

BEFORE THE SECRETARY OF HUMAN RESOURCES
STATE OF KANSAS

BUTLER COUNTY COMMUNITY COLLEGE)
EDUCATION ASSOCIATION,)
)
Petitioner,)
)
vs.) Case No. 72-UCA-1-1993
)
BUTLER COUNTY COMMUNITY COLLEGE,)
EL DORADO, KANSAS,)
)
Respondent.)
_____)

INITIAL ORDER

ON the 3rd day of May, 1993, the above-captioned matter came on for hearing pursuant to K.S.A. 72-5430a(a) and K.S.A. 77-523 before presiding officer Monty R. Bertelli.

APPEARANCES

PETITIONER: Appeared by Marjorie Blaufuss, attorney
Kansas National Education Association
715 W. 10th
Topeka, Kansas 66612

RESPONDENT: Appeared by Robert D. Overman, Attorney
MARTIN, CHURCHILL, OVERMAN, HILL & COLE
500 North Market Street
Wichita, Kansas 67042

ISSUES PRESENTED FOR REVIEW

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

1. WHETHER THE PROPOSED AMENDMENTS TO THE BARGAINING UNIT OR UNITS ARE APPROPRIATE.

- A). WHETHER THE POSITIONS OF PLACEMENT COUNSELOR, SPECIAL NEEDS COORDINATOR, DIRECTOR OF ON-SITE ADVISING AT ANDOVER, OFF-CAMPUS COUNSELOR AT McCONNELL, COORDINATOR FOR ALTERNATIVE SCHOOL/HOMELESS YOUTH PROGRAMS (OR SIMILAR PROGRAMS), ABE/GED INSTRUCTOR/COMMUNITY COORDINATOR, DIRECTOR OF LIBRARY SERVICES, AND ASSISTANT DIRECTOR OF LIBRARY SERVICES SHOULD BE EXCLUDED AS "ADMINISTRATIVE EMPLOYEES" AS DEFINED IN K.S.A. 72-5413(d).
- B). WHETHER THE POSITIONS OF PART-TIME ADVISOR, FINANCIAL AID COUNSELOR, PLACEMENT COUNSELOR/COORDINATOR, ADMISSIONS COUNSELOR, ADMISSIONS COORDINATOR, ADMISSIONS RECRUITER, TESTER, AND ABE/GED TESTER HAVE A COMMUNITY OF INTEREST WITH FULL-TIME PROFESSIONAL EMPLOYEES IN THE CURRENT UNITS, AND MEET THE QUALIFICATIONS OF K.S.A. 72-5413(b).
- C). WHETHER THE PETITIONER'S PROPOSAL TO INCLUDE THE CLASSIFICATIONS OF "PART-TIME ADVISORS" AND "LIBRARIAN ASSISTANTS" BE DENIED AS CONTRARY TO THE CURRENT MEMORANDUMS OF AGREEMENT BETWEEN THE PARTIES.
- D). WHETHER THE INCLUSION OF THE CLASSIFICATION OF "PART-TIME ADVISORS" IS INAPPROPRIATE PURSUANT TO THE CRITERIA SET FORTH IN K.S.A. 72-5420.
2. WHETHER THE BUTLER COUNTY COMMUNITY COLLEGE PROFESSIONAL EMPLOYEE CLASSIFICATIONS HAVE BEEN DIVIDED INTO TWO BARGAINING UNITS, i.e. CLASSIFICATIONS EMPLOYED AT THE COMMUNITY COLLEGE AND CLASSIFICATIONS AT THE EL DORADO CORRECTIONAL FACILITY, OR COMPRISE ONLY ONE BARGAINING UNIT.

SYLLABUS

1. **UNIT DETERMINATION** - *Appropriate Unit - Test.* The determination of appropriateness requires a three step inquiry:
- 1). Does the job classification meet the definition of "professional employee"?
 - 2). Is the individual in the job classification excludable from the unit as an "administrative employee"? and
 - 3). Does the job classification share a sufficient community of interest with the other classifications proposed for the unit?

2. **PROFESSIONAL EMPLOYEE** - *Definitions - Who qualifies.* K.S.A. 72-5413(c) sets forth two alternative means by which an individual may qualify as a "Professional employee" for purposes of the Professional Negotiations Act (PNA); 1) certification by the state board of education, and 2) by employment in a professional, educational or instructional capacity. Since this portion of the statute is written in the disjunctive, each "capacity" is viewed as having a separate and distinct meaning, with performance within any one being sufficient to confer the status of "professional employee."
3. **PROFESSIONAL EMPLOYEE** - *Definitions - "Professional" definition adopted.* The term "Professional employee" includes any employee (1) whose work is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; involves the consistent exercise of discretion and judgment; requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning; or (2) who has completed courses of prolonged study as described in paragraph (1) of this section, and is performing related work under the supervision of a professional person in order to qualify as a professional employee as defined in paragraph (1) of this subsection; or (3) attorneys-at-law or any other person who is registered by a board of registration or other public body established for such purposes under the laws of this state.
4. **PROFESSIONAL EMPLOYEE** - *Definitions - "Instructional" definition adopted.* "Instructional capacity" means role of teacher; to furnish with knowledge; teach. It refers to a structured form of learning in the traditional classroom setting wherein the teacher is lecturing on a specific subject, and the students are listening and responding to questions. However, it can also encompass one-on-one methods of instruction.
5. **PROFESSIONAL EMPLOYEE** - *Definitions - "Educational" definition adopted.* "Educational" is a broad and comprehensive term embracing mental, moral and physical education. Education is not limited to knowledge acquired in the classroom, and includes bodily as well as mental training. To educate means "to draw out" a person's talents as opposed to putting in knowledge or instruction.
6. **PROFESSIONAL EMPLOYEE** - *Exclusions - "Administrative Employee" synonymous with supervisor.* The definition of "professional employee" does not include "any such employee who is an administrative employee."

While the term "*administrative employee*" is used, these are classifications characteristically identified as supervisors.

7. **PROFESSIONAL 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.
8. **PROFESSIONAL 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.
9. **PROFESSIONAL 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.
10. **PROFESSIONAL EMPLOYEE** - *Exclusions - Supervisors - Over non-unit employees.* When exclusion of a professional employee from a bargaining unit is based on an allegation that the individual is an "*administrative employee*", the fact that the individual supervises non-unit employees less than 50 percent of his or her time creates a rebuttable presumption that the individual is not a supervisor. The employer then has the burden of coming forward with evidence sufficient to show the supervision of non-unit employees so allied the individuals with management as to establish a differentiation between him or her and other employees in the unit in order to rebut that presumption.
11. **UNIT DETERMINATION** - *Appropriate Unit - Ancillary personnel.* The test of whether ancillary personnel belong in an overall professional faculty unit is does their ultimate function, aiding and furthering the educational and scholarly goals of the University, converges with that of the faculty, though pursued through different means and in a different manner.

12. **UNIT DETERMINATION** - *Appropriate Unit - Ancillary personnel - Librarians.* Librarians are a closely allied professional group whose function is to aid and further the educational goals of the university and there is normally considerable contact between librarians and the faculty on both work and professional levels which make substantial contributions to the education of the students.
13. **PROFESSIONAL EMPLOYEE** - *Exclusions - Supervisors - Over student employees.* Faculty members who exercise supervisory authority over student employees whose employment is dependent upon, and related to, their student status, are not supervisors.
14. **PROFESSIONAL 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.
15. **PROFESSIONAL EMPLOYEE** - *Exclusions - Supervisors - Substituting 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 it involves only infrequent and isolated occurrences.
16. **UNIT DETERMINATION** - *Appropriate Unit - Part-time employees.* Part-time employees who, because of regularity and frequency of employment have a substantial community of interest with the unit's full-time employees in conditions of employment are regarded as regular part-time employees and are includable in the bargaining unit.
17. **UNIT CLARIFICATION** - *Authority of Secretary.* Since the PNA provides a specific statutory scheme for resolving questions concerning representation by an election and certification of a labor organization, the legislature has given the Secretary the concomitant power to regulate such certification by clarification or amendment, and may subsequently revise the description of the appropriate bargaining unit by clarification and amendment.

18. **UNIT CLARIFICATION** - *When Appropriate.* Generally, a unit clarification petition is appropriate in the following circumstances: (A) where there is a dispute over the unit placement of employees within a particular job classification; (B) where there has been an "accretion" to the work force; and (C) where a labor organization or employer seeks a reorganization of the existing structure of a bargaining unit.
19. **UNIT CLARIFICATION** - *When Appropriate - "Accretion".* An "accretion" is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity.
20. **UNIT CLARIFICATION** - *When Appropriate - When election is required.* Even when the group to be accreted has sufficient community of interest with the existing unit and is not an identifiable, distinct segment, there are two circumstances under which the NLRB will not accret the unrepresented employees without giving them a chance to express their representational desires; 1) the unrepresented group sought to be accreted numerically overshadows the existing unit, or 2) when the job classifications of the unrepresented group have been historically excluded from the bargaining unit by the parties
21. **UNIT CLARIFICATION** - *When Appropriate - Armour-Globe election purpose.* In an Armour-Globe election, the issue at stake is not who the employee representative shall be, but precisely who shall be represented with a vote for the employee organization indicates that the employee desires to be represented as part of the existing unit.
22. **UNIT CLARIFICATION** - *Added Employees - When terms of existing agreement apply.* The employer cannot unilaterally extend the terms of an existing contract to job classifications added to the bargaining unit during the term of the contract. And until negotiations are concluded, the terms and conditions enjoyed by the employees in question when they were unrepresented apply.
23. **UNIT CLARIFICATION** - *Added Employees - How treated during term of existing agreement.* Following the election to include additional employees in a bargaining unit covered by an existing memorandum of agreement, the board of education becomes obligated to engage in good faith bargaining as to the appropriate contractual terms to be applied to this new group

of employees. The new employees added to the existing bargaining unit are treated as a separate unit for the period of time until the expiration of the existing memorandum of agreement, and thereafter as a part of the existing bargaining unit.

24. **UNIT CLARIFICATION** - *When Appropriate - "Accretion" - Test.* The test for determining whether a job classification can be accreted to an existing bargaining unit without need for an election, and be covered by an existing memorandum of agreement without need for new negotiations, is as follows:
- 1). Has the petition or request been timely filed;
 - 2). Do the job classifications share a community of interest with the employees in the existing bargaining unit;
 - 3). Do the job classifications constitute an identifiable, distinct segment of employees so as to constitute a separate appropriate bargaining unit;
 - 4). Does the number of employees in the job classifications to be added when compared to the number of employees presently in the existing bargaining unit raise a question of representation; and
 - 5). Have the job classifications been historically excluded from the bargaining unit.
25. **UNIT CLARIFICATION** - *When Appropriate - "Accretion" - Burden of proof.* The burden is on the party seeking to add new positions to the existing unit by accretion rather than election to come forward with evidence sufficient to prove such accretion is appropriate

FINDINGS OF FACT¹

1. Butler County Community College ("College") is a community college duly organized pursuant to Article 6 of the Kansas Constitution and Chapters 71 and 72 of the Kansas Statutes Annotated.
2. The Butler County Community College Education Association ("Association") is the exclusive bargaining representative for certain professional employees of Butler County Community College, El Dorado, Kansas. (Petition and Answer).
3. The Board of Trustees ("Trustees") of Butler County Community College is a "Board of Education" under K.S.A. 72-5413(b) and has, in the past, entered into Memorandums of Agreement with the Butler County Community College Education Association.
4. At the hearing, the parties stipulated to the following:
 - A. The Association has withdrawn the issue of whether Adjunct Faculty teaching more than nine but less than fifteen hours credit hours per year should be added to the existing unit. (Tr.p. 10).
 - B. The following positions are appropriate for inclusion in the existing bargaining unit, (Tr.p. 11):

Academic Advisor, Butler of Andover
International Student Advisor
Center for Independent Study - Community Site Head
Instructor
 - C. The following positions are not appropriate for inclusion in the existing bargaining unit because they are "Administrative employees" as defined in K.S.A. 72-5413(d), (Tr.p. 11):

Secretarial Center Coordinator
Eureka Resource Center, ABE/GED and Community
Coordinator

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."

Augusta Resource Center and Community Coordinator

- D. The dispute concerning the position of GED Examiner/Counselor at the El Dorado Correctional Facility is moot and need not be considered. (Tr.p. 11).
- E. The positions of Technical Training Specialist, Computer Training Coordinator, and Training Specialist are not included in the Association's petition, and will not be considered. (Tr.p. 11).
5. Butler County Community College has its main campus in El Dorado, Butler County, Kansas, with satellite campuses at the El Dorado Correctional Facility, Andover, McConnell Air Force Base, Augusta, Towanda, Rose Hill, Wichita, Winfield, Derby, Remington High School, and the Flint Hills Outreach Area including sites at Eureka, Marion, Peabody, Madison and Council Grove. (Tr.p. 31-32; Ex. 2A). Faculty members may be based at the main campus, at a site away from the main campus or they may travel to teach classes at more than one location. (Tr.p. 32-33). The primary campus of each faculty member is the location where the professional employee is assigned the majority of his or her workload. (Tr.p. 31; Ex. 2A).
6. The College contracted with the Kansas Department of Corrections ("Corrections") in 1991 to provide educational services to the correctional facility located in El Dorado, Kansas for the 1991-92 school year. (Tr.p. 36, 64, 453). The contract between the College and Corrections affects many of the terms and conditions of employment for the College employees who work at the El Dorado Correctional Facility. (Tr.p. 453). Corrections is also involved in the interview and hiring process for the College's academic and vocational instructors at the El Dorado Correctional Facility, and professional employees of the College must pass a Corrections security clearance before being allowed to work at the correctional facility. (Tr.p. 453). Corrections may veto a hiring decision made by the College, if there is a security risk concerning that professional employee. Corrections may also bar any College employee from the premises if it believes that professional employee should not be allowed entrance. (Tr.p. 453-54). One professional employee who was refused entrance to the El Dorado Correctional Facility by Corrections lost his job with the College. (Tr.p. 454).
7. Corrections also controls the working environment of College employees at the El Dorado Correctional Facility. For

example, Corrections controls the coming and going of the professional employees in and out of the facility, determines where the classes taught by the College employees are held, and limits the types of communication College employees may have with inmates. (Tr.p. 454-55). According to Vicki Long, the College's Director of Human Resources, "they [Corrections] set the standards and we -- and the Board or the College complies with those . . .". (Tr.p. 454).

8. The College's contract with Corrections runs from July 1st to June 30th each year, and essentially involves a lump sum payment to the College from Corrections. (Tr.p. 477-79). All the funding for College professional employees at the El Dorado Correctional Facility comes from monies paid by Corrections pursuant to the College's contract with Corrections. (Tr.p. 454-55).

9. There are 6 Instructors at the El Dorado Correctional Facility. (Tr.p. 37, 75, 402):

Lila Fanning, Substitute
Laura Boyer, GED Instructor
Larry Hargrove, Special Pops. and GED Instructor
Jimmy Jackson, Vo-Tech
Terry Robertson, Vo-Tech
Mr. Cole, Food Service Instructor
Deloris Groves was also employed but was to leave employment in mid- July.

Of the six Instructors based at the El Dorado Correctional Facility, four are Association members. (Tr.p. 38, 74-75, 402, 411).

10 Unlike the professional employees working at other sites for the College, professional employees working at the El Dorado Correctional Facility are required to work forty (40) hours per week. (Tr.p. 451-52). These employees are paid pursuant to twelve (12) month contracts based upon the number of hours they work. The Instructors at the El Dorado Correctional Facility attend in-service and staff meetings with the faculty. Mr. Acebo testified that the Instructors were told by the College administration to be a part of the college system. (Tr.p. 413-14).

11. A comparison of the Memorandum of Agreement covering the Instructors at the El Dorado Correctional Facility, (Exhibit 2B), and the Memorandum of Agreement covering the remaining

professional employees at the Butler County Community College, (Exhibit 2A), reveals the following similarities and differences:

CONTRACT ARTICLE	BUTLER COUNTY Exhibit 2A	EL DORADO Exhibit 2B
<i>I. Rights of the Association</i>	Same as 2B	Same as 2A
<i>II. Rights of the Board</i>	Same as 2B	Same as 2A
<i>III. Non-Discrimination</i>	Same as 2B	Same as 2A
<i>IV. Conditions of Employment</i>		
<i>School year</i>	185 days	233 days
<i>Workload</i>	15 credit hours or the equivalent per semester or 30 credit hours or equivalent per year.	30 hours of instruction per week, 7:30 a.m to 4:00 p.m. duty day.
	Overload is over 30 credit hours per year.	Overload is anything over 40 hours per week.
<i>Hours required on campus</i>	35 hours per week.	No requirement
<i>Class size</i>	Maximum size to be determined by the Vice President	Maximum size to be determined by the Department of Corrections
<i>Teaching certificate required</i>	No	Yes
<i>Committee assignments</i>	Not required to serve on more than two	No requirement
<i>Assist with enrollment</i>	Required	No requirement
<i>Outside employment</i>	Same as 2B	Same as 2A
<i>Prohibited Sales</i>	Same as 2B	Same as 2A
<i>V. Compensation</i>		
<i>Base Salary</i>	\$20,918/9 mo.	\$26,000/12 mo.
<i>Advancements</i>	Same as 2B	Same as 2A
<i>Exceptions</i>	Same as 2B	Same as 2A

<i>Overload Pay</i>	\$350/ credit hour	\$350/ credit hour
<i>Off Campus Pay</i>	\$125/ credit hour	Not applicable
<i>Summer School Pay</i>	\$375/ credit hour	Not applicable 12 month contract
<i>Bank Deposit</i>	Same as 2B	Same as 2A
<i>Group Insurance</i>	Same as 2B	Same as 2A
<i>125 Plan</i>	Same as 2B	Same as 2A
<i>Early retirement</i>	Same as 2B	Same as 2A
VI. Leaves for Professional Employees		
<i>Sick leave</i>	15 days per year with other language the same as 2B	12 days per year with other language the same as 2A
<i>Medical leave</i>	Same as 2B	Same as 2A
<i>Personal leave</i>	Same as 2B	Same as 2A
<i>Other leave</i>	Same as 2B	Same as 2A
<i>Professional leave</i>	Same as 2B	Same as 2A
<i>Summer School leave</i>	Can use accumulated sick, personal and professional leave	Not applicable
<i>Sabbatical leave</i>	Eligible	None
<i>Substitutes</i>	Same as 2B	Same as 2A
VII. Grievance Procedures	Same as 2B	Same as 2A
VIII. Probation	Same as 2B	Same as 2A
IX. Reduction in Force		
<i>Selection</i>	Same as 2B	Same as 2A
<i>Service and Benefits</i>	Same as 2B	Same as 2A
<i>Reemployment</i>	Same as 2B	Same as 2A
X. Miscellaneous		
<i>Evaluation of Administration</i>	Same as 2B	Same as 2A

<i>Savings Clause</i>	Same as 2B	Same as 2A

12. K.S.A. 72-5416(a) requires certain procedures for recognition of an exclusive representative for a bargaining unit. However, the evidence from the hearing reveals: 1) No request filed with the College by the Association with a demonstrated showing of majority support to establish and represent a separate bargaining unit composed of the Instructors at the El Dorado Correctional Facility; 2) No posting of a notice of the Association's request for recognition for 10 days prior to action by the College on the request; and 3) No formal action by the College specifically granting the request. (Tr.p. 67, 88, 89, 474).
13. A 1992-93 agreement covering the instructors at the El Dorado Correctional Facility was negotiated by the Association. The preamble to that negotiated agreement asserts that it is an agreement between the Butler County Community College and the Association "*as representative of the full-time professional employees (as defined in K.S.A. 72-5413), who are employed at the El Dorado Correctional Facility by the Board as Academic and Vocational Instructors. . . .*" (Ex. 2B). There was no election among the instructors at the El Dorado Correctional Facility to select the Association as its exclusive representative pursuant to K.S.A. 72-5417 et seq., (Tr.p. 38, 66, 406), neither did they seek to form a separate bargaining unit pursuant to K.S.A. 72-5415 et seq. (Tr.p. 38, 406). Likewise, there was never a vote among the members of the existing bargaining unit to include the instructors at the El Dorado Correctional Facility into the unit. (Tr.p. 406-07).
14. During the 1991-92 school year the instructors at the El Dorado Correctional Facility were employed on "*administrative*" contracts. The first negotiated agreement for the instructors covered the 1992-93 school year. (Tr.p. 37, 64, 404). As part of the negotiations for the 1992-93 faculty agreement, the Association and the College also negotiated the terms and conditions of employment of the professional employees at the El Dorado Correctional Facility (Tr.p. 37-38). During win-win negotiations in 1992, there was a separate sub-group dealing specifically with employees at the El Dorado Correctional Facility. (Tr.p. 81). However, none of the six instructors at the El Dorado Correctional Facility served on the negotiating

team that negotiated their 1992-93 agreement, Exhibit B. The negotiating team was composed of the same individuals that negotiated the faculty agreement, Exhibit A. (Tr.p. 38, 406).

15. Prior to commencement of the 1992-93 negotiations, the Association provided a single notice to the College of subjects it sought to negotiate pursuant to K.S.A. 72-5423(a). A separate notice was not provided covering only the Instructors at the El Dorado Correctional Facility. The Association considered it was negotiating for one unit resulting in a negotiated agreement, Exhibit A, and an addendum to that agreement to cover the Instructors at the El Dorado Correctional Facility, Exhibit B. Likewise, the Instructors at the El Dorado Correctional Facility considered themselves to be part of the existing Butler County Community College bargaining unit represented by the Association. (Tr.p. 60).

