Airport Authority Safety Officer Rodney J. Baker appears in the records of the Department of Human Resources, as reported by the City of Wichita, to be an employee of the City of Wichita.

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE

WHETHER THE WICHITA AIRPORT AUTHORITY IS A SEPARATE AND DISTINCT "PUBLIC AGENCY OR PUBLIC EMPLOYER" AS DEFINED BY K.S.A. 75-4332(f) REQUIRING AN AFFIRMATIVE VOTE TO BRING SUCH PUBLIC AGENCY UNDER THE PROVISIONS OF THE PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT PURSUANT TO K.S.A. 75-4321(c), OR SIMPLY A SUBDIVISION OF THE CITY OF WICHITA, KANSAS.

A. Applicable Law

The complexity of the jurisdictional issue makes it advisable to retrace the procedural history of the dispute as a preface to a discussion of the applicable law. Having the obligation to make a determination on the record as a whole, the facts presented are

gleaned from the dispute here involved, first from the point of view of Teamsters and then from that of the City.

Teamsters Union Local 795 petitioned the Board for a unit determination and election to ascertain its status as exclusive bargaining representative of Wichita Airport Authority Safety Officers working at the Wichita Mid-Continent Airport. The Teamsters named the City of Wichita as the employer of the Safety Officers.

The City opposed the petition on the grounds that the Wichita Airport Authority, and not the City, is the employer of the Safety Officers. It further asserted the Airport Authority is a separate and autonomous entity. Since the Authority has not voted to be covered by the Public Employer-Employee Relations Act ("PEERA")as required by K.S.A. 75-4321(c), the Public Employee Relations Board ("Board") is without jurisdiction to entertain the Teamster's petition.

The Teamsters maintain the Airport Authority is under the control of the City, much like a division or department of the City, and not a separate and autonomous entity. Therefore, the airport Safety Officers are employees of the City of Wichita, and as such, since the City has voted to be covered by PEERA, the Board

has jurisdiction over the petition. This is a case of first impression, and there is no Kansas precedent squarely on point.[2]

The parties, in their briefs, present the employment relationship issue involved here as being solely black or white; seperate entity vs. City division or department. Few if any of the facts are in dispute, but, of course, the parties differ markedly in their interpretation of the weight and significance to be given them. This is one of those cases where it is easy to agree with either party if only those facts are viewed which that party relies upon. While each can point to ample evidence to support their respective positions, it is that same evidence, when viewed as a whole, that colors the picture an indistinctive grey, requiring rejection of both party's arguments. Having in mind the judicial dictate that social legislation be construed "in light of the mischief to be corrected and the end to be attained, Deaton Trucklines, 53 LRRM 1497, 1599 (1963) citing Grey Van Lines, Inc. v. Harrison, 157 F.2d 412 (C.A. 7th), aff'd sub nom U.S. v. Silk,

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[2] Although PEERA is modeled on the NLRA, it is not identical in all aspects. Because there are differences between the two acts, the rationale of decisions under the federal law is applicable to cases arising under PEERA insofar as the provisions of the two acts are similar or the objectives to be attained are the same. Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991 (February 10, 1992); City of Junction City v. Junction City Police Officers Association, Case No. 75-CAEO-2-1992 (July 31, 1992); See Law Enf.Labor Serv. v. County of Mower, 469 N.W.2d 496, 501 (Minn. 1991). As the Kansas Supreme Court concluded in U.S.D. No. 279 v. Secretary of Kansas Dept. of Human Resources, 247 Kan. 519, 531 (1990), "[a]n examination of the federal Labor-Management Relations Act, 29 U.S.C. §§144-197 (1988), provides us with guidance' in interpreting Kansas labor relations statutes, citing National Education Association v. Board of Education, 212 Kan. 741, 749 (1973).

