

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

International Association of)
Firefighters, Local No. 135,)
Petitioner,)

v.)
City of Wichita, Kansas,)
(Fire Department),)
Respondent.)

Case No. 75-UCA-2-1996

Pursuant to K.S.A. 75-4321 *et seq.* and
K.S.A. 77-501 *et seq.*

INITIAL ORDER

On the 20th day of March, 1996, the above-captioned matter for Unit Clarification or Amendment came on for formal hearing pursuant to Kansas Statutes Annotated (K.S.A.) 1995 Supp. 75-4327(e) before presiding officer Susan L. Hazlett. The hearing was held at 1430 S.W. Topeka Blvd., Topeka, Kansas. The Petitioner, International Association of Firefighters, Local No. 135 (hereinafter "I.A.F.F."), appeared by and through counsel, Steven A.J. Bukaty. Witnesses on behalf of the Petitioner were Ron Aaron, Andrew Cole, Ken Schofield, and Robert Wing. The Respondent, City of Wichita, Kansas, Fire Department, (hereinafter the "City"), appeared by and through counsel, Kelli Stewart. No witnesses appeared on behalf of the Respondent.

ISSUES

I. WHETHER OR NOT THE POSITION OF FIRE CAPTAIN OF THE WICHITA, KANSAS, FIRE DEPARTMENT SHOULD BE EXCLUDED FROM THE EXISTING BARGAINING UNIT REPRESENTED BY THE INTERNATIONAL ASSOCIATION OF

75-UCA-2-1996-I

FIRE FIGHTERS, LOCAL UNION NO. 135, PURSUANT TO K.S.A. 1995 SUPP. 75-5327(e) AND K.S.A. 1995 SUPP. 75-4322(b) AS A "SUPERVISORY EMPLOYEE."

A. WHETHER OR NOT THE FIRE CAPTAINS NORMALLY PERFORM DIFFERENT WORK THAN THEIR SUBORDINATES.

B. WHETHER OR NOT THE FIRE CAPTAINS HAVE THE AUTHORITY TO EFFECTIVELY RECOMMEND OR CARRY OUT A PREPONDERANCE OF THE ACTIONS SPECIFIED IN K.S.A. 1995 SUPP. 75-4322(b).

C. WHETHER OR NOT THE RESPONDENT HAS THE BURDEN OF PROVING THAT FIRE CAPTAINS ARE SUPERVISORY EMPLOYEES.

II. WHETHER OR NOT INCLUSION OF THE FIRE CAPTAINS OF THE WICHITA, KANSAS, FIRE DEPARTMENT IN THE EXISTING BARGAINING UNIT REPRESENTED BY THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL UNION NO. 135, WOULD BE APPROPRIATE IF THE CAPTAINS ARE NOT FOUND TO BE SUPERVISORY EMPLOYEES.

FINDINGS OF FACT

1. Petitioner is an employee organization, as defined by K.S.A. 1995 Supp. 75-4322(i). I.A.F.F. is the exclusive bargaining representative, as defined by K.S.A. 1995 Supp. 75-4322(j), for certain employees of the City of Wichita, Kansas, Fire Department, in a unit currently consisting of approximately 204 fire fighters and 69 fire lieutenants. (Petition and Answer; Resp. Ex. 3; Pet. Ex. 2)
2. Respondent is a public agency or employer, as defined by K.S.A. 1995 Supp. 75-4322(f), which has voted to come under the Kansas Public Employer-Employee Relations Act (P.E.E.R.A.) in accordance with K.S.A. 1995 Supp. 75-4321(c). (Petition and Answer)
3. The petition filed in this matter seeks inclusion of fire captains in the bargaining unit described in paragraph 3, above. The City contends that captains should be excluded

from the existing bargaining unit because they are "supervisors" as defined in K.S.A. 1995 Supp. 75-4322(b). (Petition and Answer)

4. I.A.F.F. was originally certified as the exclusive bargaining representative of all employees in the Wichita fire Department below the rank of captain by the Kansas Public Employee Relations Board ("PERB") in August, 1974. The original unit determination, Case No. UE4-1974, refers to Local Union No. 666, which is now Local Union No. 135. (Resp. Ex. 3)