Only a single notice of subjects for the 1992-93 negotiations, covering both faculties, was provided by the College to the Association. (Tr.p. 65). The College never indicated that it considered the negotiations to cover two separate bargaining units. (Tr.p. 68, 76).

16. The special terms and conditions of employment pertaining only to the faculty at the El Dorado Correctional Facility were referred to as an "addendum" to the negotiated agreement by the parties during negotiations. (Tr.p. 39, 82). Vicki Long, Director of Human Resources for the College, (Tr.p. 441), was present during negotiations for the 1992-93 memorandum of agreement, and in her opinion, the College considered there to be only one unit, with a separate agreement for the El Dorado Correctional Facility faculty because of the unique working conditions and the different funding source. According to Ms. Long, the College considered the El Dorado agreement, Ex. 2B, to be an addendum to the agreement covering the other unit employees, (Ex. 2A). (Tr.p. 452, 473-76). Ms. Long testified:

"Q. Here's 2A. You -- there seems to be some contention here as to whether or not the University was dealing with one unit or with two separate units. Do you have an opinion as a staff person at the time that those contracts or that contract was entered into whether or not the University -- there was one unit or two units?"

"A. When these were put together, the reasoning behind doing them this way was because there were -- the working conditions were different. We felt that the

administration would be better handled this way of those two. Not just working conditions, the funding sources, everything. I think we've got one unit and two agreements here. We have a group of professional employees working at the El Dorado Correctional Facility, and we have professional employees working in El Dorado at our other sites." (Tr.p. 473-75).

17. The combined faculty of Butler County Community College and the El Dorado Correctional Facility voted on whether to ratify the 1992-93 negotiated agreement and the addendum pertaining to the El Dorado Correctional Facility. (Tr.p. 41). The Instructors at the El Dorado Correctional Facility did not vote separately to ratify their agreement, and the faculty at the community college did not vote separately to ratify their agreement. (Tr.p. 46, 59, 407-08).
18. According to the negotiated agreement, a full work load for bargaining unit members is teaching fifteen credit hours or working thirty-five hours in a week for non-teaching professionals. A faculty member may perform extra duties that reduce the number of credit hours required. (Tr.p. 23; Ex. 2A). Instructors who teach more than fifteen credit hours or those who work more than thirty-five hours per week are paid additional salary for the "overload." (Tr.p. 23-24; Ex. 2A). Any position working less than 35 hours per week would be considered part-time or adjunct. (Tr.p. 450). Other advising, counseling, and teaching positions not specifically covered by the memorandum of agreement have been classified "administrative" as the positions were developed. Administrative employees have benefits which are set forth in the College's Policies and Procedures Manual. (Ex. 1).
19. Faculty members have work-study students who serve as secretaries. (Tr.p. 29, 51, 53-54, 63). The responsibilities of a faculty member relative to the work-study students include assigning duties, evaluating, making sure time sheets are turned in, and termination. (Tr.p. 51-52). There was testimony that as many as twenty percent of the teachers at Butler County Community College supervise secretaries or student workers. (Tr.p. 29-30, 51-56, 62-63, 69).

DIRECTOR OF LIBRARY SERVICES
Hugh Richardson

20. Hugh Richardson is employed as the Director of Libraries for the College. (Tr.p. 352). He is employed under an "administrative" contract covering a 12 month period and requiring him to work 40 hours per week. (Tr.p. 354). Mr. Richardson has a Bachelor's degree in Education, a Masters degree in Business Education, and a Masters degree in Library Science. (Tr.p. 352). The Library Director reports to Tom Erwin, the Division Chairman of Institutional Support. (Tr.p. 365-66).
21. Hugh Richardson is responsible for directing the provision of library service to the students, faculty and patrons of the College at each of its campus sites. His duties include selecting and purchasing of materials; assisting patrons; hiring and supervising the Assistant Director, Library Assistants, and staff; formulating policies and procedures for the library; and preparing the budget. (Ex. 27). He also evaluates the Assistant Director. (Tr.p. 365-66). Mr. Richardson testified that approximately one-fourth of his time is spent working either with the faculty or at the circulation desk just as any other library employee. (Tr.p. 363-64). He does not teach a class. (Tr.p. 354).
22. Hugh Richardson's position description specifies that he has supervisory powers over the full-time and part-time staff of the Library. (Ex. 27). He evaluates the Assistant Director, Hazel Clothier, (Tr.p. 365-66), and has the ability to recommend whether the Assistant Library Director should be retained in her employment, as well as the ability to correct her performance. (Tr.p. 356). The Library Director, along with Assistant Director of Libraries, Hazel Clothier, schedules, supervises, and evaluates the library assistants. Ms. Clothier does the initial or preliminary evaluation of the library assistants, and Mr. Richardson reviews her evaluation. (Tr.p. 364). Mr. Richardson also has the authority to resolve employee complaints. (Tr.p. 366). For the most part, Mr. Erwin follows the Library Director's recommendations concerning personnel supervised by the Director. (Tr.p. 366).

ASSISTANT DIRECTOR OF LIBRARY SERVICES
Hazel Clothier

23. The position of Assistant Director of Library Services is occupied by Hazel Clothier. (Tr.p. 321, 324). She has been in that position for nearly four (4) years. (Tr.p. 321). The Assistant Director has a twelve-month administrative contract with a forty (40) hour work week, (Tr.p. 324), and receives benefits similar to other administrative employees. (Tr.p. 324). Ms. Clothier has a Bachelor's degree in Home Economics and Secondary Education, a Masters degree in Early Childhood Education, and 24 hours toward her Masters degree in Library Science. (Tr.p. 323).
24. The Assistant Director's duties include assisting the Director of Libraries, preparing book orders, attending meetings concerning the library, communicating with students and faculty concerning library policies and procedures, assisting in budget preparation, and writing grants. (Tr.p. 330; Ex. 28). She also provides library orientation to both faculty and students. (Tr.p. 330). Ms. Clothier is not responsible for preparing the library budget, except in a clerical capacity. (Tr.p. 330-31). She considered her work in the library to be related to the overall educational mission of the College. (Tr.p. 339).
25. Hazel Clothier is responsible for supervision of the student workers, 3 full-time Library Assistants, one Librarian and 1 Assistant Librarian. (Tr.p. 322, 328-29, 341; Ex. 28). The Assistant Library Director has the responsibility to resolve grievances from the library staff. (Tr.p. 343, 345-46). Ms. Clothier interviews, trains and assigns work study students. (Tr.p. 328-29). She testified that there are two such student workers. (Tr.p. 341). While she asserts she could reprimand them, such an occasion has not arisen. The Assistant Library Director has the responsibility to terminate the employment of student workers, who are paid out of the library's budget, if they do not meet specific standards. (Tr.p. 343).

LIBRARY ASSISTANTS

26. There are three Library Assistants, Wilma McGinnis, Mary Logue and Lonnie Marley. (Tr.p. 343-45). Library Assistants are full-time employees supervised by the Library Director and Assistant Library Director. (Tr.p. 350). They are employed

under an "administrative" contract covering a 12 month period and requiring each to work 40 hours per week. (Tr.p. 357).

27. Wilma Dawn McGinnis is the Senior Library Assistant responsible for interlibrary loan which involves locating and obtaining material from other libraries for patrons, processing new books into the library collection, and staffing the circulation desk. (Tr.p. 355-56).
28. Mary Logue is the Library Technical Coordinator. (Tr.p. 358). She is in charge of the computers, and is responsible for operation of the library computer system, ensuring the equipment is properly maintained and loaded with the proper software and programming, and staffing the circulation desk. (Tr.p. 358-60).
29. Lonnie Marley is the Periodical and Serials Library Assistant. He is responsible for keeping magazines in order, on display and monitoring subscription renewals. (Tr.p. 360). He also assists students with research in the periodicals. (Tr.p. 360-61).

**PLACEMENT COUNSELOR
Dennis Schamber**

30. Dennis Schamber is employed as a Placement Counselor for the College. (Tr.p. 254). He is employed under an "administrative" contract covering a 12 month period and requiring him to work 40 hours per week. (Tr.p. 255). He has the same benefits as those outlined in the College's Policies and Procedures Manual. (Tr.p. 254-56). Mr Schamber has a Bachelor's degree in Business and a Masters degree in Education. (Tr.p. 254-55). He is supervised by Judy Strain in the Division of Advising and Placement. (Tr.p. 230).
31. The primary function of the Placement Counselor is to place students and graduates in available job opportunities. These duties include contacting the College's students for job placement, developing a data base of employers and employees, establishing a credentials file, and referring students in response to particular employment needs in the community. (Ex. 10). (Tr. 257-58). Dennis Schamber's responsibilities include academic advising which requires him to instruct students in skills of job resume writing, job interviewing and job search, and educating the students about the services that are available in placement. (Tr.p. 260). He teaches a class in Career Planning as part of his responsibilities. (Tr.p. 257).

Students are also provided academic advising, both at enrollment and throughout the year. (Tr.p. 257-58).

32. The Placement Counselor also recruits companies to appear on campus to interview prospective student job applicants, and posts job vacancies. (Tr.p. 258). In addition, he works with the faculty to assist in the placement of students in particular jobs or businesses. (Tr.p. 260). Fifty percent of Mr. Schamber's time is devoted to student contact, 40% to business contact, and 10% teaching class. (Tr.p. 259).
33. The Placement Counselor also supervises the office's part-time, thirty hour per week, secretary, who is shared with Cooperative Education. (Tr.p. 262-265). He evaluates the secretary, assigns her work, and determines the secretary's working hours. The Placement Counselor has the ability to adjust the secretary's concerns and grievances, and to recommend termination to his supervisor, Judy Strain. Generally, Judy Strain follows the Placement Counselor's recommendations concerning his secretary. The Placement Counselor also supervises work study and other student workers. (Tr.p. 262-63, 265-66). Secretaries and student workers are not members of the existing bargaining unit represented by the Association.

**ASSISTANT DIRECTOR OF FINANCIAL AID
Jolene Keith**

34. Jolene Keith is employed as the Assistant Director of Financial Aid for the College, and has held this position for nearly two (2) years. (Tr.p. 92). She is presently employed under an "administrative" contract covering a 12 month period and requiring her to work 40 hours per week with benefits similar to other administrative personnel. (Tr.p. 95-96). Ms. Keith receives incremental pay increases for additional education at the present rate of \$550.00 per ten credit hours. (Tr.p. 95). She has a Bachelor's degree in Business Education, (Tr.p. 92, 116), and worked as Vice-President for Compliance at a savings and loan for 11 years before coming to the College. (Tr.p. 92, 102). Ms. Keith's immediate supervisor is Jan Green, Director of Financial Aid, and the position is in the division of the College administered by the Dean of Students, Bill Richenbaugh. (Tr.p. 100, 106).

35. As Assistant Director of Financial Aid, Jolene Keith is responsible for counselling students on their eligibility for financial aid, with a great deal of her time devoted to determining student eligibility for financial aid and admission to student loan programs. (Tr.p. 94; Ex. 3A). Ms. Keith has the authority to grant or deny loans and grants to students, and the position is more administrative than educational. (Tr.p. 103-04, 119-120). She is also responsible to verify that students are enrolled in the proper number of hours, and maintain the proper grade average to preserve their eligibility for financial aid. (Tr.p. 105-06). (Tr.p. 105). Between 25-30% of the College's students receive some form of financial aid. (Tr.p. 121). The Assistant Director's counseling of students is usually limited to monetary related issues; rarely does she advise students on personal matters. (Tr.p. 103-04). Ms. Keith's normal duties do not include teaching. (Tr.p. 104). The Assistant Financial Aid Director trains employees and shows them how to qualify students for financial aid. (Tr.p. 108). Finally, Ms. Keith fills in for the Director of Financial Aid during her absences. (Tr.p. 106-07).
36. Jolene Keith has supervisory responsibility over a work study student, (Tr.p. 94, 95-96). The student worker is assigned to her by the department director, and Ms. Keith does not have the power to hire or fire the worker, (Tr.p. 94-95). However she does have input into the hiring of student assistants. (Tr.p. 98). The Assistant Financial Aid Director sits on the hiring committee which includes administrative personnel. She has one (1) vote just like the other members of the committee. (Tr.p. 109). In the absence of the Director of Financial Aid, the Assistant Director has the authority to supervise and direct staff in the Financial Aid office. (Tr.p. 106, 121). She also has the authority to take corrective action as to employees. (Tr.p. 107).
37. Jolene Keith testified that her educational background did not provide a basis for her present work responsibilities. (Tr.p. 116). She is unaware of any specific course of study in which a person could enroll to become a Student Loan/Financial Aid administrator. (Tr.p. 116). Ms. Keith views her job as relating more to the operation of the College than with the education of the students. (Tr.p. 120). She does not consider herself to be a part of the faculty, has no teaching responsibilities, (Tr.p. 104-05), and does not interact on a regular basis with the faculty. (Tr.p. 98).

FINANCIAL AID COUNSELOR
Karen Porter

38. Karen Porter is employed as the Financial Aid Counselor for the College. (Tr.p. 125). She is presently employed under an "administrative" contract covering a 12 month period and requiring her to work 40 hours per week. (Tr.p. 95-96, 126). Her benefits are the same as listed in the Policies and Procedures manual for administrative employees. (Tr.p. 127). Ms. Porter has a Bachelor's degree in Sociology, and 7 years of experience in counseling. (Tr.p. 125, 147).
39. Karen Porter's position description describes her position as "the primary staff member responsible for counseling students and parents regarding the availability of financial assistance. . .". (Ex. 3). Ms. Porter's primary duties are counseling and advising prospective and present students regarding the availability of and their eligibility for various types of financial aid. (Tr.p. 128-132). She explained her counselling role as follows:
- . . . the counseling really comes into play when a person just needs to know what is financial aid, what's a Pell grant, what's a Stafford loan, what's a Perkins loan, why is that campus-based, why is this administered through - - okay, what do you think I should do, do you think I should take all of it now, or how much is the dorm cost, will my financial aid costs, will that cover all my dorm costs and all my direct costs, . . . "*
40. The Financial Aid Counselor has the discretion to grant loans to students unless the student's academic performance falls below minimum levels. (Tr.p. 131). Ms. Porter consults students on grants and loans, and also works in enrollment by assisting students with financial aid. (Tr.p. 133-34). Her duties are limited to financial aid counseling, and do not include academic counseling. (Tr.p. 141-42). Ms. Porter's duties do not include teaching. (Tr.p. 127-131; Ex. 3). Ninety-six percent of Karen Porter's time involves students. (Tr.p. 132). Approximately 50-60% of her time is spent counseling parents of current or prospective students relative to financial aid available. (Tr.p. 141).
41. Karen Porter's position description calls for supervision of student workers but does not call for any other administrative duties, and she apparently exercises none. (Ex. 3).

VOCATIONAL-TECHNICAL RECRUITER
Jeff Ruckert

42. Jeff Ruckert is employed as the Vocational-Technical Recruiter for the College, and has held this position since October of 1992. (Tr.p. 149). He is presently employed under an "administrative" contract covering a 12 month period and requiring him to work 40 hours per week, (Tr.p. 150, 161), with benefits similar to other administrative employees. (Tr.p. 150). Mr. Ruckert has an Associate degree in Applied Science - Farm and Ranch Management, and a Bachelor's degree in Animal Science. (Tr.p. 149). Prior to his employment by the College Mr. Ruckert was a truck driver and mixer of agricultural chemicals for Mears Fertilizer. Before that he was a rancher. (Tr.p. 157). Mr. Ruckert's immediate supervisor is Neal Hoelting, Director of Admissions. (Tr.p. 156).
43. Jeff Ruckert's duties require him to travel to high schools in a five county area to recruit students for Butler County Community College's vocational-technical programs. (Tr.p. 151-52). Mr. Ruckert estimated that approximately seventy-five percent of his time is spent dealing with prospective students with the remainder spent on-campus. (Tr.p. 152-53; Ex. 4). On campus he counsels students concerning Butler County Community College's vocational technical programs. (Tr.p. 153). Mr. Ruckert has no teaching responsibilities. (Tr.p. 151). Unlike professional employees of the college whose work directly impacts upon students, the Vocational/Technical Recruiter's position is similar to an outside salesman for the College. If the position was eliminated, the College, not the students, would be directly affected. (Tr.p. 164-66).
44. Mr. Ruckert's supervisory duties consist of supervising student workers and "student ambassadors", who escort prospective students when they visit the Butler County Community College campus. (Tr.p. 155). Mr. Ruckert cannot fire the student ambassadors, nor has he been involved in their training in the past. (Tr.p. 155, 162). He does not evaluate or make recommendations concerning the job performance of the other student workers. (Tr.p. 163).

ADMISSIONS COUNSELOR

45. The position of Admission Counsellor is held by Darren Harvey. (Tr.p. 427). An Admission Counsellor works on a 12 month

contract, (Tr.p. 425), and is considered a part-time employee since the individual works only 25-30 hours per week. (Tr.p. 425). The Admission Counsellor is supervised by Neal Hoelting, the Director of Admissions for the College. (Tr.p. 424).

46. The Admission Counsellor's primary responsibility is recruitment at a designated number of high schools to enroll students for the College. (Tr.p. 426). The Admissions Counselor performs duties with a limited amount of supervision in the area of recruiting and admissions. (Ex. 4A). The job requires visiting high schools, doing follow up on prospective students, and assisting in preparing the College for campus visits by prospective students. (Ex. 4A). The Admission Counsellor spends approximately 50% of the time away from campus. (Tr.p. 426). The Admission Counsellor position has no teaching responsibilities. (Tr.p. 426).

COUNSELOR AT McCONNELL
Harriett Taylor

47. Harriett Taylor is employed as an Academic Advisor at Butler of McConnell Air Force Base. (Tr.p. 204). She is employed under an "administrative" contract covering a 9 month period and requiring her to work 35 hours per week, (Tr.p. 205-06). She receives 15 days of sick leave per year. (Tr.p. 207). Ms. Taylor has a Masters degree in Human Resource Development. (Tr.p. 204).
48. According to her job description, Ms. Taylor is responsible for providing counseling, advising, and career planning services to present and potential students at McConnell. (Ex. 7). In her position, Ms. Taylor advises students on courses they should be taking for a particular degree, assists with problems relating to classes and transferring credit hours, coordinates the Asset Placement Tests, and provided counselling for personal problems. (Tr.p. 208). She also deals with class problems and complaints from over thirteen hundred (1300) students at McConnell Air Force Base. (Tr.p. 209). Also as part of her duties, Ms. Taylor teaches classes in career planning. (Tr.p. 206-07). The career planning class is taught every semester, while other classes she may teach are only taught when there is a special need. (Tr.p. 207). Harriett Taylor considers herself to be part of the faculty. (Tr.p. 205).

49. The Off Campus Counselor may supervise as many as five (5) to six (6) adjunct advisors at any one time. (Tr.p. 214-15). Ms. Taylor presently supervises one part-time advisor and one Adjunct Advisor. One of Ms. Taylor's part-time advisors works thirty (30) hours a week, while another works twelve (12) hours per week. (Tr.p. 210). She is responsible for hiring, evaluating, disciplining, assigning work, and determining whether to retain them. (Tr.p. 209-10, 214, 215, 217, 218). The Off Campus Counselor has the ability to resolve grievances as well as take corrective actions concerning the advisor's performance. (Tr.p. 215-17). The Off Campus Counselor, during enrollment at McConnell Air Force Base, supervises staff who set up equipment and arranges for appropriate rooms to handle the enrollment. (Tr.p. 212). Harriet Taylor spends approximately 70% of her time counseling students and 30 % of her time supervising the part-time Advisor and Adjunct Advisor. (Tr.p. 220).

**COORDINATOR OF THE VOLUNTEER PROGRAM
Carolyn Connell**

50. Carolyn Connell is employed as the Coordinator of the Volunteer Literacy Program for the College, and has held this position since February of 1992. (Tr.p. 367). She is employed under an "administrative" contract covering a 12 month period and requiring her to work 20 hours per week. (Tr.p. 368). The position is part-time. Ms. Connell receives no benefits under the contract. (Tr.p. 368-69). The Volunteer Literacy Coordinator is paid Ten Dollars (\$10.00) an hour and receives no vacation, sick leave or other benefits. Ms. Connell is based at the El Dorado Community Resource Center, not at the campus. (Tr.p. 369). The ABE/GED/Alternative School is also located there. (Tr.p. 369-70). She has a Bachelor's degree in Science in Elementary Education. (Tr.p. 368).
51. Carolyn Connell's position requires her to recruit, train and match volunteers within the catchment area with low level and non-readers. There are approximately thirty-five (35) to forty (40) such tutors. (Tr.p. 371). She also provides community awareness for the Literacy Program through speaking to community groups, and by developing and coordinating media attention for the program. (Tr.p. 369). The Volunteer Literacy Coordinator does have some student contact, and will work with a student until a tutor becomes available. (Tr.p. 370). Such tutoring requires 5 - 15% of her time. (Tr.p. 370-71).