331 U.S. 704 (1947), a third alternative theory must be adopted -- joint employers.

"Joint employment" is a labor law concept which often finds application in bargaining unit determinations.[3] *See e.g.,* Boire

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[3] Early in its history the NLRB asserted its power to enter bargaining orders requiring independent employers to bargain jointly against their expressed wishes. In Waterfront Employers Ass'n of the Pacific Coast, 18 LRRM 1465 (1946), the NLRB said:

> "We concluded, therefore, that this Board is empowered by the Act to find multiple-employer units appropriate for the purposes of collective bargaining, and that we may properly exercise that power under the circumstances in this case. We are not persuaded otherwise by the fact that the companies and employer associations have indicated that they do not desire multiple-employer units. To hold in all cases, especially where the employers have themselves acted on a multiple-employer basis, that the Board is precluded in the face of employer opposition from finding a multiple-employer unit to be appropriate, is to permit the employers to shape the bargaining unit at will, notwithstanding the presence of compelling factors, including their own past conduct, decisively negating the position they have taken. Contrary to the mandate given the Board under the Act, such a holding would in effect vest in the hands of the employers rather than the Board the power to determine the appropriate unit for collective bargaining purposes."

The power of the Board in this field was considered by the Eighth Circuit:

> "Obviously all these provisions of the Act place a broad power of discretion, though not one that may be exercised arbitrarily, in the Board for the designation of an appropriate bargaining unit. In National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 58 S.Ct. 571, 572, 82 L.Ed. 831, 115 A.L.R. 307, 2 LRRM 599, three related corporations were involved. The two respondents claimed that the third corporation was the 'employer.' There was only one group of employees. The court said, 'Together, respondents act as employers of those employees . . . and together actively deal with labor relations of those employees.' In Consolidated Edison Co. v. Board, supra, [305 U.S. 197, 3 LRRM 645 (1938)] the order was directed at more than one legal entity. These entities consisted of the consolidated company and its affiliates, together constituting an integrated system. Each affiliated company was nevertheless a separate entity. It was not suggested in that case either by court or counsel that the fact that the employers were separate corporate entities was a fact affecting the jurisdiction of the Board. The inference to be drawn from theses decisions of the Supreme Court and form the language of the statute is that, within the meaning of the Act, whoever as or in the capacity of an employer controls the employer-employee relations in an integrated industry is the employer. So interpreted it can make no difference in determining what constitutes an appropriate unit for collective bargaining whether there be two employers of one group or employees or one employer of two groups of employees. Either situation having been established the question of appropriateness depends upon other factors such as unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations. There may be others; but, unless the finding of the Board is clearly arbitrary upon the point, the court is bound by its finding. In the present instance the conclusion of the Board appears reasonable rather than arbitrary, and its finding is sustained." NLRB v. Lund, 103 F.2d 815, 819 (8th Cir. 1939).
>
> We recognize that these cases are hardly similar to our instant facts, and that the Supreme court citation is at best dictum. But these cases (and those that follow) do illustrate the breadth of discretion which the Board has exercised with occasional express or tacit approval in appropriate bargaining unit proceedings.

v. Greyhound Corp., 376 U.S. 473 (1964); S.S. Kresge Co. v. NLRB, 416 F.2d 1225 (6th Cir. 1969); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 528-32 (9th Cir. 1968); County of Ulster v. CSEA Unit of the Ulster County Sheriff's Department, 326 N.Y.S.2d 706 (1971). As labor law has developed, largely in a Federal and private-sector context[4], the test for existence of joint employers has come to be defined as whether *"two or more employers exert significant control over the same employees - where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment."* National Labor Relations Board v. Browning-Ferris Industries of Pennsylvania, 691 F.2d 1117, 1124 (3rd Cir. 1982); Orenic v. Illinois St. Labor Rel. Bd., 127 Ill.2d 453, 474 (1989). Such a joint employer relationship exists when an employer exercises authority over employment conditions which are within the area of mandatory collective bargaining. Sun-Maid Growers of California v. NLRB, 618 F.2d 56, 57 (9th Cir. 1980). This situation must not be confused with the *"single employer"* concept.

The so called *"single employer"* and *"joint employer"* concepts both reflect a judgment that two or more nomally separate entities may properly be considered sufficiently integrated to warrant their

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[4] See footnote #2 above.

unitary treatment for various statutory purposes. However, the *"joint employer"* and *"single employer"* concepts are distinct. Admittedly, there has been a blurring of these concepts at times by some courts and by the National Labor Relations Board ("NLRB"). However, as the United States Supreme Court itself has recognized, the two concepts approach the issue *"who is the employer,"* from two different viewpoints. As such, different standards are required for each -- that enunciated in Radio Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965), to apply in the *"single employer"* context and that set out in Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964), to apply in the *"joint employer"* context.

A *"single employer"* relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a *"single employer."* The question in the *"single employer"* situation, is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise.