5. PERB's stated basis in Case No. UE4-1974 for excluding captains from the bargaining unit was a determination that the captains had a "general span of control, in terms of numbers of employees directed," which was "materially greater than that of lieutenants; although, the substance of the supervisory decisions made is not substantially dissimilar." Lieutenants generally had three fire fighters within their span of control. (Resp. Ex 3)

6. The Wichita Fire Department, headed by Larry Garcia, Fire Chief, is made up of an Administrative Division, a Fire Prevention Division, and an Operations Division. (Resp. Ex 1)

7. The Operations Division is headed by a deputy fire chief, who commands eleven battalion chiefs who, in turn, are in command of the fire captions. Each battalion chief, with the exception of two, are specifically assigned to one of three shifts and one of three battalions. (Garcia Depo. p. 6)

8. Battalion One has five fire stations and Battalions Two and Three have six stations each. (Resp. Ex. 1)

9. Below the rank of battalion chief is captain. Each fire station is staffed by a fire captain who will, generally, have one lieutenant and three fire fighters reporting to him on his 24-hour shift. There are 57 captains in the Wichita Fire Department. (Pet. Ex. 2; Garcia Depo. pp. 6, 7; Resp. Ex. 1)

10. Each lieutenant normally supervises three fire fighters, and a battalion chief normally supervises between 20 and 24 employees, including captains and lieutenants. (Garcia Depo. p. 92)

11. A reduction in manpower occurred in the Wichita Fire Department in approximately 1983, which included a reduction in the number of fire fighters. Prior to the reduction, captains rarely participated in actual fire fighting. (Garcia Depo. pp. 10, 13-15)

12. Captains now participate in hands-on fire fighting, including using of equipment or going into the structure, along with the lieutenants and fire fighters. The battalion chiefs do not participate in the actual using of equipment, preparation of equipment, or fighting fires. (Garcia Depo. pp. 14-15; 78-79)

13. Captains, lieutenants and fire fighters work together in responding to fires and other emergencies. They all may participate in physical fitness training, equipment checks, building inspections, general station maintenance duties, and fire school training. (Trans. pp. 19-29, 63; Garcia Depo. pp. 29-34)

14. Similarities in the "Distinguishing Features of Work" and the "Examples of Work Performed" by captains and lieutenants, according to the Administrative Policy Position Classifications, include: supervisory work; in command of lower-ranked personnel at fires

until relieved by a ranking officer; work which involves physical exertion and potential hazards to health and safety; report to the incident commander during an emergency incident; respond to fire alarms and direct the route; supervise fire fighting operations; supervise cleaning of station and equipment; train personnel of lower rank by conducting/helping to conduct training classes; initiate disciplinary actions against personnel of lower rank; perform fire prevention activities as needed; and ensure that equipment is properly taken care of following a fire. (Pet. Ex. 2)

15. Differences in the "Distinguishing Features of Work" and "Examples of Work Performed" by captains and lieutenants, according to the Administrative Policy Position Classification, include: captains perform skilled supervisory work at a fire station, while lieutenants perform first-line supervisory work in fire fighting and emergency care; captains supervise fire fighting operations, while lieutenants supervise and assist fire fighting operations; captains are primarily responsible for station activities, while lieutenants primarily command a small number of fire fighters; captains' work involves entering burning buildings; captains report to battalion chiefs, while lieutenants report to captains; captains must establish goals; captains make decisions regarding extinguishing a fire, while lieutenants locate the nearest plug and supervise laying of hose lines; captains conduct roll call and inspect personnel; and captains supervise preparation of periodic reports. (Pet. Ex. 2)

16. The Wichita Fire Department Rules and Regulations apply to and are the concern of all officers and members of the Department. The Fire Chief is responsible for the administration of the Rules and Regulations. (Pet. Ex. 2)

17. Administrative Policy defines "Commanding Officer" in the Position Glossary as "Officer with the rank of Lieutenant or above." (Pet. Ex. 2)

18. Employees of the Wichita Fire Department are required to perform their duties in compliance with a detailed set of departmental/administrative polices. (Pet. Ex. 2, Trans. pp. 27, 74-75; Garcia Depo. p. 47)