SPECIAL NEEDS COORDINATOR
Liane Fowler

52. Liane Fowler is employed as the Coordinator of Special Needs for the College. (Tr.p. 221; Ex. 9). She is employed under an "administrative" contract covering a 12 month period and requiring her to work 40 hours per week, (Tr.p. 223), and receives benefits like those of other College administrative employees. (Tr.p. 223). Ms. Fowler has an Associate's degree in Fine Arts, Bachelor's degree in Education and a Masters degree in Counseling and School Psychology. (Tr.p. 222). She is supervised by Judy Strain in the Division of Advising and Placement. (Tr.p. 230).
53. Liane Fowler is responsible for learning disabled or physically impaired or challenged students who attend Butler County Community College. (Tr.p. 225). She sees to it that any physical accommodations or learning aids that are needed by disabled students are provided for them, i.e., providing deaf students an interpreter and providing mobility aids for blind students. (Tr.p. 225-26). In addition, she counsels the special needs students as to the direction of their course work, and advises these students on courses required for a particular degree. (Tr.p. 225). The Special Needs Coordinator reports to Judy Strain and serves roughly one hundred and nine (109) full-time students and an additional two hundred and fifty (250) students on an as-needed basis. (Tr.p. 230). She testified that she is generally available for counseling and advising. Ms. Fowler works with the faculty to assure accommodations are made and to assist with problems that arise to ensure success of the students academically. She also serves as the ADA Compliance Officer for the College. (Tr.p. 225, 226, 229).
54. The Special Needs Coordinator has supervisory responsibilities. The Coordinator employs a thirty (30) hour per week paraprofessional, two twenty (20) hour per week student workers, and an interpreter. (Tr.p. 227). Ms. Fowler has the authority to hire interpreters or mobility aids, can assist in adjusting their conditions of employment if necessary, and can make the decision whether to retain such an employee. (Tr.p. 246-47). She further has the authority to hire helpers for her students and is required to supervise them. (Tr.p. 234, 242). The Special Needs Coordinator has the authority to resolve employee concerns or complaints. (Tr.p.

236-37). With respect to these employees, Ms. Fowler is responsible to train, (Tr.p. 229), adjust grievances, (Tr.p. 246-47), evaluate, and determine whether to retain or terminate such student workers. (Tr.p. 243).

DIRECTOR OF ON-SITE ADVISING
Peggy Hageman

55. Peggy Hageman is employed as the Director of On-Site Advising for the College. (Tr.p. 170). She was originally hired as a Counselor/Advisor but that position was reclassified to Director of On-Site Advising in October of 1992, (Tr.p. 173), however her duties have not changed. (Tr.p. 170-171). A Masters degree in counseling is required to hold this position. (Ex. 5). Ms. Hageman has a Bachelor's degree in Elementary Education and a Masters degree in Counseling. (Tr.p. 171). She is employed under an "administrative" contract covering a 12 month period and requiring her to work 40 hours per week, (Tr.p. 173, 444-45), and receives benefits similar to other administrative employees. (Tr.p. 174). Peggy Hageman is supervised by Judy Strain in the division under the Dean of Students. (Tr.p. 197).
56. Peggy Hageman spends approximately 80 percent of her time working with students at the Andover campus of the College. (Tr.p. 177). Her responsibilities include academic advising, career counseling, some personal counseling, placement testing and enrollment. (Tr.p. 176; Ex. 5).
57. The Director of Onsite Advising at Andover supervises the Wichita Area Vo-Tech/Technical Adjunct Advisors and adjunct advisors in Butler County outside of El Dorado. (Tr.p. 176). There are currently fifteen (15) to eighteen (18) adjunct advisors. Ms. Hageman interviews applicants for adjunct advisor positions, and recommends to her supervisor, Judy Strain, who to hire. (Tr.p. 178). She also has the authority to assign adjunct advisors their responsibilities, (Tr.p. 178), to resolve any grievances they may have, (Tr.p. 190-91), correct or discipline adjunct advisors, (Tr.p. 191), and can recommend not to rehire any adjunct advisor who is not performing up to the College's standards. (Tr.p. 191). If an adjunct advisor is not performing up to expectations, Ms. Hageman can make recommendations to her supervisor for corrective action. (Tr.p. 187). Her recommendations carry considerable weight, (Tr.p. 191), but there is no evidence on how often such recommendations are followed. Approximately

twenty percent of Ms. Hageman's time is spent working with the adjunct advisors for the community sites. (Tr.p. 178). Adjunct Advisors are not members of the bargaining unit. (Tr.p. 200).

58. Peggy Hageman also supervises and evaluates one full-time and one part-time academic advisor. (Tr.p. 197). The full-time advisor is Nelson Escalante. (Tr.p. 183). The part-time advisor is Kathryn McCoskey. (Tr.p. 184). The difference between being a part-time employee and an adjunct employee apparently relates to the manner of payment of salary; clock hours vs. credit hours, and the number of each required. (Tr.p. 184, 199). While Ms. Hageman was instrumental in hiring the academic advisors, that was before the division reorganization and the hiring of Judy Strain. She is uncertain what part she will play in the future. (Tr.p. 180). According to Ms. Hageman, she and Nelson Escalante have the same responsibilities except that she is considered his supervisor. (Tr.p. 183).

COORDINATOR OF ALTERNATIVE SCHOOL/HOMELESS YOUTH PROGRAMS

59. Jeanie Parscal, Patricia Bernhardt, Virginia Sue Choens, and Carol Moore hold the positions described in Ex. 18, 19 & 20, although the emphasis of each person's job may differ. (Tr.p. 274, 293, 305, 376-77). They are employed as classroom teachers for at-risk high school students. (Tr.p. 274-77, 293-98, 307-309, 376-379).

a. Alternate School/Homeless Youth Instructor/Coordinator Jeanie Parscal

60. Jeanie Parscal is employed as an Alternative School/Homeless Youth Instructor/Coordinator and has held the job for ten and one-half (10½) months. Ms. Parscal has an eleven (11) month contract with the College, works forty (40) hours per week, and has fringe benefits which are similar to administrative employees. (Ex. 1, 19). She is considered an adjunct professor even though she works full time because funding for her position comes from two different grant programs such that she is considered performing in only a part-time capacity under each grant project. The College considers her to be a full-time employee however. (Tr.p. 433, 438). Ms. has a Bachelor's degree in Education, (Tr.p. 293), which is required by her position description (Ex. 19). Her office is located in El Dorado, but is not on the College campus. (Tr.p. 281).

61. The services Jeanie Parscal provides to her students are different from services provided normally by professional employees at the College. (Tr.p. 281). Ms. Parscal essentially provides basic literacy, homemaker assistance, and GED testing. The youth that receive instruction from Ms. Parscal are high-risk youth of high school age. (Tr.p. 275, 282). She is responsible for teaching homeless youth in basic academic skills, life skills, and interpersonal communication skills. (Tr.p. 275). She conducts much of her teaching at Bethlehem House, which is a shelter for pregnant mothers. (Tr.p. 275). The instruction she provides does not lead to college credit or a college degree. (Tr.p. 282). Her instruction is limited to high school students, but is not a substitute for high school courses. (Tr.p. 286-87).
62. Ms. Parscal's duties for the alternative school also include work under a homeless youth grant providing small group instruction for "at risk" students from high schools in surrounding districts. The purpose of the program is to prevent high school students from dropping out of school. (Tr.p. 276). Instruction given by Jeanie Parscal may be in a classroom setting, in small groups, or one-on-one. (Tr.p. 275, 284-86). Ms. Parscal spends part of her time doing paperwork to apply for federal grants to operate these programs. (Tr.p. 277). Approximately 60-75% of Jeanie Parscal's time is spent working with students. The remainder is spent on preparing and developing curriculum, grading papers and working with other agencies. (Tr.p. 277). Ms. Parscal's office is located in El Dorado, but is not on the main College campus. (Tr.p. 281).
63. Jeanie Pascal does not have the authority to hire, fire or discipline other employees. (Tr.p. 279-80). She does have supervisory responsibilities over student workers, and has disciplined student workers and made recommendations concerning their employment in the absence of Ms. Davis. (Tr.p. 436-37). Ms. Pascal's position description contains no indication that she performs administrative duties. (Ex. 19).

**b. ABE/GED Instructor/Community Coordinator
Beverly Davis**

64. Beverly Davis is employed as the ABE/GED Instructor/Coordinator at Augusta for the College. (Tr.p. 381; Ex. 23). She spends her time at the ABE/GED and military center in Augusta and at the alternative school for high school students in Butler County. (Tr.p. 383; Ex. 23). Ms.

Davis is employed under an "administrative" contract covering a 12 month period and requiring her to work 40 hours per week. (Tr.p. 382). She has a Bachelor's degree in General Studies. (Tr.p. 381).

65. Beverly Davis is responsible for Adult GED, Alternative School and military programs. (Tr.p. 383-85, 387). Since Ms. Davis is the creator of the military program, she coordinates and visits with counselors in the program. The military program provides additional education for students above their GED in order to qualify them for military enlistment. (Tr.p. 387-88). She also will spend some of her time getting alternative school referrals from principals and superintendents in various school districts. (Tr.p. 388). The ABE/GED Instructor/Coordinator is required to visit high schools and set up classes to advertise the programs provided for high school students. (Tr.p. 386). Ms. Davis testified that eighty-five to ninety-five percent of her time is spent teaching ABE/GED, military and alternative high school students, or in activities that relate directly to her classroom responsibilities, i.e. grading papers. (Tr.p. 386-87). The five to fifteen percent of Ms. Davis' remaining time is spent supervising her part-time secretary and any KanWork workers assigned to her. (Tr.p. 387).
66. Beverly Davis supervises a part-time secretary, but does not supervise any adjunct faculty. (Tr.p. 385). The ABE/GED Instructor/Coordinator has recommended the hiring of her secretary. The College's Personnel Department has sent evaluation forms to Ms. Davis to evaluate her secretary. (Tr.p. 392). Whether the secretary will continue in the employment of the College is primarily dependent on the ABE/GED Instructor/Coordinator's recommendation. (Tr.p. 393). Ms. Davis also has a financial aid student worker whom she trains and evaluates. (Tr.p. 395). This person's continued employment may be based upon Ms. Davis' recommendation. (Tr.p. 395-96).
67. Beverly Davis does not supervise the adjunct faculty, and does not hire or fire the instructors. (Tr.p. 386). Patricia Bernhardt and Jeanie Parscal are instructors at the Augusta campus, (Tr.p. 383). Ms. Davis, as the coordinator at Augusta, if either Ms. Parscal or Ms. Bernhardt have a problem, they report to her. (Tr.p. 391-92). Although Ms. Davis is in charge of the Augusta facility, she does not consider herself to be the supervisor of the other ABE/GED instructors, but rather a part of their team. (Tr.p. 390).

**c. Instructor of Alternative High School/Homeless Youth Grant
Community Corrections Coordinator
Patricia Bernhardt**

68. Patricia Bernhardt is employed in the position of Instructor of Alternative High School/Homeless Youth Grant, and Community Corrections Grant Coordinator for the College. (Tr.p. 292). She also substitutes for the ABE/GED instructors, coordinates; military programs in Augusta, and is a GED instructor at Andover and El Dorado. (Tr.p. 294). Ms. Bernhardt is employed under an "administrative" contract covering an 11 month period and requiring her to work 30 hours per week. (Tr.p. 293). She is considered a part-time employee by the College. (Tr.p. 451). Ms. Bernhardt has a Bachelor's degree in Education. (Tr.p. 293). She is supervised by Mary Ann Christensen in the Adult and Continuing Education Division. (Tr.p. 296).
69. Ms. Bernhardt's GED duties consist of testing students to determine their skills for placement into classes they need to take to obtain their GED. She works with a broad range of students from those 16 years old to students in their fifties and sixties. (Tr.p. 294). Under the Community Corrections grant individuals placed in the community corrections program are provided the opportunity to receive G.E.D. instruction and life-skill training. (Tr.p. 296). This involves approximately nineteen (19) to twenty (20) students per quarter. (Tr.p. 297). Ms. Bernhardt's students in the Community Corrections Program are primarily controlled by the Court, which is unrelated to the College. (Tr.p. 299). The Court can terminate someone from the program without permission from the College. (Tr.p. 299). The forms that Ms. Bernhardt must complete are required by the Court and not by the College. (Tr.p. 300). She performs these duties at the Butler County Jail. (Tr.p. 300).
70. Patricia Bernhardt performs the duties of Beverly Davis when Beverly is absent from Augusta, and of Virginia Sue Choens when Virginia is absent from El Dorado. (Tr.p. 429). When Ms. Bernhardt substitutes at Augusta or El Dorado, she essentially becomes the Coordinator at that center. (Tr.p. 429). The absences by Ms. Davis or Ms. Choens would be for illness or professional conferences, and occur approximately once per month at Augusta and once every other month at El Dorado. The absences last for no more than a day or two. (Tr.p. 430). During the period of time that Ms. Bernhardt has substituted for Ms. Davis and Ms. Choens, she has never been called upon to hire anyone, discipline any employee, or reward any

employee. (Tr.p. 436-37). Substituting for Ms. Davis and Ms. Choens amounts to approximately ten percent of Ms. Bernhardt's time. (Tr.p. 437).

71. Patricia Bernhardt's position description contains no specific indication that she performs administrative or supervisory duties. (Ex. 19). She has no authority to hire, fire or discipline other employees. (Tr.p. 279-80).

**d. El Dorado Resource Center ABE/GED, Alternate School Instructor
Virginia Sue Choens**

72. Virginia Sue Choens is the El Dorado Resource Center ABE/GED, Alternative School Instructor. (Tr.p. 302). She currently works at the El Dorado Resource Center and instructs and supervises the KanWork students. (Tr.p. 303). Ms. Choens is employed under an "Administrative" contract covering a 12 month period and requiring her to work 40 hours per week. (Tr.p. 304). Her health and sick leaves are similar to other administrative employees. (Tr.p. 305). Her primary responsibilities are the alternative school and GED Program in El Dorado. (Tr.p. 306; Ex. 18). Ms. Choens' students are primarily ninth through twelfth graders. (Tr.p. 307). Virginia Sue Choens is eight hours away from receiving an Associates degree. (Tr.p. 303).
73. Virginia Sue Choens has the same duties and responsibilities as the other ABE/GED Instructors, She also has supervisory authority over a full-time secretary, a part-time secretary, Coordinator of the Volunteer Literacy Program employee, Jeanie Parscal and Pat Bernhardt. (Tr.p. 315, Ex. 18). Ms. Choens directs employees to perform certain assignments, (Tr.p. 311-12), and recommends the hiring, firing, and disciplining of employees in the Department. (Tr.p. 311-13). Mary Ann Christensen usually follows Ms. Choens recommendations regarding these personnel actions. (Tr.p. 312). Ms. Choens does not evaluate anyone. (Tr.p. 314). She views the employee relationships at her office to be that of a team effort rather than one based on supervisor-subordinates. The other employees look to her for guidance and assistance because she has been in the program the longest. (Tr.p. 309-10, 315). Ms. Choens assumes the duties of Mary Ann Christensen in her absence; however, she does not believe she has the authority to fire or reprimand employees, although she can recommend corrective action. (Tr.p. 311-12). She supervises two days a

week when Mary Ann Christensen is out of the office. (Tr.p. 314).

e. ABE/GED Instructor at Andover
Carol Moore

74. Carol Moore is employed as the ABE/GED Instructor at Andover for the College. (Tr.p. 374). She is employed under an "administrative" contract covering a 12 month period and requiring her to work 40 hours per week. (Tr.p. 375). Her benefits are those listed in the Policy and Procedures Manual. (Tr.p. 376; Ex. 1). Ms. Moore is supervised by Mary Ann Christensen. (Tr.p. 379). Carol Moore has a Bachelor's degree in Elementary Education, which is required for her position, (Ex. 20), and is working on a Masters degree in Special Education. (Tr.p. 374).
75. Carol Moore teaches adults who are working toward their GED. She also works with military recruits who have a GED but are seeking advanced education to qualify for enlistment. Additionally, she works with English As A Second Language students. (Tr.p. 376-77; Ex. 20). Ms. Moore is the sole instructor at the Andover office. (Tr.p. 378). Her position requires she be available to students all week, prepare for class, and keep track of student hours and scores. (Tr.p. 379). Ms. Moore's position description calls for supervision of various community volunteers. (Tr.p. 379).

CONCLUSIONS OF LAW AND DISCUSSION

ISSUE 1A

WHETHER THE POSITIONS OF PLACEMENT COUNSELOR, SPECIAL NEEDS COORDINATOR, DIRECTOR OF ON-SITE ADVISING AT ANDOVER, OFF-CAMPUS COUNSELOR AT McCONNELL, COORDINATOR FOR ALTERNATIVE SCHOOL/HOMELESS YOUTH PROGRAMS (OR SIMILAR PROGRAMS), ABE/GED INSTRUCTOR/COMMUNITY COORDINATOR, DIRECTOR OF LIBRARY SERVICES, ASSISTANT DIRECTOR OF LIBRARY SERVICES, INSTITUTIONAL RESEARCH DIRECTOR, AND DEPARTMENT HEAD SHOULD BE EXCLUDED AS "ADMINISTRATIVE EMPLOYEES" AS DEFINED IN K.S.A. 72-5413(d).

ISSUE 1B

WHETHER THE POSITIONS OF PART-TIME ADVISOR, FINANCIAL AID COUNSELOR, PLACEMENT COUNSELOR/COORDINATOR, ADMISSIONS COUNSELOR, ADMISSIONS COORDINATOR, ADMISSIONS RECRUITER, TESTER, AND ABE/GED TESTER HAVE A COMMUNITY OF INTEREST WITH FULL-TIME PROFESSIONAL EMPLOYEES IN THE CURRENT UNITS, AND MEET THE QUALIFICATIONS OF K.S.A. 72-5413(b).

K.S.A. 72-5414 gives "professional employees" the right to form, join or assist professional organizations and to participate in professional negotiations with boards of education². This process is commenced by the designation of job classifications to be grouped together to form a bargaining unit, K.S.A. 72-5416 and 5417. Pursuant to K.S.A. 72-5420, in each case where the question of unit composition is at issue, the Secretary of Human Resources is to decide an "appropriate" unit. It has been a long-standing rule that there is nothing which requires the bargaining unit approved by the Secretary be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be an appropriate unit. See Colby Community College Faculty Alliance v. Colby Community College, Case No. 72-UCA-4-1992 (November, 1993); Friendly Ice Cream Corp., 110 LRRM 1401 (1982), enforced 705 F.2d 570 (CA 1, 1983).

² "Board of Education" is defined to include "the board of trustees of any community junior college." K.S.A. 72-5413(b).

[1] The determination of appropriateness requires a three step inquiry:

- 1). Does the job classification meet the definition of "professional employee";
- 2). Is the individual in the job classification excludable from the unit as an "administrative employee"? and
- 3). Does the job classification share a sufficient community of interest with the other classifications proposed for the unit?

Only after a position has successfully satisfied each prong of this test is it appropriate to include the position in the bargaining unit. Consequently, a complete understanding of what is meant by "professional employee", "administrative employee" and "community of interest" is essential to proper application of the test.

1. Definition of "Professional Employee"

[2] K.S.A. 72-5413(c) defines "Professional employee" to mean:

"[A]ny person employed by a board of education in a position which requires a certificate issued by the state board of education or employed by a board of education in a professional, educational or instructional capacity, but shall not mean any such employee who is an administrative employee."

As is apparent, K.S.A. 72-5413(c) sets forth two alternative means by which an individual may qualify as a "Professional employee" for purposes of the Professional Negotiations Act (PNA); 1) certification by the state board of education, and 2) by employment

in a professional, educational or instructional capacity.³ The first alternative primarily refers to those individuals typically identified as primary and secondary education "teachers" in public and private school systems.

Of concern for most of the positions here in dispute is the second alternative - that is, employment in a "professional, educational, or instructional capacity". Since this portion of the statute is written in the disjunctive, it must be construed that the legislature viewed each "capacity" as having a separate and distinct meaning, with performance within any one being sufficient to confer the status of "professional employee." Colby Community College Faculty Alliance v. Colby Community College, Case No. 72-UCA-4-1992 (November, 1993). Unfortunately, the legislature failed to define "professional," "educational," or "instructional" to provide guidance as to what activities might fall within each term.

Under K.S.A. 77-201, *Second*, the following rule is provided for statutory interpretation:

"Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such peculiar and appropriate meaning."

"Professional," "educational," and "instructional" are not technical words and have no specially defined meaning in the

³ There is no question in this case that the individuals in question have met the requirement of being employed by a board of education.

Professional Negotiations Act. Colby Community College Faculty Alliance v. Colby Community College, Case No. 72-UCA-4-1992 (November, 1993). However, these words do have an accepted, definite, and clear meaning in the English language, and should be construed according to the context and approved use of the language. State ex rel., v. Minneola Hospital District, 177 Kan. 238, 244 (1954). As explained by the court in State v. Personnet, 114 Kan. 680, 688 (1923) this means "one ought to be able to turn to his dictionary, encyclopedia or to reported cases defining the term."

[3] We need not look beyond the statutes of the State of Kansas to find an acceptable definition for the term "professional." K.S.A. 75-4322(d) of the Kansas Public Employer-Employee Relations Act ("PEERA") defines "Professional employee" to include any employee:

"(1) Whose work is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; involves the consistent exercise of discretion and judgment; requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning; or (2) who has completed courses of prolonged study as described in paragraph (1) of this section, and is performing related work under the supervision of a professional person in order to qualify as a professional employee as defined in paragraph (1) of this subsection; or (3) attorneys-at-law or any other person who is registered by a board of registration or other public body established for such purposes under the laws of this state."

This definition from PEERA provides a comprehensive test to determine whether one is employed in a "Professional" capacity, and it was adopted by the Secretary for use under the Professional

Negotiations Act in Colby Community College Faculty Alliance v. Colby Community College, Case No. 72-UCA-4-1992 (November, 1993).