In answering questions of this type, one considers the four factors approved by the Radio Union court, 380 U.S. at 256: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. The *"single employer"* standard is relevant to the determination that *"separate corporations are not what they appear to be, that in*

truth they are but divisions or departments of a single enterprise." NLRB v. Deena Artware, Inc., 361 U.S. 398, 402 (1960). *"Single employer"* status ultimately depends on all the circumstances of the case and is characterized as an absence of an *"arm's length relationship found among unintegrated companies."* Local 627, International Union of Operating Engineers v. NLRB, 518 F.2d 1040, 1045-46 (1975); NLRB v. Browning Ferris Industries, 111 LRRM 2748, 2751-52 (3rd Cir. 1982).

In contrast, the *"joint employer"* concept does not depend upon the existence of a single integrated enterprise and therefore the above-mentioned four factor test is not pertinent. Rather, a finding that companies are *"joint employers"* assumes that companies are *"what they appear to be"* - independent legal entities that have merely *"historically chosen to handle jointly . . . important aspects of their employer-employee relationship."* NLRB v. Checker Cab Co., 367 F.2d 692, 698, (6th Cir. 1966).

[1] In *"joint employer"* situations, no finding of a lack of arm's length transaction or unity of control or ownership is required, as in the *"single employer"* cases. As the federal court in Browning Ferris Industries, 111 LRRM at 2752, concluded, *"[i]t is rather a matter of determining which of two, or whether both, respondents control, . . . the labor relations of a given group of workers."* The basis of the finding is simply that one employer

while contracting in good faith with an otherwise independent employer, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Walter B. Cooke, 111 LRRM 1152 (1982). Thus the *"joint employer"* concept recognizes that the business entities involved are in fact separate, but that they share or co-determine those matters governing the essential terms and conditions of employment. Browning Ferris Industries, 111 LRRM at 2752.

Thus *"joint employer"* relationships are found where, despite an absence of common ownership, one entity effectively and actively participates in the control of labor relations and working conditions of employees of the second entity. *See, e.g.*, Tranforan Park Food Purveyors Council v. NLRB, 656 F.2d 1358 (9th Cir. 1981) *enforcing in part and vacating in part* 100 LRRM 1100 (1978) (management company of restaurant complex at shopping center joint-employer of restaurant employees since it exercised authority over matters such as employee wage rates); Industrial Personnel Corp. v. NLRB, 657 F.2d 226 (8th Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (transportation company and tire manufacturer joint-employers of transportation company's employees where manufacturer controlled working conditions and day-to-day operations).

[2] While the Teamsters' arguments would support adoption of the *"single employer"* theory, the correct standard to apply to the

analysis of the facts of this case is the *"joint employer"* standard, i.e. two or more employers exerting significant control over the terms and conditions of the same employees. Where from the evidence it can be shown that two public agencies share or co-determine those matters governing essential terms and conditions of employment, they constitute *"joint employers"* for application of the Kansas Public Employer-Employee Relations Act.[5]

A variety of tests for determining whether an employer *"possessed sufficient control over the essential terms and conditions of employment of the employees to qualify as a joint employer."* The Eighth Circuit, for example, endorses the four factors set forth in Pulitzer Publishing Co. v. NLRB, 618 F.2d 1275, 1279 (1980). The Ninth Circuit concentrates on the degree of an employer's *"authority over employment conditions which are within the area of mandatory collective bargaining."* Sun-Maid Growers v. NLRB, 618 F.2d 56, 59 (1980). The D.C. Circuit has scrutinized *"the amount of actual and potential control . . . over*