19. When responding to emergencies, fire fighters, lieutenants and captains are required to comply with an "Incident Command System" which establishes detailed, comprehensive procedures for conducting emergency operations. The "Incident Command System," dictates that the arrival order of officers and equipment at emergency scenes determines which officer will assume command or pass command of the situation, regardless of whether that officer is a lieutenant or a captain. (Pet. Ex. 2; Garcia Depo. p. 77; Tran. pp. 104, 133)

20. Lieutenants can command captains at emergency scenes pursuant to the "Incident Command System." (Garcia Depo. p. 77; Tran. pp. 115, 127)

21. Captains can only recommend the formulation of personnel policies or procedures. (Garcia Depo. pp. 88, 90)

22. Captains do not have authority to change policy, or to authorize a deviation from a written policy, although captains are sometimes required to exercise some discretion in such matters. (Garcia Depo. p. 90)

23. Captains do not have authority to hire, transfer, lay-off, recall, promote, discharge, discipline or adjust grievances for employees, and can only make recommendations

in such matters. Captains are allowed some discretion in handling minor infractions with verbal reprimands. (Trans. pp. 47, 114; Garcia Depo. pp. 46-49)

24. Captains do evaluations on lieutenants, and lieutenants do evaluations on fire fighters. (Garcia Depo. p. 71)

25. Only battalion chiefs and higher-ranked personnel attend staff meetings routinely. (Garcia Depo. p. 17)

26. Only battalion chiefs may reassign lieutenants within his/her battalion, and on his/her shift with approval of the Deputy Chief. (Pet. Ex. 2)

27. Battalion chiefs participate in the formulation of departmental personnel policies; decide what in-service training is to be accomplished by captains, lieutenants and fire fighters; make assignments, influence authorization to go to training, authorize time off; and are ultimately responsible for the fire stations. (Garcia Depo. pp. 16, 35, 36, 63, 85, 87, 102)

28. Captains do not have authority to approve a day off, personal day or Kelly day for lieutenants or fire fighters. (Garcia Depo. p. 63)

29. Captains can delegate some of their duties to lieutenants. (Garcia Depo. pp. 37, 38)

30. The duties of fire fighters, lieutenants, and captains are equally hazardous, while the duties of the battalion chief is generally less hazardous. (Garcia Depo. p. 79)

31. Captains have more accountability for everything that takes place at the fire station, i.e. injuries or accidents with equipment, than do lieutenants or fire fighters. (Garcia Depo. 95)

32. Three times a year, captains receive from the Fire Inspection Department a list of buildings that need inspection. After receipt of the list, captains meet with the lieutenants and select certain properties that will be inspected. Captains exercise discretion in scheduling the time for inspection, but are required to complete the inspections within a four-month time frame. Captains are responsible for the completion of the reports of the inspection activity.
(Resp. Ex. 2)

33. Captains exercise discretion in scheduling fire hydrant inspections, but are required to complete the inspections within a four-month time frame established by the Department. Captains accompany and participate in the inspection of the hydrants with two fire fighters assigned to the apparatus. (Resp. Ex. 2)

34. Captains prepare reports, and supervise the preparation of reports of activities at their assigned stations. Captains assign many report functions to lieutenants. Captains maintain responsibility for assuring the reports are properly completed and timely submitted.
(Resp. Ex. 2)

CONCLUSIONS OF LAW

I. WHETHER OR NOT THE POSITION OF FIRE CAPTAIN OF THE WICHITA, KANSAS, FIRE DEPARTMENT SHOULD BE EXCLUDED FROM THE EXISTING BARGAINING UNIT REPRESENTED BY THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL UNION NO. 135, PURSUANT TO K.S.A. 1995 SUPP. 75-5327(e) AND K.S.A. 1995 SUPP. 75-4322(b) AS A "SUPERVISORY EMPLOYEE."