[4] "*Instructional capacity*" means role of teacher. Colby Community College Faculty Alliance v. Colby Community College, Case No. 72-UCA-4-1992 (November, 1993); Riddel v. Department of Employment Sec., 436 A.2d 1086, 1088 (1981). "*Instruct*" means "*To furnish with Knowledge: Teach.*" Webster's II New Riverside University Dictionary, 1984, p. 633. Clearly this refers to a more structured form of learning in the traditional classroom setting, wherein the teacher is lecturing on a specific subject, and the students are listening and responding to questions. However, it can also encompass one-on-one methods of instruction. As noted in Claim of Dailey, 454 N.Y.S.2d 348, 349 (1982), a school social worker whose services consisted of counseling students regarding school-related problems which interfered with the learning process, generally pursuant to referrals by school personnel, was rendering services which were "*instructional.*"

[5] By contrast, "*educational*" is a broad and comprehensive term embracing mental, moral and physical education. Colby Community College Faculty Alliance v. Colby Community College, Case No. 72-UCA-4-1992 (November, 1993); Board of Trustees of Leland Stanford Jr. University v. Santa Clara County, 150 Cal.Rptr 109, 112 (1978); Zorach v. Clauson, 99 N.Y.S.2d 339, 343 (1950); Harbor Schools, Inc. v. Board of Appeals of Haverhill, 366 N.E.2d 764, 767

(1977); First Nat. Bank & Trust Co. v. Falligant, 67 S.E.2d 473, 475 (1951). Education is not limited to knowledge acquired in the classroom, Wilhoit v. Fite, 341 S.W.2d 806, 816 (1960), and includes bodily as well as mental training. McNair v. School dist. No. 1 of Cascade County, 288 P. 188, 190 (1930). It has often been said that to educate means "to draw out" a person's talents as opposed to putting in knowledge or instruction. Webster's II New Riverside University Dictionary, 1984, p. 418.

Against these definitions of "professional," "educational," and "instructional" the activities of each of the following positions in question will be compared to determine if the individual is a "professional employee:"

Placement Counselor - Dennis Schamber
Vocational & Technical Recruiter - Jeff Ruckert
Admissions Counselor - Darren Harvey
Coordinator of Special Needs Services - Laine Fowler
Director of On-site Advising at Andover - Peggy Hageman
Off Campus Counselor at McConnell - Harriett Taylor
Alternate School / Homeless Youth Instructor - Patricia Bernhardt and
Jeanie Parscal
ABE / GED Instructor / Community Coordinator - Beverly Davis
ABE / GED Instructor at Andover - Carol Moore
El Dorado Resource Center / GED, Alternate School Instructor - Virginia Sue Choens
Literacy Program Volunteer Coordinator - Carolyn Connell
Director of Library Services - Hugh Richardson
Assistant Director of Libraries - Hazel Clothier
Library Assistants - Ms. McGinnis, Mary Logue and Lonnie Marley.
Assistant Director of Financial Aid - Jolene Keith
Financial Aid Counselor - Karen Porter

Exclusion of "Administrative Employees"

[6] As is clear from the definition of "professional employee", above, the term does not include an "administrative employee." While the term "administrative employee" is used, these are classifications characteristically identified as "supervisors". Like K.S.A. 75-4322(a) of the Kansas Public Employer-Employee Relations Act and Section 2(3) of the National Labor Relations Act, K.S.A. 72-5413(b) excludes individuals with supervisory authority from employee status.⁴ Compare K.S.A. 72-5413(d) which defines "Administrative employee" to mean:

". . . in the case of an area vocational-technical school or community junior college, any person who is employed by the board of control or the board of trustees in an administrative capacity and who is acting in that capacity and who has authority, in the interest of the board of control or board of trustees, 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."

with K.S.A. 75-4322(b) which defines "supervisory employee" to mean:

". . . 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

⁴ 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, . . ."

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."

[7] By adopting the federal definition of supervisor in the PNA definition of "administrative 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.⁵ Accordingly, in any proceeding where

⁵ 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 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).

the composition of a bargaining unit is at issue under the PNA, the burden of proving that an individual should be excluded as an "administrative employee/supervisor" rests on the party alleging that supervisory status. See Teamsters Local Union #955 v. Wyandott County, Kansas, Case No. 75-UDC-3-1992 (September 3, 1993); Ohio Masonic Home, 131 LRRM 1289, 1503 (1989). 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. 72-5420, the inquiry is predominately factual. It involves a case-by-case approach in which the Secretary gives practical application of the statute to the infinite and complex gradations of authority which may exist in professional. 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."

⁵(...continued)

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.

The secretary'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).

It appears appropriate at this time to review the underlying rationale for the exclusion of supervisors from a bargaining unit. The exclusion of supervisors 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.

The title a position carries has little bearing on whether it is supervisory. 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."

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). The enumerated functions in the definition of supervisor are listed disjunctively, 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."

[8] 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).

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. Relevant factors to be considered include, but are not limited to, the business of the employer, the duties of the individuals exercising supervisory authority and those of the bargaining unit employees, the particular supervisory functions being exercised, and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to the those of the bargaining unit in which they would be included.

[9] Finally, even where supervisory functions are being performed by an employee, K.S.A. 72-5413(d) 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. Authority to perform one of the 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). "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).

The College seeks to exclude the following positions, proposed for inclusion in the existing unit, on the grounds that they are "administrative employees":

Placement Counselor - Dennis Schamber
Coordinator of Special Needs Services - Laine Fowler
Director of On-site Advising at Andover - Peggy Hageman
Off Campus Counselor at McConnell - Harriett Taylor
Alternate School / Homeless Youth Instructor - Patricia Bernhardt and
Jeanie Parscal
ABE / GED Instructor / Community Coordinator - Beverly Davis
El Dorado Resource Center / GED, Alternate School Instructor - Virginia Sue Choens
Director of Library Services - Hugh Richardson
Assistant Director of Libraries - Hazel Clothier
Assistant Director of Financial Aid - Jolene Keith

3. Community of Interest

K.S.A. 72-5420 sets forth the criteria for determining an appropriate unit for professional negotiations. The first criteria listed is "the community of interest between and among the professional employees of the board of education." Community of interest is not susceptible to precise definition or to mechanical

application. Morris, The Developing Labor Law, Ch. 11, p. 417 (2 ed. 1989). In fact, the 1969 Report of the Advisory Commission on Intergovernmental Relations refers to the test as a "somewhat elusive concept." ACIR Report at p. 74. However, a unit will generally be deemed appropriate if the employees grouped together have substantial mutual interests in wages, hours and other conditions of employment. Kalamazoo Paper Box Corp., 1950 NLRB Ann.Rep. 39 (1951).

The Secretary approaches the community of interests determination using a case-by-case analysis, and is given considerable discretion in making a decision. The factors considered in determining whether a group of employees share a community of interest include: 1) common supervision of employees; 2) functional integration of operations and job duties; 3) similar skills, training and qualifications; 4) interchangability and contact between employees; 5) similar work situations; 6) common wages and benefits; 7) payment of wages; 8) working hours; 9) regularity of work (full-time, part-time, temporary, seasonal); and 10) geographic proximity. See Kramer, Fundamentals of Labor Law Under the National Labor Relations Act, p. 163 (1993). While these are the most frequently cited factors, they are not exclusive, and no single factor or group of factors is controlling. The weight to be assigned each factor is within the sole discretion of the Secretary. Colby Community College Faculty Alliance v. Colby

Community College, Case No. 72-UCA-4-1992 (November, 1993); *Cf.*
Kansas Association of Public Employees v. Depart. of S.R.S, Rainbow
Mental Health Facility, Case No. 75-UCA-6-1990 (February 4, 1991).

Examination of Job classifications⁶

**PLACEMENT COUNSELOR
Dennis Schamber**

Dennis Schamber is employed as a Placement Counselor for the College. The primary function of the Placement Counselor is to place students and graduates in available job opportunities. To that end the Placement Counselor recruits companies to appear on campus to interview prospective student job applicants, and posts job vacancies; maintains a data base of employers and employees; establishes a credentials file; and refers students in response to particular employment needs in the community. He also instructs students in the skills of resume writing, job interviewing, and job search.

The record shows that the work performed by the Placement Counselor is not intellectual in nature, but involves predominantly routine mental and manual activities. Also, there is no evidence that the position requires knowledge of an advanced type or that

⁶The classifications sought for inclusion in the existing bargaining unit are all employed under administrative contracts, covering at least as many months as the faculty, and most receive the same benefits and are covered by the same terms and conditions of employment as outlined in the College Policies and Procedures Manual.

any particular course of study is required to perform the work of a Placement Counselor so as to satisfy the "professional capacity" criteria of K.S.A. 72-5413(b). The fact that Mr. Schamber has a Bachelor's degree in Business and a Masters degree in Education appears to be of no significance in the performance of his duties.

While the Placement Counselor teaches one class in Career Planning, such requires only 10% of his time, and represents only an ancillary part of his duties. Accordingly, it cannot be said that Mr. Schamber is employed in an "Instructional" or "educational" capacity. On the basis of the forgoing, Mr. Schamber fails to meet the requirements of a "professional employee," and inclusion of the position of Placement Counselor in the existing professional employee unit would be inappropriate.

The College further seeks to exclude Dennis Schamber as being "administrative" in that the Placement Counselor supervises a part-time secretary who works thirty (30) hours per week. Mr. Schamber's supervisory responsibility include determining the secretary's hours of work, assigning her work, and evaluating her performance. Additionally, he has the authority to adjust the secretary's grievances and to recommend her termination. The Placement Counselor also supervises work study and other student workers assigned to his office.

Of import here is the fact that the secretary and the work study and student workers are not employees in the bargaining unit

represented by the Association. As explained above, the rationale for excluding supervisors is the potential for a conflict of interest if the person doing the supervising is in the same unit as the employees being supervised. In Adelphi University, 79 LRRM 1545 (1972), the NLRB reasoned that it would be inequitable to exclude an employee from a bargaining unit solely because he happened to exercise supervisory authority over non-unit employees.

The NLRB reasoned:

"The issue of supervisory status usually arises where authority is regularly exercised on the employer's behalf, over employees sought by the union. . . To include in such a unit persons who exercise statutory supervisory authority would clearly create a conflict of interest which Congress intended to avoid. This does not mean, however, that a similar conflict of interest is necessarily created whenever persons occasionally exercise some authority over other employees of the employer. . . . [W]here professionals regularly (more than 50 percent of their time) supervise nonunit employees, they are nevertheless excluded from the unit of professional employees since under such circumstances the principal interests of the excluded professional were so allied with management as to establish a differentiation between them and other employees in the unit.

"The underlying rationale of this body of precedent is that an employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over nonunit personnel. No danger of conflict of interest within the unit is present . . . as to create a more generalized conflict of interest of the type envisioned by Congress in adopting Section 2(11) of the Act."

In New York University, 91 LRRM 1165 (1975), the NLRB further commented on the basis for its Adelphi decision, noting especially the relative imprecision of the supervisory question in professional employee settings. Professional employees, the NLRB explained:

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

The NLRB emphasized that just because an employer provides his professional employees with support personnel, it was not Congress' intention to exclude them from the NLRA "by rote application of the statute without any reference to its purpose or the individual's place on the labor-management spectrum." The Adelphi decision has been cited in subsequent cases as establishing a rule that any individual who supervises non-unit employees less than 50 percent of his or her time is not a supervisor, regardless of the supervisory duties or any other factors that might indicate the nature of the individual's alliance. See Florida Memorial College, 111 LRRM 1547 (1982); A. Barton Hepburn Hospital, 99 LRRM 1230 (1978); Mount Vernon College, 95 LRRM 1349 (1977); Clothing & Textile Workers, 86 LRRM 1307 (1974).

[10] This shorthand approach to the determination of supervisory status has the desirable benefit of ease of application. When exclusion of a professional employee from a bargaining unit is based on an allegation that the individual is an "administrative employee", the fact that the individual supervises non-unit employees less than 50 percent of his or her time creates a rebuttable presumption that the individual is not a supervisor.

The employer then has the burden of coming forward with evidence sufficient to show the supervision of non-unit employees so allied the individuals with management as to establish a differentiation between him or her and other employees in the unit in order to rebut that presumption.

Admittedly, the Placement Counselor's supervisory responsibility must be described as more than sporadic, but it would be inappropriate to exclude the Placement Counselor from the Association bargaining unit solely because he exercised supervisory authority over non-unit employees. If such policy were to be followed, then it would be necessary to exclude twenty percent of the faculty presently included in the bargaining unit because the evidence revealed they also supervise a secretary. This certainly was not the intent of the legislature in providing the "administrative employee" exclusion.

Here, the Placement Counselor's sole supervisory authority is over a part-time secretary and an unspecified number of work study and other student workers assigned to his office. There is no evidence as to the percentage of his time Mr. Schamber devotes to their supervision. It is doubtful that such could account for 50% of his work time. However, one need not speculate. As noted above, the party seeking to exclude an individual from the unit has the burden of establishing that ineligibility. See Teamsters Local Union #955 v. Wyandott County, Kansas, Case No. 75-UDC-3-1992

(September 3, 1993). 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. See Teamsters Local Union #955, id.; Phelps Community Medical Center, 131 LRRM 1522 (1989). The College had the burden of establishing that the Placement Counselor's supervisory responsibilities relative to non-unit employees required more than 50 percent of his work time, or so allied the individuals with management as to establish a differentiation between them and other employees in the unit, if it desired to exclude the position from the unit as an "administrative employee." The College has failed to meet that burden.

The final inquiry relates to whether the position of Placement Counselor shares a sufficient community of interest with the professional employees presently in the existing bargaining unit to make inclusion appropriate. In making a unit determination the Secretary 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.⁷ See Speedway Petroleum, 116 LRRM 1101 (1984).

⁷ 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.

[11] There can be no question but that the position of Placement Counselor is of a character different from that of the faculty members presently in the unit. As has been noted, personnel other than full-time faculty present a particularly acute issue in the higher education setting because of the greater diversity of functions. The Law and Practice of Teacher Negotiations, §2:53. The question of whether ancillary personnel belong in an overall professional faculty unit came before the NLRB on several occasions since it assumed jurisdiction over private colleges and universities. The NLRB apparently has drawn a dividing line which includes in a regular faculty unit those categories of ancillary employees whose *"ultimate function, aiding and furthering the educational and scholarly goals of the University, converges with that of the faculty, though pursued through different means and in a different manner."* New York University, 83 LRRM 1549 (1973); Rensselaer Polytechnic Institute, 89 LRRM 1844 (1975).

In public colleges and universities, the supportive personnel seems generally to be included. The position of the New York PERB is fairly typical:

"Although these 'satellite personnel' [personnel involved in initiating, developing, and coordinating teaching and research programs, professionals providing technical assistance in services directly related to teaching and research programs, professionals working primarily and directly with students and student affairs, and professionals with traditional administrative duties] are not primarily concerned with the instruction of students, they share with the rest of the permanent staff a community of professional

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interest inasmuch as they are engaged in directly supportive activities that are clearly and closely associated with the function of teaching. . . [T]hey do have many common interests. All are professionals, and their functions dovetail." Board of Higher Education of the City of New York, 1 N.Y. PERB ¶1-407 at 4021, aff'd, 2 N.Y. PERB ¶2-3056.

Nearly identical reasoning was used by the Michigan Employment Relations Commission, Wayne State University, GERR No. 444, B-11 (1972), and the New Jersey Public Employment Relations Commission, State Colleges of New Jersey, GERR No. 293, E-1 (1969), in reaching similar conclusions.

The record shows that although there is a minor instructional element to the Placement Counselor's duties, Dennis Schamber's work is primarily directed at placing students of the College in occupations after they graduate. Such cannot be characterized as "*directly supportive activities that are clearly and closely associated with the function of teaching,*" but are more closely associated with the administrative functioning of the College.

Since the Position of Placement Counselor lacks a community of interest with the other employees in the existing bargaining unit, and does not meet the definition of "*professional employee*", it must be excluded from the unit.

ASSISTANT DIRECTOR OF FINANCIAL AID
Jolene Keith

The Assistant Director of Financial Aid is responsible for counselling students on their eligibility for financial aid.

Consequently, a great deal of Jolene Keith's time is devoted to determining student eligibility for financial aid and student loan programs, and to verifying that the students are enrolled for the proper number of credit hours and maintain the proper grade average to preserve their eligibility for financial aid. Ms. Keith testified that her educational background did not provide a basis for her present work responsibilities, and she is unaware of any specific course of study in which a person could enroll to become a Student Loan/Financial Aid administrator. Her normal duties do not include teaching.

The record shows that the work performed by the Assistant Director of Financial Aid is not intellectual in nature, but involves predominantly routine mental and manual activities. Also, there is no evidence that the position requires knowledge of an advanced type or that any particular course of study is required to perform the work of a Placement Counselor so as to satisfy the "*professional capacity*" criteria of K.S.A. 72-5413(b). Ms. Keith has no teaching responsibilities, and so does not qualify as a professional employee under the "*instructional capacity*" criteria. Neither can her work be characterized as "*educational*."

The College seeks to exclude Jolene Keith as being "*administrative*." The Assistant Director of Financial Aid has supervisory responsibility over a work study student assigned to her by the department director, but does not have the power to hire

or fire the worker. She does have input into the hiring of student assistants. In the absence of the Director of Financial Aid, the Assistant Director has the authority to supervise and direct staff in the Financial Aid office. There is no evidence in the record that any of these supervised employees are members of the bargaining unit. Likewise the record is void of evidence as to the percentage of her time Ms. Keith devotes to such supervisory activities. Consequently, the College has failed to satisfy its burden of coming forward with evidence sufficient to show the supervision of non-unit employees so allied the individuals with management as to establish a differentiation between them and other employees in the unit in order to rebut the presumption of non-supervisory status.

The position of Assistant Director of Financial Aid does not possess sufficient community of interest to be included in the existing bargaining unit. Her duties cannot be characterized as *"directly supportive activities that are clearly and closely associated with the function of teaching."* Additionally, Jolene Keith does not consider herself to be a part of the faculty, has no teaching responsibilities, and does not interact on a regular basis with the faculty. The position is more administrative than educational. Ms. Keith testified she views her job as relating more to the operation of the College than with the education of the students. The position should be excluded from the unit. See

Florida Southern College, 80 LRRM 1160, 1164 (1972)[Assistant to the Director of Financial Aid excluded from unit].

Since the position of Assistant Director of Financial Aid lacks a community of interest with the other employees in the existing bargaining unit, and does not meet the definition of "professional employee", it must be excluded from the unit.

FINANCIAL AID COUNSELOR
Karen Porter

Karen Porter is employed as the Financial Aid Counselor for the College. Ms. Porter's primary duties are counseling and advising prospective and present students and their parents regarding the availability of, and their eligibility for, various types of financial aid. Approximately 50-60% of her time is spent counseling the parents. Her duties are limited to financial aid counseling, and do not include academic counseling. The Financial Aid Counselor has the discretion to grant loans to students unless the student's academic performance falls below minimum levels. Ms. Porter's duties do not include teaching. Ms. Porter has a Bachelor's degree in Sociology, and 7 years of experience in counseling. (Tr.p. 125, 147).

The record shows that the work performed by the Financial Aid Counselor is not intellectual in nature, but involves predominantly routine mental and manual activities. Also, there is no evidence

that the position requires knowledge of an advanced type or that any particular course of study is required to perform the work of a Placement Counselor so as to satisfy the "*professional capacity*" criteria of K.S.A. 72-5413(b). Ms. Porter has no teaching responsibilities, and so does not qualify as a professional employee under the "*instructional capacity*" criteria. Neither can her work be characterized as "*educational*."

Karen Porter's position description calls for supervision of non-unit student workers but does not call for any other administrative duties, and she apparently exercises none. The College does not seek to exclude her from the unit as an "*administrative employee*," and there is nothing in the record that would justify such exclusion.

The position of Financial Aid Counselor does not possess sufficient community of interest to be included in the existing bargaining unit. Karen Porter has no teaching responsibilities, there is no evidence that she interacts on a regular basis with the faculty, and her duties cannot be characterized as "*directly supportive activities that are clearly and closely associated with the function of teaching*." The position is more administrative than educational. Since the position of Financial Aid Counselor lacks a community of interest with the other employees in the existing bargaining unit, and does not meet the definition of "*professional employee*", it must be excluded from the unit.

VOCATIONAL-TECHNICAL RECRUITER

Jeff Ruckert

Jeff Ruckert is employed as the Vocational-Technical Recruiter for the College, and has held this position since October of 1992. His duties require him to travel to high schools in a five county area to recruit students for Butler County Community College's vocational-technical programs. Mr. Ruckert estimated that approximately seventy-five percent of his time is spent dealing with prospective students. He has no teaching responsibilities.

Jeff Ruckert has an Associate degree in Applied Science - Farm and Ranch Management, and a Bachelor's degree in Animal Science. Prior to his employment by the College, Mr. Ruckert was a truck driver and mixer of agricultural chemicals for Mears Fertilizer. Before that he was a rancher.

The record shows that the work performed by the Vocational-Technical Recruiter is not intellectual in nature, but involves predominantly routine mental and manual activities. Also, there is no evidence that the position requires knowledge of an advanced type or that any particular course of study is required to perform the work of a Placement Counselor so as to satisfy the "professional capacity" criteria of K.S.A. 72-5413(b). The fact that Mr. Schamber has a Bachelor's degree in Animal Science appears to be of no significance in the performance of his duties. Jeff Schamber has no teaching responsibilities, and so does not qualify

as a professional employee under the "*instructional capacity*" criteria. Neither can his work be characterized as "*educational*."