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[5] See cf Boire v. Greyhound Corp., supra 376 U.S. at 481; Sheeran v. American Commercial Lines, Inc., 683 F.2d 970, 978 (6th Cir. 1982); North American Soccer League v. NLRB, 613 F.2d 1379, 1381-83 (5th Cir. 1980); Lutheran Welfare Services of Illinois v. NLRB, 607 F.2d 777, 778 (7th Cir. 1979); NLRB v. Jewell Smokeless Coal Corp., 435 F.2d 1270, 1271 (4th Cir. 1970); Ace-Alkine Freight Lines, Inc. v. NLRB, 431 F.2d 280, 282-83 (8th Cir. 1970); Ref-Chem Co. v. NLRB, 418 F.2d 127, 129 (5th Cir. 1969); S.S. Kresge Co. v. NLRB, 416 F.2d 1225, 1230-31 (6th Cir. 1969); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 530-31 (9th Cir. 1968); NLRB v. Greyhound Corp., 368 F.2d 778 (5th Cir. 1966); NLRB v. Checker Cab Co., 367 F.2d 692, 698 (6th Cir. 1967); NLRB v. Condenser Corp., 128 F.2d 67, 71-72 (3rd Cir. 1942); NLRB v. Lund, 103 F.2d 815, 819 (8th Cir. 1939); C.R. Adams Trucking Co., 110 LRRM 1381 (1982); Atwood Leasing Corp., 94 LRRM 1629 (1977); The Southland Corp., 67 LRRM 1582 (1968); and Frostco-Super Save Stores, Inc., 50 LRRM 1558 (1962).

the . . . employees." International Chemical Workers Union Local 483 v. NLRB, 561 F.2d 253, 255 (1977).

Other formulae are not lacking. The Fourth Circuit has posed the question as whether the employer *"possess[es] sufficient indicia of control over the work of the employees."* NLRB v. Jewell Smokeless Coal Corp., 435 F.2d 1270, 1271 (1970). The Third and Fifth Circuits look to whether the employer shared or co-determined matters governing the employee's essential terms and conditions of employment. NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1123 (3rd Cir. 1982); Ref-Chem Company v. NLRB, 418 F.2d 127, 129 (5th Cir. 1969). It is this latter test which appears the more appropriate for application to unit determination cases under PEERA.

[3] The facts to be considered in determining whether an entity is a joint employer, include whether that entity has authority to hire and discharge employees, to fix compensation and fringe benefits, to adopt personnel rules and regulations, to tax and raise funds, and to approve its budget and grant funding. County of Kane v. Illinois State Labor Relations Board, 518 N.E.2d 1339 (1988). The critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations of the other. Teamsters Local 610 v. NLRB, 104 LRRM 2965, 2967 (1980). Actual control is not

necessary. As stated in Southland Corp., 67 LRRM 1582, 1584 (1968):

> *"We have long held that the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other. It is immaterial whether this control be actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate. See Thriftown, Inc., 63 LRRM 1298 (1966)."*

The facts must be viewed on a case-by-case basis in order to determine whether there is joint employer status in any given situation. County of Will v. Illinois State Labor Relations Board, 219 Ill.App.3d 183, 186 (1991). Whether a public agency possesses sufficient indicia of control to qualify as a joint employer *"is essentially a factual issue . . ."* Boire v. Greyhound Corp., 376 U.S. 473 (1964).

B. Indicia of Control

1. Relationship of employers

The City urges application of the common law "right of control" test to determine if the Safety Officers of the Airport

Authority can be considered employees of the City.[6] When the question arose in the administration of the National Labor Relations Act, the United States Supreme Court in NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124 (1944), pointed out that the legal standards to fix responsibility for acts of servants, employees and agents had not been reduced to such certainty that it could be said there was *"some simple, uniform and easily applicable test."* The word *"employee,"* the Court stated, was not used in the NLRA as a word of art, and its meaning must be *"drawn from the history, tems and purposes of the legislation,"* i.e. in that context language is to be construed *"in light of the mischief to be corrected and the end to be attained."* The Court concluded that, since that end was the elimination of labor disputes and industrial strife, *"employees"* included workers who were such as a matter of economic reality. The aim of the NLRA was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. Accordingly, for purposes of that legislation, the

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[6] The Kansas Supreme Court in Atwell v. Maxwell Bridge Co., 196 Kan. 219, 224 (1966) explained the "right of control" test:

> "The general rule is that a master is a principle who employed another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. It is not the exercise of direction, supervision or control over a workman which determines whether he is a servant . . . but the right to exercise such direction, supervision or control."

See also Anderson v. Kingsley Sand and Gravel, 221 Kan. 191, 198 (1976) (control test dependent on right to direct employee).

common law definition of employees would not be appropriate, and a broader definition would be applied to carry out the purpose of the NLRA.[7] The reasoning of the United States Supreme Court is pursuasive, and given the premise that labor relations acts are remedial enactments and as such should be liberally construed in order to accomplish their objectives[8], should be adopted for the sole purpose of interpreting the requirements of PEERA.