K.S.A. 1995 Supp. 75-4324 gives "public employees...the right to form, join and to

participate in the activities of employee organizations...for the purpose of meeting and conferring with public employers... ." To assert these rights, an employee organization must be certified by the Public Employee Relations Board ("PERB") as representing a majority of the employees in an *appropriate* unit, or recognized formally by the public employer. See K.S.A. 1995 Supp. 75-4327. In each case where the question of unit composition is at issue, K.S.A. 1995 Supp. 75-4327(c) requires the PERB to rule on the definition of the "appropriate unit" in accordance with specific factors set out in K.S.A. 1995 Supp. 75-4327(e). The PERB

shall take into consideration, along with other relevant factors: (1) The principle of efficient administration of government; (2) the existence of a community of interest among employees; (3) the history and extent of employee organization; (4) geographical location; (5) the effects of overfragmentation and the splintering of a work organization; (6) the provisions of K.S.A. 75-4325 and amendments thereto; and (7) the recommendations of the parties involved. K.S.A. 1995 Supp. 75-4327(e).

To aid the implementation of the foregoing statute, K.A.R. 84-2-6 was enacted, and provides that

(1) Any unit may consist of all of the employees of the public employer, or any department, division, section or area, or party or combination thereof, *if found to be appropriate by the board*, except as otherwise provided in the act or these rules. (2) In considering whether a unit is appropriate, the provisions of K.S.A. 75-4327(e) and whether the proposed unit of the public employees is a distinct and homogeneous group, with significant problems which can be adjusted without regard to the other public employees of the public employer shall be considered by the board or presiding officer, and the relationship of the proposed unit to the total organizational pattern of the public employer may be considered by the board or presiding officer. Neither the extent to which public employees have been organized by an employee organization nor the desires of a particular group of public employees to be represented separately or by a particular employee organization shall be controlling on the question of whether a proposed unit is appropriate. [Emphasis added]

K.S.A. 1995 Supp. 75-4322(a) defines public employee as "...any person employed by any public agency, except those persons classed as supervisory employees... ." Supervisory employee is then defined in K.S.A. 1995 Supp. 75-4322(b) as

any individual who normally performs different work from his subordinates, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. A memorandum of agreement may provide for a definition of "supervisory employees" as an alternative to the definition herein.

As there is no question that the City of Wichita is a public agency or that a fire captain is a person employed by a public agency, and neither party offered argument to the contrary, fire captains in the Wichita Fire Department, therefore, qualify as public employees unless they can be defined as supervisory employees.

A. Do Captains normally perform different work than their subordinates?

In order to include captains in the existing bargaining unit, it must be demonstrated by a preponderance of the evidence that they are not supervisors, that: 1) captains do not normally perform different work than their subordinates; 2) captains do not, in the interests of the employer, have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or to effectively recommend a preponderance of such actions; and 3) in exercising such authority, captains are not using independent judgment but are performing duties merely routine or clerical in nature. "The nature of one's duties and not his or her title is

determinative of that person's status as a supervisor." *Kansas Univ. Police Officers Ass'n v. Public Employee Relations Bd.*, 16 Kan.App.2nd 438, 828 P.2d (1991)

The record in this matter includes a deposition from Larry Garcia, the Fire Chief; testimony from a fire captain, Ron Aaron; and testimony from two fire lieutenants, Andrew Cole and Ken Schofield. It is significant that testimony was not presented only by that rank of officer wanting to be included in the unit, but also from his superior who is not in the unit, and from his subordinates who are members of the existing unit.

Mr. Garcia, the Fire Chief, testified that both captains and lieutenants supervise lower-ranked employees: captains normally supervise four people, and lieutenants normally supervise three people. He also testified that captains now, after a 1983 reduction in manpower within the Wichita Fire Department, work alongside lieutenants and fire fighters at fires and other emergency calls, doing actual hands-on firefighting and, furthermore, that captains may participate with the lieutenants and fire fighters in physical fitness training, equipment checks, building inspections, general station maintenance duties, and fire school training. (Garcia Depo. pp. 10, 13-15; 29-34; 78-79)

The testimony of Aaron, Cole, and Schofield all substantiated and confirmed Garcia's above statements by stating that not only do captains have the authority to participate in all of the duties Garcia noted, but that, in fact, captains do regularly participate in those duties.