Jeff Ruckert's supervisory duties consist of supervising non-unit student workers and "*student ambassadors*" who escort prospective students when they visit the Butler County Community College campus. The College does not seek to exclude him from the unit as an "*administrative employee*," and there is nothing in the record that would justify such exclusion.

The position of Vocational-Technical Recruiter does not possess sufficient community of interest to be included in the existing bargaining unit. Mr. Ruckert's duties cannot be characterized as "*directly supportive activities that are clearly and closely associated with the function of teaching*." Unlike professional employees of the College whose work directly impacts upon students, the Vocational/Technical Recruiter's position is similar to an outside salesman for the College. If the position was eliminated, the College, not the students, would be directly affected.

Since the position of Vocational-Technical Recruiter lacks a community of interest with the other employees in the existing bargaining unit, and does not meet the definition of "*professional employee*", it must be excluded from the unit.

ADMISSIONS COUNSELOR

The position of Admission Counsellor is held by Darren Harvey. Her primary responsibility is recruitment at a designated number of high schools to enroll students for the College. The job requires visiting high schools, doing follow up on prospective students, and assisting in preparing the College for campus visits by prospective students. The Admission Counsellor spends approximately 50% of the time away from campus. The Admission Counsellor position has no teaching responsibilities.

The record shows that the work performed by the Admission Counsellor is not intellectual in nature, but involves predominantly routine mental and manual activities. Also, there is no evidence that the position requires knowledge of an advanced type or that any particular course of study is required to perform the work of a Admission Counsellor so as to satisfy the "professional capacity" criteria of K.S.A. 72-5413(b). The knowledge they are required to possess and the duties they perform are not related to a discipline or field of science but require only a knowledge of the university curriculum, services and admissions requirements. C.W. Post, 77 LRRM 1001 (1971); Tuscalum College, 81 LRRM 1345 (1972); Florida College, 80 LRRM 133 (1972). The Admission Counselor has no teaching responsibilities, and so does not qualify as a professional employee under the

"*instructional capacity*" criteria. Neither can the work be characterized as "*educational*."

The Admissions Counselor has no supervisory duties. The College does not seek to exclude the position from the unit as an "*administrative employee*," and there is nothing in the record that would justify such exclusion.

The position of Admissions Counselor does not possess sufficient community of interest to be included in the existing bargaining unit. Its duties cannot be characterized as "*directly supportive activities that are clearly and closely associated with the function of teaching*." Like the Vocational-Technical Recruiter, the Admissions Counselor's position is similar to an outside salesman for the College. If the position was eliminated, the College, not the students, would be directly affected.

Since the position of Admissions Counselor lacks a community of interest with the other employees in the existing bargaining unit, and does not meet the definition of "*professional employee*", it must be excluded from the unit.

COORDINATOR OF THE VOLUNTEER PROGRAM
Carolyn Connell

Carolyn Connell is employed as the Coordinator of the Volunteer Literacy Program for the College. She has a Bachelor's degree in Science in Elementary Education. Ms. Connell's position

requires her to recruit, train and match volunteers within the catchment area with low level and non-readers. There are approximately thirty-five (35) to forty (40) such tutors. She also provides community awareness for the Literacy Program through speaking to community groups, and by developing and coordinating media attention for the program.

The record shows that the work performed by the Coordinator of the Volunteer Literacy Program is not intellectual in nature, but involves predominantly routine mental and manual activities. Also, there is no evidence that the position requires knowledge of an advanced type or that any particular course of study is required to perform the work of a Admission Counsellor so as to satisfy the "*professional capacity*" criteria of K.S.A. 72-5413(b). The Coordinator of the Volunteer Literacy Program has no teaching responsibilities, and so does not quality as a professional employee under the "*instructional capacity*" criteria. Neither can the work be characterized as "*educational*."

The record reveals no supervisory duties for the Coordinator of the Volunteer Literacy Program. Any supervisory authority Ms. Connell might have would be over the program volunteers, who are not members of the bargaining unit. The College does not seek to exclude the position from the unit as an "*administrative employee*," and there is nothing in the record that would justify such exclusion.

The position of Coordinator of the Volunteer Literacy Program does not possess sufficient community of interest to be included in the existing bargaining unit. She is employed under an "administrative" contract covering a 12 month period. The position is part-time, requiring her to work 20 hours per week. The Volunteer Literacy Coordinator is paid Ten Dollars (\$10.00) an hour and receives no vacation, sick leave or other benefits. In addition, Ms. Connell's duties cannot be characterized as "*directly supportive activities that are clearly and closely associated with the function of teaching.*" While the program clients receive a benefit from the reading program, Ms. Connell's responsibilities of recruiting the volunteers and promoting the program are more administrative than educational.

Since the position of Admissions Counselor lacks a community of interest with the other employees in the existing bargaining unit, and does not meet the definition of "*professional employee*", it must be excluded from the unit.

DIRECTOR OF LIBRARY SERVICES, Hugh Richardson
ASSISTANT DIRECTOR OF LIBRARY SERVICES, Hazel Clothier
LIBRARY ASSISTANTS, Wilma McGinnis, Mary Logue and Lonnie Marley

[12] The library staff consists of the Director of Library Services, Assistant Director of Library Services, 3 full-time Library Assistants, one Librarian, one Assistant Librarian, and

student workers. They assist students and faculty members in using the library and help students learn how to do research. Librarians are generally included in faculty units even where they possess no faculty rank and are not eligible to participate in the faculty governing body. Bradford College, 110 LRRM 1055 (1988); University of Vermont & State Agricultural College, 91 LRRM 1570 (1976). Librarians are a closely allied professional group whose function is to aid and further the educational goals of the university and there is normally considerable contact between librarians and the faculty on both work and professional levels. As noted by the NLRB in Florida Southern College, 80 LRRM 1160, 1163 (1972), "In many respects through their functions as librarians in relationship with the members of the student body make substantial contributions to the education of the students."

"We conclude that they [librarians] possess a sufficient community of interest to be included in the unit, as a closely allied professional group whose ultimate function, aiding and furthering the educational and scholarly goals of the University, converges with that of the faculty, though pursued through different means and in a different manner." New York University, 83 LRRM 1549, 1553 (1973).

The Director of Library Services, Hugh Richardson, has a Bachelor's degree in Education, a Masters degree in Business Education, and a Masters degree in Library Science. The Assistant Director and the Library Assistants have academic training in this field. As these library employees utilize advanced training in a specialized field - library science - in their work, they

constitute professional employees within the meaning of the PNA, engaged in functions closely related to teaching, and they have a community of interest with the other employees in the bargaining unit. Accordingly, under these criteria the positions may appropriately be included in that unit.⁸ See Florida Southern College, 80 LRRM 1160, 1163 (1972); Tusculum College, 81 LRRM 1345, 1349 (1972); New York University, 83 LRRM 1549, 1553 (1973); Rensselaer Polytechnic Institute, 89 LRRM 1844, 1848 (1975).

However, the College argues for the exclusion of the Director of Library Services, Hugh Richardson, and Assistant Director of Library Service, Hazel Clothier, as "administrative employees." Hugh Richardson is responsible for directing the provision of library service to the students, faculty and patrons of the College at each of its campus sites. His duties include selecting and purchasing of materials; assisting patrons; hiring and supervising the Assistant Director, Library Assistants, and staff; formulating policies and procedures for the library; and preparing the budget. The Director of Library Services' position description specifies that he has supervisory powers over the full-time and part-time staff of the Library. He evaluates the Assistant Director, Hazel Clothier, and has the ability to recommend whether the Assistant

⁸ In University of San Francisco, 84 LRRM 1403 (1973), the NLRB included in the law faculty unit an assistant law librarian who neither possessed a law degree nor taught law courses. The NLRB noted the critical importance of the relationship between librarians and faculty members in the supply and maintenance of the library as a research tool for students and professors. See also Bradford College, 110 LRRM 1055 (1982); Mount Vernon College, 95 LRRM 1349 (1977).

Library Director should be retained in her employment, as well as the ability to correct her performance. The Library Director, along with the Assistant Director of Libraries schedules, supervises, and evaluates the library staff. Ms. Clothier does the initial or preliminary evaluation and Mr. Richardson reviews her evaluation. The Director also has the authority to resolve employee complaints.

Hazel Clothier, as Assistant Director of Library Services, is also responsible for supervision of the student workers, 3 full-time Library Assistants, one librarian and one Assistant Librarian, doing the initial evaluations of the library staff, and has the responsibility to resolve their grievances. Presumably, Ms. Clothier is in charge of the library during the absence of the Director.

The responsibilities of the Director and Assistant Director of Library Services are characteristic of those identified with administrators or management. The record contains sufficient evidence sufficient to show these responsibilities so allied Mr. Richards and Ms. Clothier with management as to establish a differentiation between them and other employees in the bargaining unit. Despite the fact that the positions of Director and Assistant Director of Library Services are professional employees and have a community of interest with the other employees in the bargaining unit, they must be excluded as "administrative

employees." See New York University, 91 LRRM 1165 (1975); Bradford College, 110 LRRM 1055 (1982).

COUNSELOR AT McCONNELL
Harriett Taylor

Harriett Taylor is employed as an Academic Advisor at Butler of McConnell Air Force Base. Ms. Taylor has a Masters degree in Human Resource Development. According to her job description, Ms. Taylor is responsible for providing counseling, advising, and career planning services to present and potential students at McConnell. In her position, Ms. Taylor advises students on courses they should be taking for a particular degree, assists with problems relating to classes and transferring credit hours, coordinates the Asset Placement Tests, and provides counselling for personal problems. In addition, she deals with class problems and complaints from over thirteen hundred (1300) students at McConnell Air Force Base. As part of her duties, Ms. Taylor teaches classes in career planning. The career planning class is taught every semester, while other classes are taught only when there is a special need.

The record shows that the work performed by the Counselor at McConnell is intellectual in nature and varied in character as opposed to routine mental, manual, mechanical, or physical work. Ms. Taylor's position description indicates that a master's degree

in counseling or a related field is required evidencing that the position requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. This satisfies the "professional capacity" criteria of K.S.A. 72-5413(b).

The Counselor at McConnell has teaching responsibilities which would qualify as a professional employee under the "instructional capacity" criteria. Additionally, as noted above, in Claim of Dailey, 454 N.Y.S.2d 348, 349 (1982), a school social worker whose services consisted of counseling students regarding school-related problems which interfered with the learning process was rendering services which were "instructional." Harriet Taylor spends approximately 70% of her time counseling students in some of these same area. She certainly meets the requirements of a "professional employee."

The College further seeks to exclude Ms. Taylor from the bargaining unit as an "administrative employee" in that the Counselor at McConnell may supervise as many as five (5) or six (6) adjunct advisors at any one time. She presently supervises only one part-time advisor and one Adjunct Advisor. Harriet Taylor spends approximately 30% of her time supervising the part-time Advisor and Adjunct Advisor. Adjunct Advisors are not members of the bargaining unit. Consequently, since the percentage is less than 50 percent, the College has the burden of coming forward with

evidence sufficient to show the Ms. Taylor's supervision of non-unit employees so allied her with management as to establish a differentiation between them and other employees in the bargaining unit. This it has failed to do. Ms. Taylor will not be excluded from the unit as an *"administrative employee."*

The position of Counselor at McConnell also possesses sufficient community of interest to be included in the existing bargaining unit. Advising students on courses they should be taking for a particular degree, assisting with problems relating to classes and the transferring of credit hours, coordinating the Asset Placement Tests, providing counselling for student personal problems, and dealing with class problems and student complaints most certainly can be characterized as *"directly supportive activities that are clearly and closely associated with the function of teaching."* See Long Island University, 77 LRRM 1001, 1005 (1971)[Guidance counselors do have advanced knowledge and are performing the intellectual and varied functions contemplated by the definition of professional employees]. Plus, Harriett Taylor considers herself to be part of the faculty.

Since the position of Counselor at McConnell meets the definition of *"professional employee"*, possesses a community of interest with the other employees in the existing bargaining unit, and cannot be excluded from the unit as an *"administrative*

employee, it is appropriate to include the position in the bargaining unit.

SPECIAL NEEDS COORDINATOR

Liane Fowler

The Coordinator of Special Needs for the College is Liane Fowler. Ms. Fowler has an Associate's degree in Fine Arts, Bachelor's degree in Education and a Masters degree in Counseling and School Psychology. She is responsible for providing any physical accommodations or learning aids needed by a learning disabled or physically impaired or challenged student attending the College, i.e. providing interpreters for the deaf and mobility aids for blind students. Ms. Fowler works with the faculty to assure accommodations are made and assists with problems that arise which may produce a barrier to the success of those students academically. In addition, Ms. Fowler testified she is generally available for counseling and advising the special needs students as to the direction of their course work and on courses required for a particular degree. The Special Needs Coordinator serves roughly one hundred and nine (109) full-time students and an additional two hundred and fifty (250) students on an as-needed basis.

The record shows that the work performed by the Coordinator of Special Needs, like that of the Counselor at McConnell, is intellectual in nature and varied in character as opposed to

routine mental, manual, mechanical, or physical work. Ms. Taylor's position description indicates that, at a minimum, a master's degree in Education or a related field is required evidencing that the position requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. This satisfies the "professional capacity" criteria of K.S.A. 72-5413(b).

The Coordinator of Special Needs has no teaching responsibilities which would qualify as a professional employee under the "instructional capacity" criteria, but Ms. Fowler is generally available for counseling and advising the special needs students as to the direction of their course work and on courses required for a particular degree, as well as with personal problems that arise that can affect the success of those students academically. These duties are similar to those of the Counselor at McConnell. As noted above, in Claim of Dailey, 454 N.Y.S.2d 348, 349 (1982), a school social worker whose services consisted of counseling students regarding school-related problems which interfered with the learning process, was rendering services which were "instructional."

The College further seeks to exclude Ms. Fowler from the bargaining unit as an "administrative employee" in that the Coordinator of Special Needs supervises a thirty (30) hour per week paraprofessional, two twenty (20) hour per week student workers,

and an interpreter. Ms. Fowler has the authority to hire interpreters or mobility aids, can assist in adjusting their conditions of employment if necessary, and can make the decision whether to retain such an employee. She further has the authority to hire student helpers, and is required to supervise, train, adjust grievances, evaluate, and determine whether to retain or terminate them. None of these employees, however, are members of the bargaining unit.

The record is void as to the percentage of time Ms. Fowler devotes to supervising these non-unit employees. The College has the burden of coming forward with evidence that such supervision exceeds 50 percent of her time or to show that Ms. Fowler's supervision of non-unit employees so allied her with management as to establish a differentiation between her and other employees in the bargaining unit. This it has failed to do. Ms. Fowler will not be excluded from the unit as an *"administrative employee."*

The position of Coordinator of Special Needs also possesses sufficient community of interest to be included in the existing bargaining unit. As noted with the Counselor at McConnell position above, advising students on courses they should be taking for a particular degree, assisting with problems relating to classes, providing counselling for student personal problems, and dealing with class problems and student complaints most certainly can be characterized as *"directly supportive activities that are clearly*

and closely associated with the function of teaching." See Long Island University, 77 LRRM 1001, 1005 (1971)[Guidance counselors do have advanced knowledge and are performing the intellectual and varied functions contemplated by the definition of professional employees].

Since the position of Coordinator of Special Needs meets the definition of "professional employee", possesses a community of interest with the other employees in the existing bargaining unit, and cannot be excluded from the unit as an "administrative employee," it is appropriate to include the position in the bargaining unit.

DIRECTOR OF ON-SITE ADVISING
Peggy Hageman

Peggy Hageman is employed as the Director of On-Site Advising for the College. She has a Bachelor's degree in Elementary Education and a Masters degree in Counseling. A Masters degree in counseling is required to hold this position. Ms. Hageman spends approximately 80 percent of her time working with students at the Andover campus of the College. Her student responsibilities include academic advising, career counseling, some personal counseling, placement testing and enrollment.

The record shows that the work performed by the Director of On-Site Advising, like that of the Counselor at McConnell and the

Coordinator of Special Needs, is intellectual in nature and varied in character as opposed to routine mental, manual, mechanical, or physical work. Ms. Hageman's position description indicates that, at a minimum, a master's degree in counseling or a related field is required evidencing that the position requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. This satisfies the "*professional capacity*" criteria of K.S.A. 72-5413(b).

The Director of On-Site Advising has no teaching responsibilities which would qualify as a professional employee under the "*instructional capacity*" criteria, but Ms. Hageman spends 80 percent of her time counseling and advising students as to the direction of their course work, placement testing, and on career planning and the courses required for a particular degree, as well as with personal problems. These duties are similar to those of the Counselor at McConnell and the Coordinator of Special Needs which were found to qualify as "*instructional.*"

The College seeks to exclude Ms. Hageman from the bargaining unit as an "*administrative employee.*" The record reveals the Director of Onsite Advising at Andover supervises fifteen (15) to eighteen (18) Wichita Area Vo-Tech/Technical Adjunct Advisors and adjunct advisors in Butler County outside of El Dorado. Ms. Hageman interviews applicants for adjunct advisor positions, and

recommends to her supervisor, Judy Strain, who to hire. She also has the authority to assign adjunct advisors their responsibilities, to resolve any grievances they may have, correct or discipline adjunct advisors, and can recommend not to rehire any adjunct advisor who is not performing up to the College's standards. If an adjunct advisor is not performing up to expectations, Ms. Hageman can make recommendations to her supervisor for corrective action. Her recommendations carry considerable weight, but there is no evidence on how often such recommendations are followed. Approximately 20 percent of Ms. Hageman's time is spent working with the adjunct advisors for the community sites. Peggy Hageman also supervises and evaluates one full-time and one part-time academic advisor.

Again, the problem here is that the supervision alleged to exclude Ms. Hageman is over non-unit members. Adjunct Advisors are not members of the bargaining unit. Consequently, since the percentage of time she devotes to such supervision is less than 50 percent, the College has the burden of coming forward with evidence sufficient to show the Ms. Hageman's supervision of non-unit employees so allied her with management as to establish a differentiation between them and other employees in the bargaining unit. This it has failed to do. Peggy Hageman will not be excluded from the unit as an *"administrative employee."*

The position of Director of Onsite Advising, like the positions of Counselor at McConnell and Coordinator of Special Needs, also possesses sufficient community of interest to be included in the existing bargaining unit. Advising students on courses they should be taking for a particular degree, assisting with problems relating to classes, coordinating placement tests, providing counseling for student personal problems, and dealing with class problems and student complaints most certainly can be characterized as "*directly supportive activities that are clearly and closely associated with the function of teaching.*" See Long Island University, 77 LRRM 1001, 1005 (1971)[Guidance counselors do have advanced knowledge and are performing the intellectual and varied functions contemplated by the definition of professional employees].

Since the position of Director of Onsite Advising meets the definition of "*professional employee*", possesses a community of interest with the other employees in the existing bargaining unit, and cannot be excluded from the unit as an "*administrative employee*", it is appropriate to include the position in the bargaining unit.

Alternate School / Homeless Youth Instructor / Coordinator
Jeanie Parscal

Jeanie Parscal is employed as an Alternative School/Homeless Youth Instructor/Coordinator. She has a Bachelor's degree in

Education which is required by her position description. At the Bethlehem House shelter for pregnant mothers, Ms. Parscal essentially provides basic literacy instruction, homemaker assistance, and GED testing for homeless youth requiring the teaching of basic academic skills, life skills, and interpersonal communication skills. Ms. Parscal's duties for the alternative school include work under a homeless youth grant aimed at preventing high school students from dropping out of school by providing small group instruction for "at risk" students from high schools in surrounding districts. The instruction may be given in a classroom setting, in small groups, or one-on-one. Approximately 60-75% of Jeanie Parscal's time is spent working with students. The remainder is spent on preparing and developing curriculum, grading papers and working with other agencies.

The record shows that the work performed by the Alternative School/Homeless Youth Instructor/Coordinator is intellectual in nature and varied in character as opposed to routine mental, manual, mechanical, or physical work. Ms. Parscal position description indicates that, at a minimum, a bachelor's degree in education, counseling, curriculum, or a related field is required evidencing that the position requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. This satisfies the "*professional capacity*" criteria of K.S.A. 72-5413(b).

The Alternative School/Homeless Youth Instructor/Coordinator's responsibilities for teaching basic academic skills, life skills, and interpersonal communication skills, and her work under the homeless youth grant constitute employment in an "instructional capacity" qualifying her as a professional employee.

[13] Jeanie Parscal's only supervisory responsibilities is over non-unit student workers. As stated in New York University, 83 LRRM 1549, 1554 (1973), faculty who exercise supervisory authority over student employees whose employment is dependent upon, and related to, their student status, is not a supervisor. While Ms. Parscal may perform certain duties which are administrative in nature relative to administering the grant program, there is no evidence in the record to support the College's contention that the Alternative School/Homeless Youth Instructor/Coordinator is an "administrative employee" as that term has been defined here, and she will not be excluded from the unit.

The position of Alternative School/Homeless Youth Instructor/Coordinator also possesses sufficient community of interest to be included in the existing bargaining unit. The College argues that Jeanie Parscal does not share a community of interest with other employees in the unit because she provides services to her students different from services provided normally by professional employees at the College. The youth that receive

instruction from Ms. Parscal are high-risk youth of high school age, and they do not receive college credit or a college degree.

While the programs under which Ms. Parscal is employed do not provide the usual type of course work normally associated with the college setting, these are programs, initiated by the College to fulfil its educational mission to the citizens within its area. There can be no question but that the services provided by the Alternative School/Homeless Youth Instructor/Coordinator make substantial contributions to the education of the students enrolled in the programs. Ms. Parscal's basic duties - teaching - provide the necessary and overriding unifying interest.