2. Retained Control

The record clearly demonstrates that the City effectively and actively participates in the control of labor relations and working conditions of employees at the Airport Authority. The City, through Policy 8, reserved to itself the authority to approve the By-laws of the Airport Authority (Finding of Fact #40); to approve and change the proposed budget of the Airport Authority (Finding of Fact #40, 50, 51, 86); to establish position descriptions,

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[7] Following the Hearst Publications decision the 80th Congress overruled the Court and its broad definition of "employee" by amending 29 USCA, §152(3). See H.R.Rep. No. 245, 8th Cong., 1st Sess. at 18, (1947) for an explaination of the reason for the change in the NLRA.

[8] In City of Junction City v. Junction City Police Association, Case no. 75-CAEO-2-1992, p.30 (July 31, 1992) it was stated PEERA was designed to accomplish the statutory purpose of promoting harmony between public employers and their employees. The basic theme of this type of legislation "was that through collective bargaining the passions, arguments and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." H.K. Porter Co. Inc. v. N.L.R.B., 397 U.S. 99, 103 (1969); West Hartford Education Ass'n v. DeCourcy, 295 A.2d 526 (Conn. 1972). The duty to meet and confer in good faith takes on more important dimensions in the public sector because employees or government are denied the right to strike. City of New Haven v. Conn.St.Bd. of Labor, 410 A.2d 140, 143 (Conn. 1979). "Labor relations acts are remedial enactments and as such should be liberally construed in order to accomplish their objectives . . . ". Connecticut State Board of Labor Relations v. Board of Education of the Town of West Hartford, 411 A.2d 28, 31 (Conn. 1979).

positions and salaries for employees at the Airport Authority (Finding of Fact #40, 52-57, 86); to require inclusion of the Airport Authority employees in the Wichita Employees' Retirement System (Finding of Fact #40, 64-66); to require adherence by the Airport Authority to Administrative Regulations (Finding of Fact #40, 67-70,86); to set personnel policy through the Airport Authority use of the City Administrative Personnel Policy and Procedure Manual, for example the grievance procedure and the lay-off procedures. (Finding of Fact #40, 67, 68, 73, 87, 94-96); and to set benefits to be received by the Airport Authoties by tying them to the benefits received by City employees, e.g. paid holidays, computation of sick leave, vaction leave and well days. (Finding of Fact #40, 58-63).

Additional indicia of control by the City of labor relations matters can be found in the Aiport Authorities inclusion in the self-insured fund administered by the City for purposes of providing Workers Compensation protection for which the City establishes procedures to be followed following an injury and the approved physicans, (Finding of Fact # 91, 92); Airport Authority employees are protected by the Wichita merit system and are represented on an Employees' Council established by the City. (Finding of Fact #63); and the ability of Airport Authority employees to transfer to City positions without prior approval of

the Airport Authority, without loss of benefits, have their years of service calculated to include Airport Authority and City employment to determine seniority, vesting, and qualification for awards. (Finding of Fact #87-89, 91-96).

The authority of the City to appoint and remove a majority of the members of the Airport Authority is of special significance. (Finding of Fact #18, 20). According to the Illinois appelate court in County of Will v. ISLRB, 219 Ill.App.3d 183, 186 (1991), evidence establishing a joint employer relationship between the County of Will and the Will County Board of Health, includes the indirect authority the county executive and the county board exercise over the Board of Health by virtue of their appointment and removal authority. This reaffirmed its decision in Rockford v. Ill. State Labor Relations Bd., 158 Ill.App.3rd 166 (1987), in which the Illinois State Labor Relations Board was asked to determine the appropriate bargaining unit for purposes of conducting a representation election under the Illinois Public Labor Relations Act. According to the appellate court:

> *"Moveover, we find it significant to the determination . . . that the library's board of trustees, which has the final approval of who is hired and discharged and total discretion over an employee's hours, wages, and working conditions, is appointed by, and also removed by, the mayor with the approval of the city council. As the library board possesses authority over the terms and conditions of employment and the city determines who is to be on that board, we are of the opinion that the city*

> *also possesses the authority, albeit indirectly, to affect those terms and conditions."* Id. at 173.