In addition to the collaborative testimony of the witnesses of the actual day-to-day activities of captains, many similarities between the captains' and the lieutenants' job descriptions in the Administrative Policy handbook. (Pet. Ex. 2) Both ranks supervise lower-

ranked employees; either rank can be in command at a fire; both are involved in physical and equally hazardous activities; both help conduct training classes; both can initiate disciplinary actions against personnel of lower rank; both complete evaluations on lower-ranked personnel; and both ensure that equipment is properly taken care of following a fire. In contrast, the differences in their official job descriptions are slight and reflect more of a distribution and sharing of the jobs that need to be done on a daily basis at the station, rather than a supervisor versus employee relationship. For instance, captains perform *skilled* supervisory work *at a fire station*, and lieutenants perform *first-line* supervisory work *at a fire or other emergency*; captains make decisions regarding *extinguishing* a fire while lieutenants make the decisions regarding the nearest plug and laying the hose lines at a fire. Both perform necessary supervisory and decision-making functions, that appear to go hand-in-hand with getting the job done. Although captains report to battalion chiefs and lieutenants report to captains, lieutenants have fire fighters reporting to them. It is the typical para-military command structure; each employee within that structure has authority to direct those employees of lesser seniority. Furthermore, although the captains have many clerical duties, such as conducting roll call, inspecting personnel, and supervising the preparation of periodic reports, captains can delegate some of these duties to a lieutenant. In fact, the Administrative Policy handbook lumps captains and lieutenants together by defining "commanding officer" as "officer with the rank of Lieutenant or above."

It is also significant to note the differences between captains and their superiors, battalion chiefs. Most importantly, battalion chiefs never participate in the hazardous activities

of actual fire-fighting as do captains, lieutenants, and fire fighters. Additionally, only battalion chiefs and higher-ranked personnel routinely attend staff meetings, participate in the formulation of policy, and are not stationed on-site at the fire station as are captains, lieutenants and fire fighters.

The Respondent has offered, as evidence, the recent United States District Court decision in *Aaron, et al. v. City of Wichita, U.S. Dist. Ct., Case No. 9-1536-PFK*, in which the court determined that captains in the Wichita Fire Department are exempt from the provisions of the Federal Labor Standards Act and that their primary duty is management of the enterprise. Although the ruling in that case is not relevant in the instant case as the issues and matters of law are clearly distinguishable, the factual stipulations entered into by the parties in that case, the same parties in the instant case, are relevant. However, the Petitioner is correct in contending that those stipulations do not "tell the whole story." The stipulations or admissions by the petitioners in *Aaron*, set out many of the responsibilities and duties of fire captains, but fail to compare those responsibilities and duties with those of the fire lieutenants and fire fighters which, as shown above, are substantially similar.

In the instant case, it was very apparant from the witness' testimony that the captains, lieutenants, and fire fighters work side by side on a daily basis, normally performing much of the same work.

B. Do captains have the authority to effectively recommend or carry out a preponderance of the actions specified in K.S.A. 1995 Supp. 75-4322(b)?

The record and testimony in this matter demonstrates that the captains have more

authority in many ways than fire fighters, and are held to a higher degree of accountability for the fire station and its activities than lieutenants, because of their higher rank. But in many respects, captains and lieutenants have almost the same, or lack thereof, of authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend a preponderance of such actions. See K.S.A. 1995 Supp. 75-4322(b)

All officers and members of the Wichita Fire Department are guided and restricted by the Department's Rules and Regulations. (Pet. Ex. 2) Therefore, for example, when a captain has to decide when and where to conduct building or fire hydrant inspections, he consults with the lieutenant and makes that decision, *within the timeline required* by the rules and regulations.

An "Incident Command System" is also in place which dictates that the arrival order of officers at an emergency scene, not the rank of the officer, determines which officer will assume command, or responsibly direct the other employees fighting the fire. Captains can, and do, command the situation, and lieutenants can, and do, the same.