Since the position of Alternative School/Homeless Youth Instructor/Coordinator meets the definition of "*professional employee*", possesses a community of interest with the other employees in the existing bargaining unit, and cannot be excluded from the unit as an "*administrative employee*" it is appropriate to include the position in the bargaining unit.

ABE/GED Instructor at Andover
Carol Moore

Carol Moore is employed as the ABE/GED Instructor at Andover for the College. She has a Bachelor's degree in Elementary Education, which is required for her position, and is working on a Masters degree in Special Education. Ms. Moore teaches adults who are working toward their GED. She also works with military

recruits who have a GED but are seeking advanced education to qualify for enlistment. Additionally, she works with English-As-A-Second-Language students. Ms. Moore is the sole instructor at the Andover office.

The record shows that the work performed by the ABE/GED Instructor at Andover is intellectual in nature and varied in character as opposed to routine mental, manual, mechanical, or physical work. Ms. Moore's position description indicates that, at a minimum, a bachelor's degree in education is required evidencing that the position requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. This satisfies the "*professional capacity*" criteria of K.S.A. 72-5413(b).

The ABE/GED Instructor at Andover's responsibilities for teaching courses required for GED and English-As-A-Second-Language programs constitute employment in an "*instructional capacity*" qualifying her as a professional employee.

Jeanie Pascal's only supervisory responsibilities is over GED Literacy Volunteers of America and the Community Work Experience Program Assignees. Not only are these volunteers not members of the bargaining unit, they can not even be considered employees of the College. There is no evidence in the record to support a finding that the ABE/GED Instructor at Andover is an "*administrative employee*" as that term has been defined here, nor

is the College's so contending. Ms. Moore will not be excluded from the unit as an "*administrative employee.*"

The position of ABE/GED Instructor at Andover possesses sufficient community of interest to be included in the existing bargaining unit. The College argues that Ms. Moore does not share a community of interest with other employees in the unit because she provides services to adults working toward a GED or military certificate rather than taking courses for college credit. While the program under which Ms. Moore is employed, like that of Ms. Parscal, does not provide the usual type of course work normally associated with the college setting, these are programs, initiated by the College to fulfil its educational mission to the citizens within its area. There can be no question but that the services provided by the ABE/GED Instructor at Andover make substantial contributions to the education of the students, be they adult or military, enrolled in the programs. Her basic duties - teaching - provide the necessary and overriding unifying interest.

Since the position of ABE/GED Instructor at Andover meets the definition of "*professional employee*", possesses a community of interest with the other employees in the existing bargaining unit, and cannot be excluded from the unit as an "*administrative employee*", it is appropriate to include the position in the bargaining unit.

ABE/GED Instructor / Community Coordinator
Beverly Davis

Beverly Davis is employed as the ABE/GED Instructor/Coordinator at Augusta. She has a Bachelor's degree in General Studies. Ms. Davis is responsible for Adult GED, Alternative School and military programs, and spends her time at the ABE/GED and military center in Augusta and at the alternative school for high school students in Butler County. Ms. Davis testified that eighty-five to ninety-five percent of her time is spent teaching ABE/GED, military and alternative high school students, or in activities that relate directly to her classroom responsibilities, i.e. grading papers.

The record shows that the work performed by the ABE/GED Instructor/Coordinator at Augusta is intellectual in nature and varied in character as opposed to routine mental, manual, mechanical, or physical work. Ms. Davis' position description indicates that, at a minimum, a bachelor's degree in education or a related field is required evidencing that the position requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. This satisfies the "professional capacity" criteria of K.S.A. 72-5413(b).

The ABE/GED Instructor at Andover's responsibilities for teaching courses required for Adult GED, Alternative School and

military programs constitute employment in an "instructional capacity" also qualifying her as a professional employee.

The College seeks to exclude Ms. Davis from the bargaining unit as an "administrative employee." Approximately five to fifteen percent of Ms. Davis' time is devoted to her supervisory duties. She supervises a part-time secretary but does not supervise any adjunct faculty. The ABE/GED Instructor/Coordinator recommends the hiring of her secretary, and whether the secretary will continue in the employment of the College is primarily dependent on the ABE/GED Instructor/Coordinator's recommendation. Ms. Davis also has a financial aid student worker whom she trains and evaluates. This person's continued employment may be based upon Ms. Davis' recommendation. Both of these individuals are not members of the bargaining unit. Beverly Davis does not supervise the adjunct faculty, and does not hire or fire the instructors.

The College has the burden of coming forward with evidence that such supervision of non-unit employees exceeds 50 percent of her time or to show that Ms. Fowler's supervision of non-unit employees so allied her with management as to establish a differentiation between her and other employees in the bargaining unit. This it has failed to do.

Ms. Davis also coordinates the staff located at the Augusta Center; i.e. Jeanie Parscal and Patricia Bernhardt who are instructors at the Augusta campus, and members of the bargaining

unit. If either Ms. Parscal or Ms. Bernhardt have a problem, they report to her as the coordinator at Augusta. Although Ms. Davis is in charge of the Augusta facility, she does not consider herself to be the supervisor of the other ABE/GED instructors but rather a part of their team.

Instructive in considering the purposes that underlay the formulation of the federal language defining supervisor is the 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"*]. 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 bosses⁹, 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." 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. The above legislative history justifies the standard reluctance to apply an exception broadly.

One cannot believe the Kansas legislature meant to do anything less for the Kansas professional employee when it passed the PNA to allow organization by professional employees. It must be concluded that the PNA line between those eligible to participate in public bargaining and those not is drawn to exclude those who are

⁹ In early logging days under certain conditions straw was spread on mountainous slopes 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.

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.

A "foreman" on the other hand is "generally the first line of management in the operation of the plant or facility. The individual who, in the eyes of the production worker, represents management and authority. He 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." Roberts', supra, p. 114.

representatives of the board of education or any of its supervisory personnel. The expressed policy of the PNA endorses this belief. That policy is to foster harmonious working relationships between professional employees and the board of education 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 Liberal-NEA v. Board of Education, 211 Kan. 219, 232 (1973) City of Davenport v. PERB, 2 PBC ¶ 20,201 (Iowa 1976).

[13] 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. NLRB v. Griggs Equip., Inc., 307 F.2d 275, 279 (CA5, 1962). A review of the record leads to the conclusion that Beverly Davis' minor supervisory authority over Jeanie Parscal and Patricia Bernhardt is consistent with and analogous to that of a leadman or straw boss. See Tucson Gas & Elect. Co., 100 LRRM 1489, 1496 (1979). While Ms. Davis possesses some attributes of power and independent judgment unlike Ms. Parscal and Ms. Bernhardt, and had greater responsibility and authority than either, such is not sufficient to find her 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). Her leadership role appears to rest on her skill and experience rather than on a need for her to be in that position to carry out the College's labor policy. cf. NLRB v. Detroit Edison Co., 537 F.2d 239 (CA 6, 1976). Ms. Davis' direction of Ms. Parscal's and Ms. Bernhardt's work was done in connection with their instructional duties, and did not go beyond into personnel authority which more directly promotes the interest of the employer¹⁰ and which is not motivated by student needs. Accordingly, the position will not be excluded pursuant to K.S.A. 72-5413(d).

The position of ABE/GED Instructor/Coordinator at Augusta possesses sufficient community of interest to be included in the existing bargaining unit. As noted above, while the ABE/GED programs do not provide the type of course work normally associated with the college setting, these are programs, initiated by the College to fulfil its educational mission to the citizens within its area. There can be no question but that the services provided by the ABE/GED Instructor/Coordinator at Augusta make substantial contributions to the education of the students enrolled in the programs.

¹⁰ "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).

Since the position of ABE/GED Instructor/Coordinator at Augusta meets the definition of "professional employee", possesses a community of interest with the other employees in the existing bargaining unit, and cannot be excluded from the unit as an "administrative employee", it is appropriate to include the position in the bargaining unit.

*El Dorado Resource Center ABE/GED, Alternate School Instructor
Virginia Sue Choens*

Virginia Sue Choens is the El Dorado Resource Center ABE/GED, Alternative School Instructor. She currently works at the El Dorado Resource Center and instructs and supervises the KanWork students. Her responsibilities are the Alternative School and GED Program in El Dorado, and her students are primarily ninth through twelfth graders. Ms. Choens has the same duties and responsibilities as the ABE/GED Instructors at other campuses in teaching courses required to obtain an ABE or GED.

The record shows that the work performed by the El Dorado Resource Center ABE/GED, Alternative School Instructor is intellectual in nature and varied in character as opposed to routine mental, manual, mechanical, or physical work. Ms. Choens' position description indicates that, at a minimum, a bachelor's degree in education is required evidencing that the position requires knowledge of an advanced type in a field of science or

learning customarily acquired by prolonged study in an institution of higher learning. This would satisfy the "*professional capacity*" criteria of K.S.A. 72-5413(b). The fact that Ms. Choens does not possess the bachelor's degree and is eight hours away from receiving an Associates degree but the College maintains her in the position must indicate the level of skill and ability she possesses through her experience with the programs as sufficient to hold the position. Regardless, the El Dorado Resource Center ABE/GED, Alternative School Instructor's responsibilities for teaching courses required for the ABE/GED programs constitute employment in an "*instructional capacity*" qualifying her as a professional employee.

The College seeks to exclude Ms. Choens from the bargaining unit as an "*administrative employee.*" The record reveals that she assumes the duties of Mary Ann Christensen two days a week when she is out of the office. In Ms. Christensen's absence, Ms. Choens has supervisory authority over a full-time secretary, a part-time secretary, the Coordinator of the Volunteer Literacy Program, Jeanie Parscal and Pat Bernhardt. She views the employee relationships at her office to be that of a team effort rather than one based on supervisor-subordinates. The other employees look to her for guidance and assistance because she has been in the program the longest.

A review of the record leads to the conclusion that Virginia Sue Choens' minor supervisory authority over Jeanie Parscal and Patricia Bernhardt, the only employees in the bargaining unit supervised, like that of Beverly Davis', is consistent with and analogous to that of a leadman. Her leadership role appears to rest on her seniority, skill, and years of experience rather than on a need for her to be in that position to carry out the College's labor policy. Ms. Choens' direction of Ms. Parscal's and Ms. Bernhardt's work primarily was done in connection with their instructional duties, and did not go beyond into personnel authority which more directly promotes the interest of the employer and which is not motivated by student needs. Accordingly, the position will not be excluded "administrative" pursuant to K.S.A. 72-5413(d).

The position of El Dorado Resource Center ABE/GED, Alternative School Instructor possesses sufficient community of interest to be included in the existing bargaining unit. As noted above, while the ABE/GED programs do not provide the type of course work normally associated with the college setting, these are programs, initiated by the College to fulfil its educational mission to the citizens within its area. There can be no question but that the services provided by the El Dorado Resource Center ABE/GED, Alternative School Instructor make substantial contributions to the education of the students enrolled in the programs.

Since the position of ABE/GED Instructor at Andover meets the definition of "professional employee", possesses a community of interest with the other employees in the existing bargaining unit, and cannot be excluded from the unit as an "administrative employee", it is appropriate to include the position in the bargaining unit.

*Instructor of Alternative High School / Homeless Youth Grant
Community Corrections Coordinator
Patricia Bernhardt*

Patricia Bernhardt is employed in the position of Instructor of Alternative High School/Homeless Youth Grant, and Community Corrections Grant Coordinator for the College. Ms. Bernhardt has a Bachelor's degree in Education. She substitutes for the ABE/GED instructors, coordinates military programs in Augusta, and is a GED instructor at Andover and El Dorado. Ms. Bernhardt's GED duties consist of testing students to determine their skills for placement into classes they need to take to obtain their GED. She works with a broad range of students from those 16 years old to students in their 50's and under the Community Corrections grant individuals placed in the community corrections program are provided the opportunity to receive G.E.D. instruction and life-skill training.

The record shows that the work performed by the Instructor of Alternative High School/Homeless Youth Grant, and Community

Corrections Grant Coordinator is intellectual in nature and varied in character as opposed to routine mental, manual, mechanical, or physical work. Ms. Bernhardt's position description indicates that, at a minimum, a bachelor's degree in education or a related field is required evidencing that the position requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. This satisfies the "*professional capacity*" criteria of K.S.A. 72-5413(b).

The College seeks to exclude the Instructor of Alternative High School/Homeless Youth Grant, and Community Corrections Grant Coordinator from the bargaining unit as an "*administrative employee*", and yet admits, in its brief, that her position "*may not involve administrative duties.*" A review of the record reveals no specific evidence of supervisory functions which would require exclusion. The record does reveal that Patricia Bernhardt substitutes for Beverly Davis when she is absent from Augusta, and for Virginia Sue Choens when she is absent from El Dorado. In each instance, Ms. Bernhardt essentially becomes the Coordinator at that center. The absences by Ms. Davis or Ms. Choens would be for illness or professional conferences and occur approximately once per month at Augusta and once every other month at El Dorado. The absences last for no more than a day or two. During the period of time that Ms. Bernhardt has substituted for Ms. Davis and Ms.

Choens she has never been called upon to hire anyone, or discipline any employee, or sought permission to reward any employee. Substituting for Ms. Davis and Ms. Choens amounts to only approximately 10% of Ms. Bernhardt's time.

It must be assumed that since the College has sought the exclusion of both Ms. Davis or Ms. Choens, the College is of the opinion that when Ms. Bernhardt substitutes for these individuals any supervisory authority they possess would similarly disqualify Ms. Bernhardt. However, as has been determined above, Ms. Davis' and Ms. Choens' minor supervisory authority over Jeanie Parscal and Patricia Bernhardt is more consistent with that of a leadman, and is not sufficient to find either in possession of supervisory powers so as to exclude them as "*administrative employees.*" Accordingly, Ms. Bernhardt cannot similarly be excluded.

[14] Additionally, 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). Here Ms. Bernhardt substitutes for Ms. Davis or Ms. Choens less than twice a month, and the substitution

amounts to only 10% of her time. As such it cannot be considered so regular or substantial as to require exclusion of the Instructor of Alternative High School/Homeless Youth Grant, and Community Corrections Grant Coordinator from the bargaining unit as an "administrative employee."

The College finally argues that Ms. Bernhardt's status as a part-time employee is evidence that she does not share a community of interest with the other employees in the bargaining unit. Ms. Bernhardt works 30 hours per week. To be considered a full-time employee of the College one must work a minimum of 35 hours per week.

[15] Part-time employees who, because of regularity and frequency of employment have a substantial community of interest with the unit's full-time employees in conditions of employment are regarded as regular part-time employees and are includable in the bargaining unit. Morris, The Developing Labor Law, Ch. 30, p. 1438.

Here Ms. Bernhardt has been employed in this position by the College since 1992. She possesses the same responsibilities as the full-time ABE/GED instructors, regularly interacts with the ABE/GED instructors and staff at the Andover and El Dorado campuses, and even has limited supervisory authority over them.

Additionally, the amount of time worked is an important factor in determining whether an employee has a sufficient community of interest with the other employees in the bargaining unit. See

Tuscarawas Landmark, Inc., 101 LRRM 1321 (1979); Tawa Bros. Inc., 102 LRRM 1669 (1979). Here the Instructor of Alternative High School/Homeless Youth Grant, and Community Corrections Grant Coordinator works 30 hours per week, 75 percent of the time of other full-time ABE/GED instructors, and 85 percent of the time of a full-time faculty member. It would appear that Ms. Bernhardt qualifies as a regular part-time employee and has sufficient community of interest with the other employees in the bargaining unit to make inclusion of the position of Instructor of Alternative High School/Homeless Youth Grant, and Community Corrections Grant Coordinator appropriate.

Since the position of Instructor of Alternative High School/Homeless Youth Grant, and Community Corrections Grant Coordinator appropriate meets the definition of "professional employee", possesses a community of interest with the other employees in the existing bargaining unit, and cannot be excluded from the unit as an "administrative employee", it is appropriate to include the position in the bargaining unit.

ISSUE 1C

WHETHER THE PETITIONER'S PROPOSAL TO INCLUDE THE CLASSIFICATIONS OF "PART-TIME ADVISORS" AND "LIBRARIAN ASSISTANTS" BE DENIED AS CONTRARY TO THE CURRENT MEMORANDUMS OF AGREEMENT BETWEEN THE PARTIES.

Butler County Community College argues, in its Reply Brief, that both K.S.A. 72-5420 and K.A.R. 49-24-4 "recognize that once the parties have reached a negotiated agreement as to an appropriate unit description, any additions of job positions to the unit thereafter, must be consistent with the unit agreed upon by the parties." Such is not a completely accurate statement of the law. Therefore, it appears advisable to review the subject of unit clarification before addressing the College's argument.

Unit Clarification

Authority of the Secretary

In seeking a source of authority for the modification of an existing bargaining unit, a review of the Professional Negotiations Act ("PNA"), K.S.A. 72-5413 *et seq*, reveals no specific reference to clarification or amendment of an employee unit after the initial determination. However, there can be no question that K.S.A. 72-5420 vests the Secretary of Human Resources with broad discretionary authority in the determination of what constitutes an appropriate bargaining unit:

"In each case where the question is in issue, the secretary shall decide, on the basis of community of interest between and among the professional employees of the board of education, the wishes of the professional employees and or the established practices among the professional employees including, among other things, the extent to which such professional employees have jointed a professional employees' organization, whether the unit appropriate for the purposes of professional negotiation shall consist of all persons employed by the board of education who are engaged in teaching or

performing other duties of an educational nature, or some subdivision thereof, except that a unit including classroom teachers shall not be appropriate unless it includes all such teachers employed by the board of education."

[16] Since there is no Kansas case law defining the extent of that authority, it is appropriate to look to other jurisdictions for guidance.¹¹ The Secretary's authority to decide a unit appropriate for the purposes of collective bargaining is similar to that of the National Labor Relations Board ("NLRB") under the National Labor Relations Act ("NLRA"). See 29 U.S.C. §159. Under the NLRA, issuance of an NLRB certification does not forever establish the precise parameters of the parties' bargaining relationship. Norris and Shershin, How to Take a Case Before the NLRB, §10.15, p. 273 (1992). It has been reasoned that since the NLRA provides a specific statutory scheme for resolving questions concerning representation by an election and certification of a labor organization, Congress has given the NLRB the concomitant power to regulate such certification by clarification or amendment. Century Electric Co., 146 NLRB No. 139 n. 4 (Feb. 4, 1964). The NLRB, therefore, may subsequently revise the description of the appropriate bargaining unit. NLRB Rules and Regulations, §§102.60(b), 102.61(d), 102.63(b); NLRB Casehandling Manual ¶¶11480, 11490-98. Based on this authority, the NLRB repeatedly has held that its certifications are subject to reconsideration,

¹¹ See footnote number 5, supra.

Worthington Pump and Mach. Corp., 30 LRRM 1052 (1952), and that it may police its certifications by clarification and amendment. NLRB Casehandling Manual, ¶11478.3; Independent Metal Workers Local No. 1, 56 LRRM 1289 (1964). Since a similar statutory scheme for resolving questions concerning representation is found in the PNA, the same reasoning and result should apply.

Unit clarification proceedings under the PNA derive from the Secretary's authority to determine the appropriateness of a bargaining unit. The clarification of an existing employee unit by adding or removing positions is similar to the Secretary's function of defining an appropriate unit. In both situations, the expertise of the Secretary is employed to determine an appropriate employee composition for a particular bargaining unit. See Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 (CA7, 1982).

The need to be able to modify an existing bargaining unit has clearly been recognized by the Secretary. K.S.A. 72-5432(a) provides that:

"The secretary of human resources may adopt such rules and regulations as are necessary to implement and administer the provisions of K.S.A. 72-5413 through 72-5431, and amendments to such sections, which place specific duties and responsibilities upon the secretary."

Pursuant to that authority the Secretary adopted K.A.R. 49-24-4¹² which provides for the filing of petitions to resolve unit determination or "clarification" questions.¹³

Unit clarification, like the original determination of an appropriate unit, is almost entirely a factual determination, South Prairie Construction Co. v. Operating Engineers, 425 U.S. 800 (1976), committed to the Secretary's sound discretion, and may not be set aside unless the reviewing court is convinced that the Secretary has acted in an arbitrary and capricious manner, Consolidated Papers, 109 LRRM at 2817, or the unit is a "crude gerrymander." S.D. Warren Co. v. NLRB, 353 F.2d 494, 498 (CA 1, 1965). The party opposing the Secretary's unit determination must show that the unit as composed is "*clearly not appropriate.*" See Banco Credito v. NLRB, 390 F.2d 110, 112 (CA 1, 1968).

With this understanding of the authority of the Secretary to amend an existing bargaining unit, the College's argument that once a unit has been determined and memorialized in a memorandum of agreement K.S.A. 72-5420 and K.A.R. 49-24-4 prohibits either the

¹² K.A.R. 49-24-4 states:

"Determining appropriate units. Petitions for unit determination may be filed by a board of education, professional employee association, or a professional employee(s). In the event a board of education has recognized a professional employee organization, unit determination or clarification questions shall be governed by the memorandum of agreement unless the secretary determines that the agreement is unclear or that the agreement is silent with regard to the positions in question."

¹³ It should be noted, however, that a petition for unit clarification may only be filed by an employee organization currently recognized or certified as bargaining agent for the employees in the bargaining unit or by the employer involved. Neither a rival union nor individual employees are authorized to file such a petition. See Norris and Shershin, How to Take a Case Before the NLRB, §10.15, p. 273 (1992).

exclusive employee organization or the board of education from attempting to add job classifications to the unit is without merit. K.A.R. 49-24-4 must not be viewed as an absolute prohibition. Instead, it must be read that during the term of a memorandum of agreement which sets forth the description of the bargaining unit, any disputes concerning who is covered by the memorandum of agreement will be controlled by that unit description. However, that bargaining unit may be amended for future agreements, and, in certain situations, during the term of an existing agreement. The question then is when and under what circumstances the Secretary should grant a unit clarification petition.