On the totality of the evidence in this case it would appear the Airport Authority and the City have *"historically chosen to handle jointly . . . important aspects of their employer-employee relationship."* Checker Cab Co., 367 F.2d at 698, and the City must be considered a joint employer with the Airport Authority of the Safety Officers for purposes of PEERA. Of special significance is the City's demonstrated authority to determine labor relations policies and terms and conditions of employment of the Airport Authority personnel. *See* Rockford v. Ill. State Labor Relations Bd., 158 Ill.App.3rd 166 (1987)[9]; S.S. Kresge Company v. NLRB, 416

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[9] The facts in this case are similar to those in Rockford v. Ill. State Labor Relations Bd., 158 Ill.App.3rd 166 (1987), the Illinois State Labor Relations Board was asked to determine the appropriate bargaining unit for purposes of conducting a representation election under the Illinois Public Labor Relations Act. The American Federation of State, County and Municipal Employees (AFSCME) filed a petition for representation-certification seeking to determine whether AFSCME should be certified as the exclusive collective-bargaining agent for the employees of the City of Rockford Public Library. The petition named only the library board as the employer of the employees sought to be represented. The main issue raised in the case was whether the City of Rockford and the Public Library were joint employers of the library employees.

The library was created by municipal ordinance and is governed by a nine member board of trustees, all of whom are appointed by the mayor of Rockford and approved by the city council. The city and the library have the same fiscal year. The budget for the library is prepared and approved by the library board of trustees and then submitted to the city for final approval. The city provides accounting and payroll services to the library, and the library uses a voucher system for payment of bills. The library board approves expenditures through vouchers which are sent to the city finance department for payment. The library employees are paid from a library account on checks issued by the city bearing the signatures of the mayor and the comptroller.

Library and city employees are covered by the same health insurance program which was obtained by the city. Additionally, library and city employees are covered by the same pension plan which sends periodic statements of pension benefits earned to library employees showing the city as the employee.

The library permitted the city's personnel office to advertise for, and screen applicants for, library positions. Such an applicant applies at the city's personnel office where an initial interview takes place. If the applicant successfully completes the interview, he or she is referred to the library for further interviewing, with final approval of the applicant resting with the director of the library. The library board has exclusive authority to suspend, promote, lay off, discharge, evaluate and discipline library employees.

Although the library board may take title to property and purchase land and buildings for library purposes, it possesses no authority to issue revenue bonds.

The Illinois State Labor Relations Board issued an opinion finding the city and the library were joint employers.

F.2d 1225, 1228 (6th Cir. 1969)[10]; and NLRB v. Jewell Smokeless Coal Corp., 435 F.2d 1270, 1271 (4th Cir. 1970)[11]. Indeed, the breadth of the City's control over fundamental areas of mandatory collective bargaining makes the City's position as a joint employer emerge *a fortiori*[12] from Boire and Sun-Maid in which cases a determination of joint employment was made from lesser indicia of joint control.

C. The Application of the K.S.A. 75-4321(c) Exemption

[4] Having decided that the City of Wichita can be considered a *"joint employer"* of the Safety Officers at the Wichita airport, it must still be determined whether, as a joint employer, the City shares the Airport Authority's exemption from coverage by PEERA

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[10] The Regional Director issued his Decision, Order, and Direction of Election in which he decided that "although K-Mart exercises a general control over the operations of policies of its licensees, there is no common control over the labor relations of the latter. S.S. Kresge Company v. NLRB, 416 F.2d 1225, 1228 (1969). Accordingly, the Regional Director concluded that Kresge and its licensees were not joint-employees of the employees in the licensed departments.

The Board reversed the findings of the Regional Director. It found that under the license agreement Kresge retained 'the power substantially to affect the employment conditions of employees in licensed departments' and that a joint-employer relationship did exist. S.S. Kresge Company v. NLRB, 416 F.2d 1225, 1228 (1969).

Pursuant to its authority under the license agreement, Kresge has promulgated a number of Rules and Regulations related to employment conditions which are usually considered within the sphere of mandatory collective bargaining.

[11] In deciding that question of whether Jewell possessed sufficient indicia of control over the work of the employees of Horn & Keene to be treated for purposes of enforcement of the National Labor Relations Act is a joint employer with Horne & Keene. The evidence showed Jewell sometimes loaned money to Horne & Keene; provided workers compensation insurance for their employees; provided engineering services and safety inspections; and produced the electricity sold to the mines.