The highest ranking officer in the Department, Larry Garcia, testified that the captains do not have authority to hire, transfer, lay off, recall, promote, discharge, discipline or adjust grievances for employees, but they can make recommendations in such matters. When asked if he ever followed those recommendations in, specifically, disciplinary matters, Garcia answered, "I can't think of anytime that I have not...", and added that captains are allowed some discretion in handling minor infractions with verbal reprimands. Significantly, though,

Garcia stated that lieutenants may also make recommendations. Likewise, Garcia testified that captains do not have any authority to change policy or to authorize a deviation from a written policy, even though captains are sometimes required to exercise some discretion in certain such matters. (Garcia Depo. pp. 46; 67; 90)

Respondent contends that the City Manager of Wichita is the only person with the legal authority to hire, transfer, discharge, ect., apparently to support the argument that captains have no less authority to do so than battalion chiefs. However, that fact can also support the argument that captains have no *more* authority than do lieutenants in such matters.

Finally, captains have no authority to approve a day off for either lieutenants or fire fighters, or to reassign them; those decisions are made by the battalion chief.

Even though Garcia admits that he almost always follows the recommendation of a captain in disciplinary matters, there is no evidence that he follows the recommendations of captains in all types of personnel matters. In fact, certain officers are assigned to sit on an interview panel for hiring of new employees and Garcia stated that neither captains nor lieutenants ever sit on such panel; "it's always battalion chief or above." (Garcia depo. p. 69) Both the Kansas legislature and the Kansas Supreme Court are silent as to the definition of "effective" recommendation in relation to the P.E.E.R.A. However, it is a well-established principle that a state agency has authority to use its discretion in interpreting the law which that agency enforces. See K.S.A. 1995 Supp. 75-4323(d)(1), (2), and (3) [referring to PERB's authority to establish procedures and exercise such other powers, as appropriate, to effectuate the purposes and provisions of P.E.E.R.A.]; K.S.A. 1995 Supp. 77-526(c) [referring to a state

agency's authority to exercise its discretion in making decisions]; and K.S.A. 1995 Supp. 77-621(4) [referring to a state agency's authority to interpret or apply the law] The Kansas Supreme Court held the following in a recent opinion:

The legislature has empowered PERB to effectuate the purposes and provisions of the Public Employee-Employer Relations Act (PEERA). K.S.A. 75-4323(d)(3). Therefore, to the extent the issues turn on PERB's interpretations of PEERA, such interpretations are entitled to significant deference and, although not binding, should be upheld if supported by a rational basis. *State Dept. of Administration v. Public Employee Relations Bd.*, 257 Kan. 275, 894 P.2d 777 (1995).

Also see *State Dept. of SRS v. Public Employee Relations Board*, 249 Kan. 163, 166, 815 P.2d 66 (1991); *Kansas Univ. Police Officers Ass'n v. Public Employee Relations Bd.*, 16 Kan.App.2d 438; and *Kansas Ass'n of Public Employees v. Public Employees Relations Bd.*, 13 Kan.App.2d 657, 659, 778 P.2d 377 (1989).

It would be rational, therefore, to interpret the legislature's use of the term "effective recommendation" as a recommendation which is made by a supervisor, and is adopted by higher authority without independent review or consideration. The fact that recommendations may have been ultimately followed would not necessarily make such recommendations "effective" within the meaning of K.S.A. 1995 Supp. 75-4322(b) if the higher authority still must make an independent consideration of the matter. Similar language was used by the Iowa Supreme Court in an Iowa PERB case. See *City of Davenport v. PERB*, 98 LRRM 2582 (1978).

Fire Chief Garcia indicated in his testimony that when a captain makes a recommendation for discipline of a lower-ranked employee, Garcia will consider the

recommendation, but may also look at the circumstances involved and look to see if the battalion chief and deputy chief concurred with the captain's recommendations. He may speak to both the captain and the employee, and may consult department legal counsel. Any final decision he makes must be according to department policies, which are explicit as to the type of discipline to be followed for a given type of violation. (Garcia Depo. pp. 51)