Unit Clarifications - When Appropriate

The College further argues that if new positions are to be added to an existing bargaining unit, then the employees in those positions must be afforded the opportunity to vote on the question of inclusion. Otherwise, "[e]mployees who are forced into the unit have no voice in selecting the bargaining unit representative or whether they even desire to turn over their bargaining rights to a third party." Neither the PNA nor the rules and regulations adopted by the Secretary specifically speak to this issue.

A self determination election is the usual method by which unrepresented employees may be added to a bargaining unit. See

Capital Cities Broadcasting Corp., 194 NLRB 1063 (1972). However, unit clarification procedures under the NLRA permit the NLRB to add employees to a particular bargaining unit without an election. When the new employees are added to and co-mingled with existing employees to the extent that they lose their separate identity, their inclusion in the existing bargaining unit follows as a matter of course without first having an election, Westinghouse Elec. Corp. v. NLRB, 76 LRRM 2986, 2989 n.3 (CA2, 1971), and they are governed by the unit's choice of bargaining representative. Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 (CA7, 1982). The added employees are then considered covered by the existing collective bargaining agreement. The theory of unit clarification, insofar as adding positions to the collective bargaining unit, is that the added employees functionally are within the existing bargaining unit but had not formally been included. NLRB v. Magna Corp., 734 F.2d 1057, 1061 (CA5, 1984); Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 755-57 (CA7, 1982); Cutting Die Co., 98 LRRM 1431 (1978); Arthur C. Logan Memorial Hospital, 96 LRRM 1063 (1977); Copperweld Specialty Steel Co., 83 LRRM 1309 (1973).

[16] Under the NLRA, generally, a unit clarification petition is appropriate in the following circumstances: (A) where there is a dispute over the unit placement of employees within a particular job classification; (B) where there has been an "accretion" to the work force; and (C) where a labor organization or employer seeks a

reorganization of the existing structure of a bargaining unit. Feerick, Baer & Arfa, NLRB Representation Elections, §6.1, p.180; Cf NLRB v. Magna Corp., 116 LRRM 2950, 2953 (CA5, 1984).

Circumstances "A" and "C" are the easiest to understand and apply. An example of circumstance "A", above, is where a dispute has arisen concerning the unit placement of employees whose job classifications have been renamed, or whose duties and responsibilities have undergone recent substantial changes which create real doubt as to whether their positions continue to fall in a job classification - either included or excluded from the unit - that they occupied in the past. Mass. Teachers Ass'n, 98 LRRM 1431, 1433 (1978). Unit clarification proceedings have also resolved questions relating to changed job responsibilities, but generally the changed job responsibilities related to whether an individual employee's assumption of new responsibilities, for example, supervisory or confidential responsibilities, would require exclusion of that employee from the bargaining unit. Philadelphia Fed. of Teachers v. PLRB, 103 LRRM 2539 (Penn. 1979); Western Colorado Power Co., 77 LRRM 1285 (19) [the NLRB, during the term of an agreement, has clarified a bargaining unit and removed improperly included supervisors]. Finally, where the unit includes individuals whose inclusion is contrary to statute, it is appropriate for the NLRB to clarify the unit to exclude the

improperly included individuals. Peerless Publications, 77 LRRM 1262, 1264 (1971).

Circumstance "C", where a labor organization or employer seeks a reorganization of the existing structure of a bargaining unit, is characterized by a sub-group of employees being severed from the bargaining unit to form a new bargaining unit. Before such severance is allowed, determination must first be made as to whether in reality, the petitioning employees, 1) constitute a functionally distinct group, and 2) whether, as a group, they have overriding special interests. Kalamazoo Paper Box Corp., 49 LRRM 1716 (1962). This determination is made on a case-by-case basis.

Most certainly, the majority of the unit clarification petitions filed under the PNA fall within circumstance "B", i.e. where there has been an "accretion" to the work force. To understand circumstance "B" it is necessary to define what is meant by an "accretion."

[17] An "accretion" is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity. Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 (CA7, 1982); See also Universal Security Instruments v. NLRB, 107 LRRM 2518, 2522 (CA4 1981); Renaissance Center Partnership, 100 LRRM 1121, 1122 (1979); Lammert Industries v. NLRB, 98 LRRM 2992, 2994 (CA7, 1978). The policy of

the NLRB is to find accretions "only . . . when the additional employees share an overwhelming community of interest with the pre-existing unit to which they are accreted," Giant Eagle Markets Co., 308 NLRB No. 46 (August 11, 1992), and to prohibit accretion of employees to an existing unit unless the employees have little or no separate identity distinct from the bargaining unit. Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1041 n.16 (CA 9, 1978). The NLRB has, therefore, limited the scope of its unit clarification proceedings to something far less than the original determination process. Philadelphia Fed. of Teachers v. PLRB, 103 LRRM 2539 (Penn. 1979). The most common application of the accretion doctrine is where new classifications of employees have been created by a public employer after the original unit determination.

As a general rule, the NLRB and the courts have applied the accretion doctrine restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit. NLRB v. Masters Like Success, Inc., 47 LRRM 2607 (CA2, 1961); NLRB v. Adhesive Products Corp., 46 LRRM 2685 (CA2, 1960); Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 n.4 (CA7, 1982). Accretion petitions are closely scrutinized because of the danger that employees who have not voted for representation may be "bootstrapped" into the bargaining unit. See Scott County v. PERB, 136 LRRM 2442, 2444 (Minn. 1990).

In determining whether a group of employees represents an accretion to an existing unit the Secretary must consider unique and complex sets of facts in light of the somewhat conflicting policies of stabilizing bargaining relationships while assuring employees the right to choose their own bargaining agents. See NLRB v. Food Employees Council, Inc., 69 LRRM 2077 (CA9, 1968). In this regard, as stated above, it is necessary to determine first the extent to which the employees to be included share a community of interest with existing unit employees, and then whether the employees to be added constitute such an identifiable, distinct segment so as to constitute an appropriate bargaining group. Capital Cities Broadcasting Corp., [1972 CCH NLRB ¶ 23,798] 194 NLRB 1063 (1972).

To determine whether certain employees share a sufficient community of interest to constitute an accretion, the factors used are generally the same as those employed in determining the appropriateness of a proposed bargaining unit in a unit determination proceeding. See Kaynard v. Mego Corp., 105 LRRM 2723, 2726 (CA2, 1990). The NLRB compares the employees to be added to the employees in the existing unit and examines such functions as similarity of working conditions, job classifications, skills and functions, similarity of job duties, interchangeability of employees, geographic proximity, Lammert Industries v. NLRB, 98 LRRM 2992, 2994 (CA7, 1978); the extent of centralized management

and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations, Peter Kiewit Sons Co., 96 LRRM 1010 (1977); and the functional integration of the employer, and collective bargaining history, R.L. Sweet Lumber Co., 89 LRRM 2726 (1973). There is no requirement that all of the listed factors be present. To so require, the court concluded in Kaynard v. Mego Corp., 105 LRRM 2717 (E.D.N.Y. 1980), would be to hamstring the NLRB by requiring it to plug each unique case into an artificial test. According to the court, the NLRB has a duty to "unearth the factors relevant to the accretion issue in the case under consideration . . . [and] then decide the relative weight to be attributed to each factor." Id.

If it is determined that there is a community of interest between the new employees and the employees in the bargaining unit, accretion may still be denied. In the words of Judge Goldberg:

"The Board has traditionally been reluctant to find an accretion, even where the resulting unit would be appropriate, in those cases where a smaller unit, consisting solely of the accreted unit, would also be appropriate and the §7 rights of the accreted employees would be better preserved by denying the accretion." Boire v. International Brotherhood of Teamsters, 83 LRRM 2128 (CA5, 1973).

As explained in Melbet Jewelry Co., [1969 CCH NLRB ¶ 21,453], 180 NLRB 107, 110 (1969), the NLRB "will not, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity to express their

preference in a secret election." Towne Ford Sales, 270 NLRB 311 (1984). In this regard, it is necessary to determine whether the employees to be added constitute an identifiable, distinct segment so as to comprise an appropriate group. If so, the employees will not be accreted to the existing unit, and a representation election must be sought. See Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1041 n.16 (CA 9, 1978); Giant Eagle Markets Co., 308 NLRB No. 46 (August 11, 1992).

Basis for Dismissing Clarification Petition seeking Accretion

A. Does the Accretion Raise Questions of Representation

1. Numerically Overshadows

[20] Even when the group to be accreted has sufficient community of interest with the existing unit and is not an identifiable, distinct segment, there are two circumstances under which the NLRB will not accret the unrepresented employees without giving them a chance to express their representational desires; 1) when the unrepresented group sought to be accreted numerically overshadows the existing unit, Carr-Gottstein Foods, 307 NLRB No. 199 (July 16, 1992); or 2) when the job classifications of the unrepresented group have been historically excluded from the bargaining unit by the parties, Plough, Inc., 83 LRRM 1206 (1973).

As stated in Renaissance Center Partnership, 100 LRRM 1121
(1979):

"[T]he Board is cautious in making such a finding [of accretion] particularly when the accreted group numerically overshadows the existing certified unit, because it would deprive the larger group of employees of their statutory right to select their own bargaining representative."

The point at which the number of employees sought to be included into an existing unit may trigger a representation election is determined by answering the question, "Does the addition raise a question of representation?". Boston Gas Co., 221 NLRB 628 (1975)[80 new employees added to 184 in existing unit does not raise question]; Scott County v. PERB, 136 LRRM 2442, 2444 (Minn. 1990)[7 new employees to a unit containing 114 would not significantly effect employee organization's majority status].

2. Historical Exclusion

Pursuant to a line of NLRB decisions, a unit clarification petition will not be entertained to clarify the unit placement of job classifications that have been historically excluded from the unit by the parties, and accordingly are dismissed by the NLRB. Plough, Inc., 83 LRRM 1206 (1973); Lufkin Foundry & Machine Co., 70 LRRM 1262 (1969). It is established NLRB policy that a classification of employees will not be found to be an accretion to a certified unit where that classification was in existence at the time of the certification but not included in the unit when the

certification was issued, Bendix Corp., 66 LRRM 1332 (19); Gould-National Batteries, Inc., 61 LRRM 1436 (19), and no recent changes have occurred to warrant finding the individuals to be accretions to an existing unit. Monongahela Power Co., 81 LRRM 1084, 1084-85 (1972). A petition to include a position historically excluded from a unit is considered to raise a question concerning representation. Monongahela Power Co., 81 LRRM 1084, 1084-85 (1972). As stated in Port of Portland v. Municipal Employees, Local 483, 2 PBC ¶ 20,298 (Oregon App. 1976);

"We therefore conclude that regardless of the label used - a petition for unit clarification or anything else - a previously unrepresented employee in a longstanding job classification cannot be added to an existing bargaining unit without the opportunity to vote."

B. Timing of Clarification Petitions

It is settled that the NLRB will not normally entertain a petition for unit clarification to modify a unit which is clearly defined in the current bargaining agreement during the term of that agreement. Wallace Murray Corp., 78 LRRM 1046 (1971); Safeway Stores, Inc., 88 LRRM 1596 (1975); Pacific Northwest Bell Tel. Co., 80 LRRM 1296 (1974); Austin Cablevision, 122 LRRM 1084, 1085 (1986)[the NLRB will not clarify a unit defined by contract during the contract's mid-term to include an excluded position in existence before the contract was signed]; International Ass'n of Machinists, 101 LRRM 1978 (1979)[The NLRB dismissed a unit clarification petition that sought inclusion of several job

categories created after the effective date of the existing contract]. To allow such mid-term petitions, the NLRB has stated, would be disruptive of continued bargaining relationships.

Two factors in addition to the stability of bargaining relationship seems to support the Wallace-Murray rule. First, the rule prevents non-unit employees from joining an existing bargaining unit *without voting* and prevents their participation in an existing collectively bargained agreement *without bargaining*. NLRB v. Mississippi Power & Light, 120 LRRM 2302, 2304-05 (1985). Thus it protects employee freedom of choice by preventing the imposition of a representative upon them, and it also protects the employer by preventing the inclusion of additional employees within the terms of a bargaining agreement without bargaining.

The NLRB's consistent procedure in such cases, therefore, has been to dismiss the unit clarification petition without prejudice to the filing of another petition "*at an appropriate time*." Wallace Murray Corp., 78 LRRM 1046 (1971). Ordinarily, "*an appropriate time*" is shortly before expiration of the current collective

bargaining agreement.¹⁴ Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 (CA7, 1982); Shop Rite Foods, 103 LRRM 1223, 1224 (1980); Peerless Publications, 77 LRRM 1262, 1264 (1971).

The Wallace-Murray rule thus deals only with the timeliness of the unit clarification petition by expressing a policy of deferring, during the term of the contract, to the previously determined appropriate unit description.¹⁵ Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2818 (CA7, 1982). Whether the rule applies to a given case has nothing to do with the appropriateness of the bargaining unit, Consolidated Papers, 109 LRRM at 2818, and an employer is not able to escape forever a finding of accretion. As explained by the court in Consolidated Papers:

"The effect of Wallace-Murray is to leave the party seeking to include a group of employees in the unit with two options: (1) to await the expiration of the current collective bargaining agreement and file another unit clarification petition with the Board, or (2) to seek an immediate self-determination election among the employees sought to be included."

By application of the Wallace-Murray rule, a contract during its term bars the non-elected addition of employees to the

¹⁴ In this manner the parties are put on notice that the unit composition is being questioned, and that the matter will be resolved by means of the statutory process. The parties can plan accordingly for the upcoming negotiations. See Fire Fighters, Local 1054 v. PERC, 110 LRRM 2306, 2308 (Wash. 1981). For ease of administration, this time period under PEERA should coincide with the window period set forth in K.S.A. 75-4327(d) - filed no more than 150 days or less than 90 days prior to expiration date of agreement. For purposes of the PNA, since the parties must exchange subjects for bargaining by February 1, notice must be given earlier. Here the deadline set forth in K.A.R 49-25-4(c) - filed before December 1 - should be applied. In either case, the amendment to the bargaining unit will not become effective until after the expiration of the existing agreement.

¹⁵ The caveat remains that the memorandum of agreement must clearly define the unit. Whether the unit is clearly defined is an issue which may be raised by a unit clarification petition. Only if the job position is clearly included or excluded from the unit by the description in the memorandum of agreement will the Wallace Murray rule be applied.

bargaining unit. It does not, however, bar an elected addition. Indeed, a contrary rule might be inconsistent with the PNA, in that some employees would be deprived of their right to representation pursuant to K.S.A. 72-5414 for as much as three years simply because other employees had entered into a memorandum of agreement not benefitting the unrepresented employees. See NLRB v. Mississippi Power & Light, 120 LRRM 2302, 2305-06 (1985).

The NLRB has consistently held that representation elections are the proper procedure to follow when unit clarification is inappropriate. Consolidated Papers, Inc. v. NLRB, 109 LRRM 2815, 2817 (CA7, 1982). See Copperweld Specialty Steel Co., 83 LRRM 1309 (1973)[holding representation election rather than unit clarification as to existing positions not previously included in bargaining unit]; Remington Rand Division of Sperry Rand Corp., 77 LRRM 1240 (1971); W. Wilson, Labor Law Handbook, ¶231 (1963). Even where a bargaining unit is being "clarified" to add only one employee, it has been concluded that meaningful freedom of choice can only be protected through an election process. Cf. Linden Lumber Division v. NLRB, 419 U.S. 301 (1974); Port of Portland v. Municipal Employees, Local 483, 2 PBC ¶ 20,298 (Oregon App. 1976). This type of election is referred to, in the private sector, as an Armour-Globe election, and it differs fundamentally from a representation election.

The purpose of representation or certification election is to determine which employee organization, if any, shall be certified to represent the employees in an predetermined appropriate unit. In a pure Armour-Globe election, on the other hand, the question of which employee organization will be the certified representative in the preexisting unit has already been determined - it will always be the incumbent organization - and the only purpose of the election is to determine whether a group of unrepresented employees desires to share in the representation provided by that incumbent employee organization. See NLRB Field Manual, §11090.2c(1). Accordingly, when a majority of the voting employees vote in favor of such representation, a Certification of Results rather than a Certification of Representation is issued.

[21] Stated another way, in an Armour-Globe election, the issue at stake is not who the employee representative shall be, but precisely who shall be represented. Federal-Mogul Corp., 85 LRRM 1353, 1355 (1974). The ballot used, as well as the Notice of Election, clearly states that a vote for the employee organization indicates that the employee desires to be represented as part of the existing unit. Carr-Gottstein Foods, 307 NLRB No. 199 n.3 (July 16, 1992).

Coverage of New Employees by Existing Agreement

Following proper expansion of a bargaining unit to add previously unrepresented employees, the question may arise whether the existing bargaining agreement applies to the new members of the bargaining unit, or whether it is necessary to bargain over the terms and conditions of the new member's employment. The existing agreement between the employer and the existing bargaining unit cannot be applied to the new members, and it is necessary to negotiate about this position. This is in accord with federal labor law. Federal-Mogul Corp. Bower Roller Bearing Div., [1974 CCH NLRB ¶ 26,281] 209 NLRB 343 (1974). As the NLRB reasoned in Federal-Mogul Corp., 85 LRRM 1353, 1354 (1974):

"That would create the only situation in law known to us in which individuals theretofore not a party to an agreement could, by their own unilateral action, vote themselves a share of the bargain which the other parties had agreed to between and for themselves."

Given the above-described differences between a regular unit certification election and an Armour-Globe style election, it must be recognized that different bargaining obligations flow therefrom. Following a regular certification election in which the employee organization is victorious, a Certification of Representation is issued and the board of education is thereafter obligated to bargain with that representative in a good-faith effort to reach a collective bargaining agreement covering the unit employees.

Following an Armour-Globe style election in which the unrepresented employees vote to join the preexisting unit, the parties have already discharged their duty to bargain, at least with regard to contract provisions which are unit-wide in scope and which therefore apply equally to all unit members. With respect to such provisions, the incumbent employee organization and the board of education have already bargained in good faith, have already agreed to specific terms, and have already incorporated those terms into an executed memorandum of agreement covering each and every employee in the unit. In short, in regard to these provisions, no duty to bargain remains at the time of the election.

[22] The employer cannot unilaterally extend the terms of an existing contract to job classifications added to the bargaining unit during the term of the contract. Instead, the terms and conditions of the new bargaining unit members' employment must be negotiated. And until negotiations are concluded, the terms and conditions enjoyed by the employees in question when they were unrepresented apply. Port of Portland v. Municipal Employees, Local 483, 2 PBC ¶ 20,298 (Oregon App. 1976).

[23] Following the election to include additional employees in a bargaining unit covered by an existing memorandum of agreement, the board of education becomes obligated to engage in good faith bargaining as to the appropriate contractual terms to be applied to this new group of employees. Thus, in such situations, the new

employees added to the existing bargaining unit are treated as a separate unit for the period of time until the expiration of the existing memorandum of agreement, and thereafter as a part of the existing bargaining unit. See Federal-Mogul Corp., 85 LRRM 1353, (1974). As the NLRB explained in Federal-Mogul:

"We do not perceive either legal or practical justification for permitting either party to escape its normal bargaining obligation upon the theory that this newly added group must somehow be automatically bound to terms of a contract which, by its very terms, excluded them. Such a determination would appear to be at odds with the Supreme Court's holding in H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970). In H.K. Porter, the Supreme Court noted that "while the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision or a collective-bargaining agreement. Were the Board to require unilateral application of the existing contract to the setup men we would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the H.K. Porter doctrine. We understand the teaching of that case to be that we have no statutory authority here to force on these employees and their Union, as well as the Employer, contractual responsibilities which neither party has ever had the opportunity to negotiate.

Our decision promotes bargaining stability, since a major consequence of the opposite view would be that in contract negotiations both parties would be held to be making agreements for groups of persons whose identity and number would be totally unknown to, and unpredictable by, either party. Costs of wages and benefits under negotiation would thus become equally unpredictable, and informal negotiations of such benefits as health and pension plans would become well-nigh impossible. The unpredictable scope of the number, age groups, and other factors of coverage which are essential to develop cost data as to such items would leave negotiators in the dark as to how to make any reliable estimates of future costs. Bargaining under such conditions would be seriously handicapped. "

* * * * *

". . . [W]hen it comes time to negotiate a new contract, the union and the Employer must bargain for a single contract to cover the entire unit, including the setup men. In the meantime, the Union must, of course, fairly represent all employees in the unit, including both setup men and those previously included in the unit. But we fail to perceive anything divisive, or even unusual, about requiring interim bargaining for this new group. If an agreement is reached it will in all likelihood be an addendum to the existing production and maintenance contract. Insofar as it may contain terms peculiarly applicable to setup men, that seems to us a practical, acceptable and not a divisive result. Single contracts often have separate or special provisions for separate

classifications, departments, or shifts, depending upon the extent to which the bargaining has developed agreement upon whether all-inclusive provisions are adequate - or inadequate - to deal with the problems of each such group. We believe this is what is needed to be bargained here, and that such bargaining is to be preferred, both legally and practically, over automatically fitting the new group, sans bargaining, into a fixed mold no matter how badly that mold may fit either the employees' or the employer's circumstances, needs and desires at the time." Id. at 1354-55.