As the court conluded, "Clearly we think Jewell exercised de facto control over the employees."

[12] A fortiori means "With stronger reason; much more. A term used in logic to denote an argument to the effect that because one ascertained fact exists, therefore another, which is included in it or analogous to it, and which is less probable, must also exist."

under the local option provision of K.S.A. 75-4321(c) for the Safety Officers. The test to be employed to determine such questions is to look to the *"degree of control,"* i.e. whether the nonexempt employer exercises sufficient control over the employees' terms and conditions of employment so as to be capable of effective bargaining with the employees' certified representative. A conclusion that one joint employer has the dominant role in setting the conditions of employment depends upon the relative weight to be credited to the individual factors having pertinence, and represents essentially a factual question.

In this situation of one PEERA covered and one non-covered public agency, the issue that arises is whether the City is vested with sufficient autonomy over the terms and conditions of employment of the Safety Officers of the Wichita Airport Authority to enable it to bargain efficaciously with the Teamsters. The City is not required *"to do the impossible"* or to engage in *"a mere 'exercise in futility;'"* rather, *"the purpose of collective bargaining is to produce an agreement and not merely to engage in talk for the sake of going through the motions."* And *"[t]he doing of a useless and futile thing is no more required in collective bargaining between an employer and a labor union than in other activities."* Herbert Harvey, Inc. v. NLRB, 424 F.2d 770, 774-45 (D.C. Cir. 1969). If sufficient autonomy is not found, the exempt

status of the Airport Authority will control, and the Board will lack jurisdiction to entertain the Teamsters' petition. However, if it is found that the City has sufficient authority over the terms and conditions of employment of the Safety Officers to bargain effectively in the areas of prospective negotiations, jurisdiction will lie with the Board to proceed with a unit determination and ultimately a representation election.

In Herbert Harvey, supra, the U.S. D.C. Circuit Court of Appeals enforced an NLRB bargaining order directed to a corporation which provided janitorial services for the World Bank. The bank was exempt from NLRB jurisdiction and, on an earlier appeal, the Court of Appeals had held that the bank and Herbert Harvey were joint employers. The order to bargain and the decision enforcing it were based on the finding *"that [Harvey] is fully capable of bargaining effectively with the Union regarding the wages, hours and other conditions of employment of its employees."* Herbert Harvey, 424 F.2d at 775.

The evidence in this case leads to the conclusion that the City has sufficient authority over wages, hours and other terms of employment to be capable of effective bargaining. In addition to the indicia of control listed above, the record indicates the City refers to the Airport Authority employees as City employees in official city publications, (Finding of Fact #98-100); in letters

of recognition, (Finding of Fact #101); reporting of wages to federal and state agencies, (Finding of Fact #102-105); and on wage and benefit reports received by Airport Authority personnel, (Finding of Fact #58, 102). Of Added significance is the opinion stated by Airport Director Bell as to the reason the City adopted Policy 8 relating to the City requiring all salaries established by the Airport Authority to be approved by the Board of City Commissioners was *"the [City] didn't want the Wichita Airport Authority to pay equipment operators twice as much as City of Wichita equipment operators."* (Finding of Fact #54). It is reasonable to assume this similar desire for control over personnel matters at the Airport Authority was a motivating factor for other reservations of authority incorporated in Policy 8.

The Airport Authority points to the language of the ordinances establishing the Airport Authority; the fact that it enacted resolutions agreeing to abide by the dictates of of Policy 8 and adopting the City salary schedule; and that personnel policies established by the City are reviewed and adopted by the Airport Director or Authority as evidence that it and not the City is the

dominant public agency when it comes to matters of labor relations. [13] There is no question that *"on paper"* the Airport Authority may be have the *"de jure"* control over matters of labor relations. However, the language of Policy 8, (Finding of Fact #40); the testimony of City Manager Cherches that the all councils, boards and commissions, including the Airport Authority had no option but to abide by the dictates of Policy 8, (Finding of Fact #41); the fact that Airport Authority has not acted contrary to the dictates of Policy 8 even when it believed such action was not in the best interests of the Airport Authority, (Finding of Fact #52); and the actions of the City relative to establishing personnel matters at the airports clearly establish the City as having the *"de facto"*[14] control over labor relations.