As stated above, K.S.A. 1995 Supp. 75-4322(a) requires that, in order for an employee to be defined as a supervisor, the employee must have either the authority to hire, transfer, suspend, etc., or effectively to recommend a *preponderance* of such actions. "The preponderance test means that the fact finder, both the presiding officer and any administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not." Goldberg's Deskbook on Evidence for Administrative Law Judges (1993), The National Judicial College, at 1-7, citing Administrative Law and Practice, Vol. 1, at 491 (1985). This presiding officer is not convinced that captains have the authority to effectively recommend a preponderance of such actions. Furthermore, what little authority they do have is strictly regulated and restricted by policy, which they have no authority to formulate. As the petitioner stated, "An employee is not a supervisor even 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 that power will be exercised." (Pet. post-hearing brief, p. 24)

C. Burden of Proof

Petitioner contends that it is the Respondent's burden to prove that captains should be

excluded from the existing unit as "supervisors." Although the Petitioner is relying on rulings of a previous hearing officer for PERB, it is a well-established principle that the "*doctrines of ...stare decisis* [is] not generally applicable to administrative determinations." *Coggins v. Public Employee Relations Board*, 2 Kan. App. 2d 416, 420, 581 P.2d 817 (1978). The previous executive director of PERB, who recently issued a decision that the burden of proving an individual should be excluded as a supervisor rests on the party alleging that supervisory status, consistently cited National Labor Relations Board (NLRB) cases as his persuasive authority. See *Teamsters Union Local 795 v. City of Wichita, Kansas (Wichita Airport Authority)*, PERB Case No. 75-UDC-1-1992.

However, this presiding officer is more persuaded that, "generally, the burdens of persuasion [proof] and of going forward with the evidence rest with the party pleading the existence of a fact." *Goldberg's Deskbook On Evidence for Administrative Law Judges* at 1-7. The Petitioner filed the petition in the instant case, pleading the existence of the fact that captains are "public employees" as contemplated in K.S.A. 1995 Supp. 75-4322(a). Essentially, the Petitioner is arguing that captains do not fall within any of the exceptions set out in that statute, one of which is supervisors. K.S.A. 1995 Supp. 75-4324 gives "public employees" the right to participate in union activities and then K.S.A. 1995 Supp. 75-4322(a) explicitly defines "public employees" as those who are not supervisors, professionals, elected and management officials, or confidential employees. It would not be logical to allow a petitioner to file a unit determination or amendment petition on any public employee, and then always expect the respondent to have the burden of proving that the employees are not really

"public employees" as contemplated by the legislature. There is no presumption that all public employees are not supervisors, professionals, ect. "A presumption is a procedural device that operates to shift the evidentiary burden of producing evidence (i.e. the burden of going forward) to the party against whom the presumption is directed. *Id.* at 1-9, citing *Weissenberger's Federal Evidence*, Section 301 (1987).

Therefore, the burden of proof is on the Petitioner in the instant case to prove that captains meet the definition of "public employee" and should be allowed in the existing unit.

II. WHETHER OR NOT INCLUSION OF THE FIRE CAPTAINS OF THE WICHITA, KANSAS, FIRE DEPARTMENT IN THE EXISTING BARGAINING UNIT REPRESENTED BY THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL UNION NO. 135, WOULD BE APPROPRIATE IF THE CAPTAINS ARE NOT FOUND TO BE SUPERVISORY EMPLOYEES.

As previously stated, K.S.A. 1995 Supp. 75-4327(e) provides that PERB must consider, in determining whether a proposed unit is appropriate, the efficient administration of government; a community of interest among employees; history of employee organization; geographics; overfragmentation of a work organization; K.S.A. 75-4325; and recommendations of the parties. Furthermore, K.A.R. 84-2-6 provides that PERB must consider whether the proposed unit of the public employees is a distinct and homogeneous group, with significant problems which can be adjusted without regard to the other public employees of the public employer, and may also consider the relationship of the proposed unit to the total organizational pattern of the public employer. K.A.R. 84-2-6 states, however, that the extent to which public employees have been organized by an employee organization nor the

desires of a particular group of public employees to be represented separately or by a particular employee organization shall be a controlling factor.