[24] In summary, the test for determining whether a job classification can be accreted to an existing bargaining unit without need for an election, and be covered by an existing memorandum of agreement without need for new negotiations, is as follows:

- 1). Has the petition or request been timely filed?
- 2). Do the job classifications share a community of interest with the employees in the existing bargaining unit?
- 3). Do the job classifications constitute an identifiable, distinct segment of employees so as to constitute a separate appropriate bargaining unit?
- 4). Does the number of employees in the job classifications to be added when compared to the number of employees presently in the existing bargaining unit raise a question of representation? and
- 5). Have the job classifications been historically excluded from the bargaining unit?

If the classifications fail the test, accretion is not appropriate, and the employee organization seeking the unit clarification must either petition the Secretary for an election and submit the requisite thirty percent showing of interest, or request recognition by the board of education accompanied by the showing of

majority membership of the employees in each of the classifications to be added.

Timely filing

In the instant case, the memorandum of agreement and addendum, Ex. 2A and 2B, expired on June 30, 1993. The petition for unit clarification was filed on November 20, 1992, prior to the December 1 cut-off date in K.A.R 49-25-4(c) making it timely filed if the intent was to amend the bargaining unit covered by the next memorandum of agreement. If, however, the clarification petition sought immediate inclusion in the proposed unit so as to be covered by the then existing memorandum of agreement, the petition would be barred since it did not seek an election to include the proposed new positions in the existing unit, and did not contain the required showing of interest. Given the fact that the 1992-93 contract has since expired, the question of coverage by that contract is moot. The petition will be considered a request to amend the bargaining unit by accretion for coverage by the successor agreement, and therefore timely filed. The contract bar rule is not applicable.

Community of Interest and Separate Appropriate Unit

The positions of Coordinator of Special Needs Services, Director of On-site Advising at Andover, Off Campus Counselor at

McConnell, Alternate School/Homeless Youth Instructor, ABE/GED Instructor/Community Coordinator, ABE/GED Instructor at Andover, El Dorado Resource Center/GED, and Alternate School Instructor have been determined above to share the requisite community of interest with the employees in the existing bargaining unit. However, as also noted, they share certain characteristics which set them apart from the College faculty. Included among these characteristics are employment under an administrative contract, benefits pursuant to the Policies and Procedures Manual, greater hours of work per week, duty stations away from the main campus, and a different type of student and courses to teach. When viewed together, these job classifications would appear to have a community of interest between themselves sufficient to constitute an identifiable, distinct segment of employees, sufficient to qualify as an appropriate unit separate from the existing unit. Consequently, accretion is not appropriate.

The positions of Library Assistants held by Wilma McGinnis, Mary Logue and Lonnie Marley have also been found to have a community of interest with the members of the bargaining unit. As has been noted, librarians are generally included in the faculty units. There is nothing in the record which would indicate that this position would constitute an identifiable, distinct segment of employees, or that it would qualify as an appropriate bargaining

unit separate from the existing unit. Consequently, accretion would be appropriate for this position.

Numerically Overshadow

The positions of Coordinator of Special Needs Services, Director of On-site Advising at Andover, Off Campus Counselor at McConnell, Alternate School/Homeless Youth Instructor, ABE/GED Instructor/Community Coordinator, ABE/GED Instructor at Andover, El Dorado Resource Center/GED, Alternate School Instructor, and Library Assistant do not contain a sufficient number of employees when compared to the number of employees presently in the existing bargaining unit to raise a question of representation and make an election necessary.

Historical Exclusion

[25] It should also be noted that as to the positions of Coordinator of Special Needs Services, Director of On-site Advising at Andover, Off Campus Counselor at McConnell, Alternate School/Homeless Youth Instructor, ABE/GED Instructor/Community Coordinator, ABE/GED Instructor at Andover, El Dorado Resource Center/GED, Alternate School Instructor, and Library Assistant, there is nothing in the record to indicate whether they were in existence at the time of the original unit determination or last unit clarification, or were created later. The burden is on the

party seeking to add new positions to the existing unit by accretion rather than election to come forward with evidence sufficient to prove such accretion is appropriate and not barred by historical exclusion. This the Association has failed to do, making accretion inappropriate.

With the determination that it is not appropriate to add the positions of Coordinator of Special Needs Services, Director of On-site Advising at Andover, Off Campus Counselor at McConnell, Alternate School/Homeless Youth Instructor, ABE/GED Instructor/Community Coordinator, ABE/GED Instructor at Andover, El Dorado Resource Center/GED, Alternate School Instructor, and Library Assistant to the existing unit by accretion, the employee organization seeking the unit clarification must either petition the Secretary for an election and submit the requisite thirty (30) percent showing of interest, or request recognition by the board of education accompanied by the showing of majority membership of the employees in each of the classifications to be added. Because the Association's unit clarification petition has been determined only to seek addition of the positions by accretion, it must be dismissed. See the Flow Chart for Unit Clarifications appended to the end of this order.

ISSUE 1D

WHETHER THE INCLUSION OF THE CLASSIFICATION OF "PART-TIME ADVISORS" IS INAPPROPRIATE PURSUANT TO THE CRITERIA SET FORTH IN K.S.A. 72-5420.

A review of the record reveals that it is void of evidence relative to the classification of "*part-time advisor*." Since the Association has the burden of coming forward with evidence to establish a community of interest with the employees in the existing unit, having failed to do so, these "*part-time advisors*" will not be included and the Association's petition as to those employees will be dismissed.

ISSUE 2

WHETHER THE BUTLER COUNTY COMMUNITY COLLEGE PROFESSIONAL EMPLOYEE CLASSIFICATIONS HAVE BEEN DIVIDED INTO TWO BARGAINING UNITS, i.e. CLASSIFICATIONS EMPLOYED AT THE COMMUNITY COLLEGE AND CLASSIFICATIONS AT THE CORRECTIONAL FACILITY, OR COMPRISE ONLY ONE BARGAINING UNIT.

There is no argument that the instructors at the El Dorado Correctional Facility are "professional employees" as defined by K.S.A. 72-5413(c). The College contends, however, that because 1) the type of student and work environment for the instructors at the El Dorado Correctional Facility differs from that of other faculty members in the bargaining unit; 2) the Department of Corrections maintains considerable control over the working conditions of the instructors at the El Dorado Correctional Facility; 3) the funding

for the faculty positions at the El Dorado Correctional Facility comes exclusively from the Department of Corrections; and 4) the bargaining history of the parties shows that separate agreements have been negotiated, the instructors at the El Dorado Correctional Facility should be included in a separate bargaining unit rather than considered a part of the existing faculty bargaining unit.

The College contracted with the Kansas Department of Corrections in 1991 to provide educational services to the correctional facility located in El Dorado, Kansas for the 1991-92 school year. As part of the negotiations for the 1992-93 faculty agreement, the Association and the College also negotiated the terms and conditions of employment of the professional employees at the El Dorado Correctional Facility. During win-win negotiations in 1992, there was a separate sub-group dealing specifically with employees at the El Dorado Correctional Facility. The special terms and conditions of employment pertaining only to the faculty at the El Dorado Correctional Facility were referred to as an "addendum" to the negotiated agreement for the faculty, Ex. 2A. Vicki Long, Director of Human Resources for the College was present during negotiations for the 1992-93 memorandum of agreement, and in her opinion the College considered there to be only one unit with a separate agreement for the El Dorado Correctional Facility faculty because of the unique working conditions and the different funding source. According to Ms. Long, the College considered the

El Dorado agreement, Ex. 2B, to be an addendum to the agreement covering the other unit employees, Ex. 2A.

There is no question that matters of unique concern to certain employees in a bargaining unit can be addressed separately in a negotiated agreement. As stated in Federal-Mogul Corp., 85 LRRM 1353, 1355 (1974):

"Single contracts often have separate or special provisions for separate classifications, departments, or shifts, depending upon the extent to which the bargaining has developed agreement upon whether all-inclusive provisions are adequate - or inadequate - to deal with the problems of each such group. We believe this is what is needed to be bargained here, and that such bargaining is to be preferred, both legally and practically, over automatically fitting [all employees] into a fixed mold no matter how badly that mold may fit either the employees' or the employer's circumstances, needs and desires at the time."

Certainly, the situation of the instructors at the El Dorado Correctional Facility is different from those at the other College campuses due to the control affected by the Department of Corrections. However, as is apparent from the 1992-93 negotiations and resulting memorandums of agreement, these differences can be addressed and memorialized in an "addendum" to the memorandum of agreement. Since these differences can be so addressed, this provides no basis for segregating the instructors at the El Dorado Correctional Facility into a separate bargaining unit.

As previously noted, K.S.A. 72-5420 vests the Secretary with broad discretionary authority in the determination of what constitutes an appropriate bargaining unit. The Michigan Supreme Court, in interpreting its public employee relations act provisions

on unit determination, said in Hotel Olds v. State Labor Mediation Board, 53 N.W.2d 308 (Mich. 1952):

"In designing bargaining units as appropriate, a primary objective of the commission is to constitute the largest unit which, in the circumstances of the particular case, is most compatible with the effectuation of the purposes of the law and to include in a single unit all common interests."

Two commentators similarly recommend that bargaining units in the public sector "should be as broad as is consistent with viable negotiations." See, L.C. Shaw & R.T. Clark Jr., Determination of Appropriate Bargaining units in the Public Sector: Legal and Practical Problems, 51 Ore.L.Rev. 152 (1971); E.G. Gee, Organizing the Halls of Ivy; Developing a Framework for Viable Alternatives in Higher Education Employment, Utah L.Rev. 233 (1973).

Finding-of-Fact #11 sets forth a comparison of the terms and conditions of employment set forth in the memorandum of agreement for the faculty with the memorandum of agreement for the instructors at the El Dorado Correctional Facility reveals they are, for the most part, similar. There are certain exceptions but those are associated generally to the difference in term of contract, i.e. salary, summer sabbatical. As concluded above, a single bargaining unit can accommodate for such differences to be addressed through viable negotiations while all still providing for the common interests of all employees in the unit. The evidence does not support a conclusion that the inclusion of the El Dorado

Correctional Facility in the existing faculty bargaining unit is incompatible with the effectuation of the purposes of the law.

In fact, one of the factors to consider in determining an appropriate unit is over-fragmentation of bargaining units. Overfragmentation has been variously defined, and certainly involves mixed questions of law and fact. Fire Fighters, Local 2287 v. City of Montpelier, 2 PBC ¶ 20,042 (Vermont 1974). As noted by the Nebraska Supreme Court in American Ass'n of University Professors v. Bd. of Regents, 2 PBC ¶20,440 (1977):

" . . . fragmentation leads directly to development of expensive and administratively unmanageable bargaining structures and to increased administrative costs once an agreement is reached. It fosters proliferation of personnel necessary to bargain and administer contracts on both sides of the bargaining table. It destroys the ability of public institutions . . . to develop, administer, and maintain any semblance of uniformity or coordination in their employment policies and practices. In the long run, it results in an inefficient, ineffective, and unworkable relationship for all parties concerned. Its ultimate effect is to substitute litigation for negotiations as the principal dispute resolving process in the public sector, in effect, it defeats the purpose Nebraska's public sector labor law."

Shaw and Clark, in their article on Determination of Appropriate Bargaining units in the Public Sector: Legal and Practical Problems, 51 Ore.L.Rev. 152, state the problem as follows:

"The more bargaining units public management deals with, the greater the chance that competing unions will be able to whipsaw the employer. Moreover, a multiplicity of bargaining units make it difficult, if not impossible to maintain some semblance of uniformity in benefits and working conditions. Unfortunately, in many states and localities bargaining units have been established without consideration of the effect such units will have on negotiations or on the subsequent administration of an agreement. The resulting crazy-quilt pattern of representation has unduly complicated the collective bargaining process in the public sector."

The determinative factor in ascertaining the appropriateness of a unit is neither what the employee wants nor what the public employer wants, but rather whether the inclusion of the job position in the unit will serve and not subvert the purpose of the act, i.e. establishment and promotion of fair and harmonious employer-employee relations in the public service. West Orange Bd. of Ed. v. Wilton, 1 PBC ¶ 10,086 (N.J. 1971). To allow the formation of a separate bargaining unit for the instructors at the El Dorado Correctional Facility, given the similarities of their terms and conditions of employment as set forth in the memorandums of agreement, would over-fragmentize the faculty, and defeat the purpose of the Kansas Professional Negotiations Act. See Kendal College v. NLRB, 97 LRRM 2880 (CA 7, 1976).

Finally, K.S.A. 72-5416(a) provides:

"If professional employees of a board of education are not represented by a professional employees' organization for the purpose of professional negotiation, any professional employees' organization may file a request with the board of education alleging that a majority of the professional employees in an appropriate negotiating unit wish to be represented for such purpose by such organization and asking the board of education to recognize it as the exclusive representative under K.S.A. 72-5415. Such request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall include a demonstration of majority support through verified membership lists. Notice of such request shall immediately be posted by the board of education on a bulletin board at each school or other facility in which members of the unit claimed to be appropriate are employed."

A 1992-93 agreement was negotiated by the Association. The preamble to the negotiated agreement for the professional employees of the El Dorado Correctional Facility asserts that it is an

agreement between the Butler County Community College and the Association "as representative of the full-time professional employees (as defined in K.S.A. 72-5413), who are employed at the El Dorado Correctional Facility by the Board as Academic and Vocational Instructors. . . ." There are only two, non-election, means by which the Association could become the exclusive representative of the instructors at the El Dorado Correctional Facility; 1) pursuant to the procedure set forth in K.S.A. 72-5416(a), above; or 2) by accretion of the instructors into the existing bargaining unit represented by the Association.

Comparing the procedures required by K.S.A. 72-5416(a) for recognition of an exclusive representative for a bargaining unit with the evidence from the hearing reveals: (1) No request filed with the College by the Association, with demonstrated majority showing of support, seeking to establish and represent a separate bargaining unit composed of the Instructors at the El Dorado Correctional Facility; 2) No posting of a notice of the Associations request for recognition for 10 days prior to action by the College on the request; and 3) No formal action by the College specifically granting the request. Additionally, the record reveals no election among the Instructors at the El Dorado Correctional Facility to select the Association as its exclusive representative pursuant to K.S.A. 72-5417 et seq., and neither did they seek to form a separate bargaining unit pursuant to K.S.A. 72-

5415 et seq. Likewise, there was never a vote among the members of the existing bargaining unit to include the Instructors at the El Dorado Correctional Facility into the unit.

None of the procedures required by statute to establish a bargaining unit for the instructors at the El Dorado Correctional Facility were followed by the Association, the instructors or the College. The Association testified they did not proceed pursuant to K.S.A. 72-5416(a) because it considered it was negotiating for one unit. Likewise, the Instructors at the El Dorado Correctional Facility considered themselves to be part of the existing Butler County Community College bargaining unit represented by the Association. Even Vicki Long, Director of Human Resources for the College, who was present during negotiations for the 1992-93 memorandum of agreement, testified that, in her opinion, the College considered there to be only one unit. Such is inconsistent with the position the College is now taking. Equally inconsistent with the proposition of two separate units are the facts that none of the instructors at the El Dorado Correctional Facility in the alleged bargaining unit served on the team negotiating their memorandum of agreement; the February 1st notice of subjects concerning the El Dorado Correctional Facility to be negotiated was included in the notice for the faculty unit; and their final memorandum of agreement was ratified by all professional employees rather than just the El Dorado Correctional Facility.

Accretion

Applying the test set forth above for determining whether a job classification can be accreted to an existing bargaining unit without need for an election, the record supports a conclusion that the instructors at the El Dorado Correctional Facility were successfully accreted. As concluded previously, the instructors at the El Dorado Correctional Facility share a sufficient community of interest with the employees in the existing bargaining unit, and they would not appear to have a community of interest between themselves sufficient to constitute an identifiable, distinct segment of employees, sufficient to qualify as an appropriate unit separate from the existing unit. The number of instructors at the El Dorado Correctional Facility, six (6), does not raise a question of representation when compared to the number of employees presently in the unit. Finally, the position of instructor at the El Dorado Correctional Facility was not in existence at the time the existing bargaining unit was recognized by the College, having been established for the first time in 1991, and therefore cannot be considered to have been historically excluded from the unit. Accordingly, accretion is appropriate, and the instructors at the El Dorado Correctional Facility will be considered a part of the existing bargaining unit with no election required.

ORDER

IT IS THEREFORE ORDERED, that the positions of instructors at the El Dorado Correctional Facility has been accreted to the existing bargaining unit represented by the Association, and does not constitute a separate bargaining unit.

IT IS FURTHER ORDERED, pursuant to the stipulation of the parties that the following positions will be added to the existing bargaining unit:

Academic Advisor, Butler of Andover
International Student Advisor
Center for Independent Study - Community Site Head
Instructor

IT IS FURTHER ORDERED, pursuant to the stipulation of the parties that the following positions will be excluded from the existing bargaining unit:

Secretarial Center Coordinator
Eureka Resource Center, ABE/GED and Community
Coordinator
Augusta Resource Center and Community Coordinator

IT IS FURTHER ORDERED, for the reasons set forth above, that the Association's Petition for Unit Clarification be dismissed as to all other positions requested by the Association.

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Dated this 15th day of June, 1994.



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

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Secretary of Human Resources, either on his 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 July 6, 1994 addressed to: Secretary of Human Resources, Employment Standards and Labor Relations, 512 West 6th Avenue, Topeka, Kansas 66603.

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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 21st day of June, 1994, a true and correct copy of the above and foregoing Initial Order was served upon each of the parties to this action and upon their attorneys of record, if any, in accordance with K.S.A. 77-531 by depositing a copy in the U.S. Mail, first class, postage prepaid, addressed to:

Marjorie Blaufuss
Kansas National Education Association
715 W. 10th
Topeka, Kansas 66612

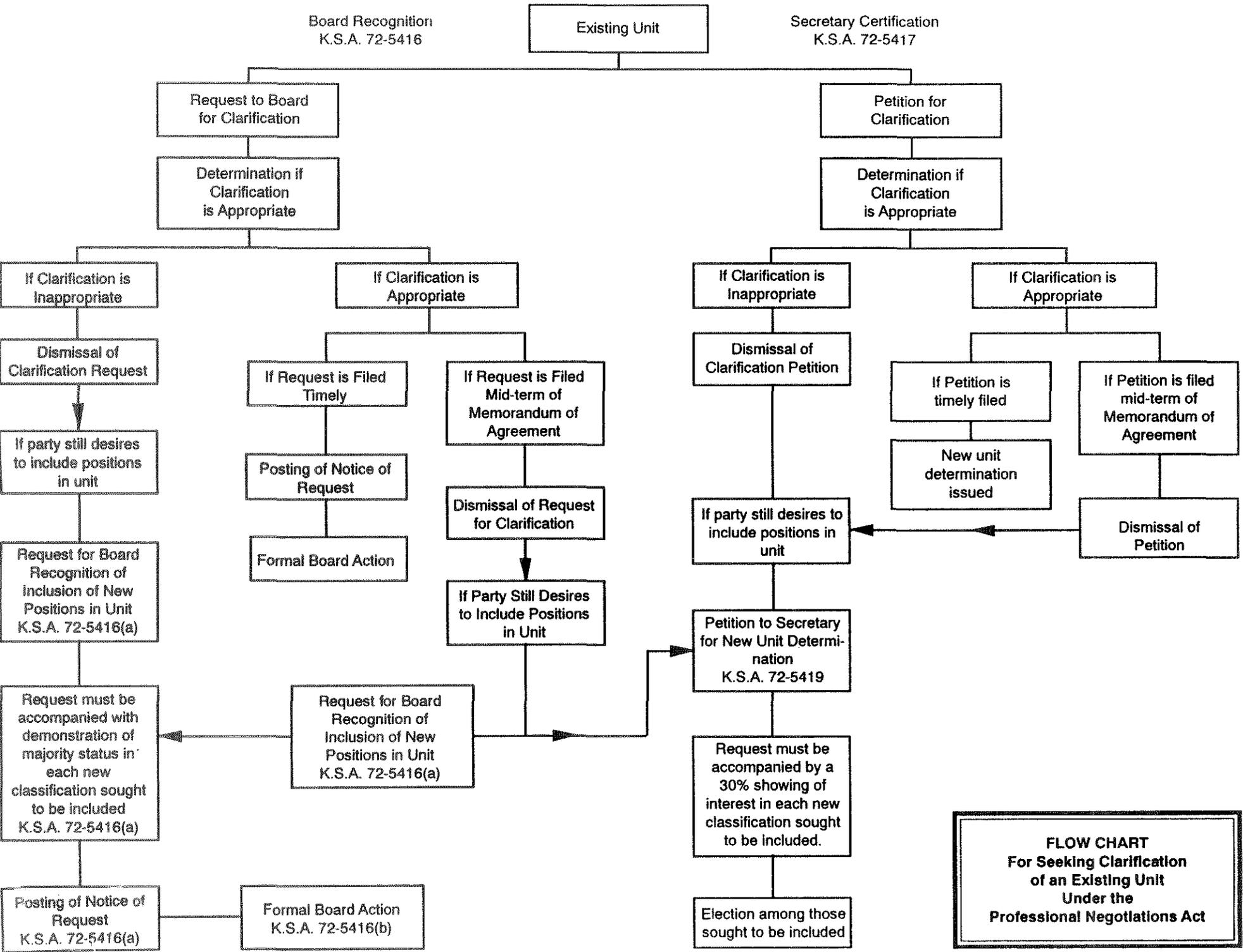
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Sharon Tunstall



FLOW CHART
For Seeking Clarification
of an Existing Unit
Under the
Professional Negotiations Act