The fact that the City does not have complete say over all terms and conditions of employment is not critical, (*See* Finding of

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[13] The City presented considerable evidence, both testimonial and documentary, to show that the Airport Authority, through its Director, was responsible for, and did administer, the airports on a day-to-day basis without the assistance or supervision of the City or its Manager. One would assume, however, that the Chief of Police, the Fire Chief, and the other division or department directors for the City also were responsible for the administration of their units on a day-to-day basis; the City Manager or Council serving as the policy making authorities providing general guidance and direction through Policies, rules and regulations, supervisory letters, etc. The focus for purposes of PEERA is not necessarily upon has control of all the day-to-day operations of the airports, but rather who is the dominate entity in controlling the terms and conditions of employment of the Safety Officers. One public agency may be dominate in the operations of the agency, i.e. acheiving it goals or meeting its responsibilities, but still not be the dominate public agency when it comes to establishing the terms and conditions for its employees.

[14] Black's Law Dictionary, 5th ed., p.375, defines "de facto" as "In fact, in deed, actually." This phrase is used to characterize an officer, a government, a past practice, or a state of affairs "which must be accepted for all practical purposes." "In this sense it is the contrary of de jure, which means rightful, legitimate, just, or constitutional."

Fact #38, 56, 57, 69). As the court of appeals stated in Herbert Harvey, Inc. v. NLRB, 424 F.2d 770, 779 (DC Cir. 1969):

> *"True it is that Harvey, like many - perhaps most - other employers, may face practical limitations in some of these areas but, as the evidence denotes and the Board found, not in sufficient degree to frustrate bargaining efforts. The process of collective bargaining . . . may appropriately be invoked although the employer is subject to rather substantial handicaps. In NLRB v. E.C. Adkins & Co., 331 U.S. 398 (1947), the Court sustained the Board's determination that Adkins had 'a substantial residual measure of control over the terms and conditions of employment of the guards' to permit their treatment as employees; 'it matters not,; said the Court, 'that [Adkins] was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. . . .' Id. at 413. The Court accordingly sustained the Board's order requiring Adkins to bargain with the guards' representaive."*

The City presently negotiates with three certified employee representatives; the Faternal Order of Police, the International Association of Firefighters, and the Service Employees Union. As such is is familiar with the Public Employer-Employee Relations Act, and has the experience and personnel to undertake the meet and confer requirements of the act. Further, many of the potential subjects for negotiations by the Safety Officers are also matters of concern to the other bargaining units.

From the record, considered as a whole, the City must be considered having the dominant role in setting the conditions of employment for the Safety Officers, and is fully capable of

bargaining effectively with the Teamsters, to satisfy an employer's obligations under PEERA. The fact that the Airport Authority has not opted to be covered by PEERA pursuant to K.S.A. 75-4321(c) is not controlling. The Board, having jurisdiction over the City, may proceed with the petitioned for unit determination.

ORDER

IT IS THEREFORE ORDERED that the City of Wichita's motion to dismiss for lack of jurisdiction be denied for the reasons set forth above.

IT IS FURTHER ORDERED that the Teamsters' petition proceed to determine the appropriateness of the proposed unit.

Dated this 9th day of October, 1992

Monty R. Bertelli
Senior Labor Conciliator
Employment Standards & Labor Relations
512 W. 6th Street
Topeka, Kansas 66603

NOTICE OF RIGHT TO REVIEW

This is an initial order of a presiding officer. It will become final fifteen (15) days from the date of service, plus 3 days for mailing, unless a petition for review pursuant to K.S.A. 77-526(2)(b) is filed within that time with the Public Employees Relations Board, Department of Human Resources, Employment Standards and Labor Relations, 512 West 6th Street, 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 9th day of October, 1992, a true and correct copy of the above and foregoing Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Richard D. Cordry
CORDRY, HUND & HARTMAN
727 N. Waco, Suite 145
Wichita, Kansas 67201-7528.

Stanley W. Churchill and Robert Dean Overman
MARTIN, CHURCHILL, OVERMAN, HILL & COLE
500 N. Market Street
Wichita, Kansas 67214,

Joel Allen Lang
Acting City Attorney
CITY ATTORNEY'S OFFICE
455 N. Main, 13th Floor
Wichita, Kansas 67202.

Sharon Tunstall

I, Sharon Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 12th day of October, 1992, a true and correct copy of the above and foregoing Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Members of the PERB

Sharon Tunstall