Two of the foregoing factors can be disposed of summarily. Neither party has presented any arguments regarding problems with geographical location of the unit, or the provisions of K.S.A. 75-4325. The remainder of the above factors are considered as follows:

1. Historically, it is evident that captains have not been included in the bargaining unit. However, it is also evident that facts and circumstances have changed since the original certification of the union in 1974, which question and contradict the captains' exclusion from the unit. For example, when the unit was originally certified, PERB found that captains normally supervised up to nine employees, while lieutenants only supervised four employees. Now captains supervise four employees (the same number lieutenants used to supervise when they were included in the unit) and lieutenants only supervise three employees. (Resp. Ex. 3; Garcia Depo. pp. 10, 13-15, 91-92). Furthermore, as shown above, captains' responsibilities at fire scenes have significantly changed since the manpower reduction in 1983, and now captains have actual hands-on fire fighting duties.

2. No evidence has been presented which would prove there would be a negative effect on any overfragmentation or splintering of the work organization.

3. Clearly, Petitioner recommends inclusion of captains in the unit and Respondent recommends exclusion. Although Captain Aaron and Lieutenant Cole testified that it is the wish of all the captains, with which they have spoken, to be included in the bargaining unit, K.A.R. 84-2-6(2) prohibits such factor from being controlling on the question of whether a

proposed unit is appropriate.

4. Respondent contends that the inclusion of captains in the bargaining unit places captains "in the position of being asked to serve two masters," creating potential conflict in disciplinary matters. There has been a showing, however, that lieutenants can also make recommendations in disciplinary matters. All considered, the efficient administration of government would not be negatively affected by the inclusion of captains.

5. Respondent argues that captains do not share a community of interest with their subordinates, contending there is a major difference in the method of payment between captains and lieutenants, as fire fighters and lieutenants are paid on an hourly basis and captains are salaried employees. Both parties cite *Kalamazoo Paper Box*, 136 NLRB 134 (1962) which lists method of wage or compensation as a factor to be considered in determining the community of interest. There is no evidence that Kansas requires method of wage or compensation to be considered in determining the community of interest. It is persuasive that such a factor may be considered, but there is no evidence, and no rational basis to conclude, that the Kansas legislature intended any one factor to be controlling. In light of the substantial evidence, discussed above, that captains and their subordinates share a community of interest in their day-to-day activities, their responsibilities to the fire station and its equipment, and their equal obligations to comply with department policy and regulations, the difference in the way that they are paid is not significant.

Finally, based on all of the foregoing evidence and arguments, captains, lieutenants and fire fighters are a distinct and homogenous group, and Petitioner has met the burden of

proving that inclusion of the captains in the existing bargaining unit would be appropriate.

ORDER

IT IS THEREFORE ADJUDGED AND ORDERED that the position of fire captain should be included in the existing bargaining unit pursuant to K.S.A. 1995 Supp. 75-4327(e).

IT IS SO ORDERED THIS 19th day of July, 1996.



Susan L. Hazlett
Presiding Officer
Public Employee Relations Board
1430 SW Topeka Blvd.
Topeka, Kansas 66612

NOTICE OF RIGHT TO REVIEW

This Initial Order is the official notice of the presiding officer's decision in this case. This order will become a final order pursuant to K.S.A. 1995 Supp. 77-530 unless reviewed by the Public Employee Relations Board, either on its own motion or at the request of either party pursuant to K.S.A. 1995 Supp. 77-527. Any party seeking review of this order must file a Petition for Review with the Public Employee Relations Board at 1430 S.W. Topeka Blvd., Topeka, Kansas, 66612, within 18 days after the mailing of this order.

CERTIFICATE OF MAILING

I hereby certify that on the 31st day of July, 1996, a true and correct copy of the above and foregoing Initial Order was deposited in the U.S. Mail, first class, postage prepaid, addressed to the following:

Steve A.J. Bukaty
Blake & Uhlig
475 New Brotherhood Bldg.
753 State Avenue
Kansas City, KS 66101
Attorney for Petitioner

Kelly J. Rundell
Senior Assistant City Attorney
Office of City Attorney
City Hall - Thirteenth Floor
455 North Main Street
Wichita, KS 67202-1635
Attorney for Respondent

and to the PERB members on the 5th day of August, 1996.

Sharon Tunstall
Sharon Tunstall
Public Employee Relations Board
1430 SW Topeka Blvd.
Topeka, KS 66612