

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

INTERNATIONAL ASSOCIATION OF)
FIREFIGHTERS, AFL-CIO, CLC,)
LOCAL NO. 2612)

Petitioner,)

Case No.: 75-UCA-3-1999

vs.)

SEDGWICK COUNTY FIRE DISTRICT)
NO. 1,)

Respondent)

INITIAL ORDER

NOW on this 26th day of April, 2000, the above-captioned unit clarification or amendment petition came on for decision pursuant to K.S.A. 75-4327(c) and K.S.A. 77-514(a) before presiding officer Douglas A. Hager.

These proceedings arise out of a Petition for Clarification or Amendment of Appropriate Unit filed on September 30, 1998 by the International Association of Firefighters Local No. 2612, (hereinafter "Petitioner"). Petitioner seeks to amend the current bargaining unit within the Sedgwick County Fire District No. 1, (hereinafter "Respondent"), comprised of firefighters and lieutenants, to include the rank of Fire Captain. Petitioner alleges that Fire Captains are not "supervisors" as that term is defined and used in the Kansas Public Employee-Employer Relations Act, (hereinafter "PEERA"), and that they are therefore eligible for inclusion in the bargaining unit.

Respondent contends that the facts and law applicable to this question are the same today as they were in 1979, when the Public Employee Relations Board, (hereinafter "PERB"), determined that the position of Fire Captain in Respondent fire district met the statutory definition of "supervisory employee" and ordered that said

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position be excluded from the firefighters' and lieutenants' bargaining unit. Accordingly, argues Respondent, Petitioner bears the burden of demonstrating why PERB should reverse itself by establishing that Fire Captains are not supervisory employees under the PEERA. The PERB's prior order is *res judicata* as to this issue and "is valid until Petitioner demonstrates conclusively that it should be reversed based on a significant change in the applicable law, relevant facts, or parties to the action." *Respondent's Post-Hearing Brief*, p. 17.

A hearing was held in this matter on August 5th and 6th, 1999 at 402 East 2nd Street in Wichita, Kansas and continued at the same location on August 19th, 1999. Petitioner appeared by and through its attorneys, Steve A. J. Bukaty and Lawrence G. Rebman, Steve A. J. Bukaty, Chartered, 8826 Santa Fe Drive, Suite 218, Overland Park, Kansas 66212. Respondent appeared by and through its attorneys, Robert D. Overman and Brian J. Christiansen, Morris, Laing, Evans, Brock & Kennedy, Chartered, Olive Garvey Building, Fourth Floor, 200 West Douglas, Wichita, Kansas 67202-3084. Numerous witnesses appeared on behalf of each of the parties and the transcribed testimony of a number of additional deposed witnesses was admitted as a part of the record.

Post-hearing briefing was completed late last year. In addition to the significant numbers of substantial documentary exhibits submitted in this case, there were well in excess of nine hundred pages of transcript testimony and nearly one thousand pages of deposition testimony to be considered. While this initial order is being issued beyond the statutory time frame mandated by the Kansas Administrative Procedure Act, *see* K.S.A. 77-526(g), the complexity of the substantive and procedural legal issues herein, the sheer quantity and length of evidentiary documents, transcripts and pleadings, the presiding officer's additional caseload and lack of staffing resources, and the presiding officer's relative lack of significant experience in the substantive legal field implicated in this matter warranted devotion of the additional time spent in researching and preparing this order. Further, the parties, by communications to this office dated April 6th and April 7th, 2000, have evidenced their respective waivers of the statutory time limit. *See* K.S.A. 77-526(g).

ISSUES OF LAW

Petitioner and Respondent differ only slightly as to their enumeration and characterization of the legal issues in need of resolution in this matter. Petitioner contends that the issue to be decided is whether the Fire Captains should be included in the bargaining unit represented by Petitioner. Prehearing Order, June 18, 1999, p. 2. Implicit in Petitioner's position is that Respondent bears the burden of establishing that Fire Captains should be excluded from the unit, i.e., the Fire District must prove that Fire Captains meet the statutory definition of "supervisory employee". See Petitioner's Legal Brief to the Hearing Officer, p. 5.

Respondent contends the issues are whether Petitioner's petition should be dismissed because the PERB order issued in case number 75-UD-1-1979 is final and binding on the question of Fire Captains' exclusion from the bargaining unit because the facts and law remain the same now as they were in 1979, and whether the Fire Captains should be included in the bargaining unit represented by Petitioner. Prehearing Order, June 18, 1999, p. 2-3. Respondent also argues that it is the opposing party's burden to prove that Fire Captains are not supervisory employees. See Respondent's Post-Hearing Brief, p. 17. After giving full consideration to the parties' arguments and authorities, the Presiding Officer concludes that the issues to be resolved in this matter are as follows:

1. Whether the order issued by the PERB in case number 75-UD-1-1979 is final and binding on the issue whether Fire Captains should be included in the bargaining unit;
2. Whether Respondent has the burden of proving that Fire Captains are supervisory employees;
3. Whether the position of Fire Captain of the Sedgwick County Fire District No. 1 should be excluded from the existing bargaining unit represented by the International Association of Fire Fighters, Local Union No. 2612, pursuant to K.S.A. 75-4322(b) as a "supervisory employee";
4. Whether inclusion of the Fire Captains in the existing bargaining unit would be appropriate, if the Captains are found not to be supervisory employees.

On August 2, 1999, Respondent filed with this office a Motion for Summary Judgment and a lengthy Memorandum supporting said motion. Because this motion was not filed in sufficient time to allow for response from Petitioner, nor to allow its

consideration by this officer, prior to the scheduled August 6th hearing date, *see* K.S.A. 60-256(c), the Presiding Officer advised the parties that the motion would not be ruled upon. Consequently, this order will make no further attempt to address said Motion.

FINDINGS OF FACT

1. Petitioner is an employee organization, as defined by K.S.A. 4322(i), and was certified as the exclusive bargaining representative of all firefighters and lieutenants in the Sedgwick County Fire District No. 1, by the PERB, by order dated December 17, 1979. The order specifically excluded from the bargaining unit the rank of Fire Captain as "supervisory employees". Petitioner has served in this capacity continuously since that time. (Respondent Exhibit [hereinafter "R.Ex."] 5).
2. Respondent is a public agency or employer, as defined by K.S.A. 75-4322(f), (R.Ex. 5, p. 2), and has opted to come under the PEERA in accordance with K.S.A. 75-4321(c).
3. The petition filed in this matter seeks to amend the current bargaining unit composition to include Fire Captains in the existing unit. (Petition).
4. The primary function of the Fire District is to protect property and save lives of the citizens of Sedgwick County. (Tr., p. 25; 332-4; 389; 432; 753).
5. The fire district serves a "very large" area, (Cowley Deposition, p. 8), of approximately 644 square miles, (Williams Deposition, p. 6), including areas with urban, suburban and rural geographic characteristics, (Cowley Deposition, p. 8). The district is of a predominantly rural character, (*Id.*), and serves the city limits of Wichita and second and third class cities including Garden Plain, Goddard, Andale, Bentley, Maize, Park City, Greenwich and Furley, and a portion of Sedgwick County. (*Id.*, p. 9).
6. The Fire District is headed by the Fire Chief and is divided into six functional units: Operations, Administration, Medical, Maintenance, Safety/Training and Fire Prevention. A Deputy Chief is in charge of the Operations unit, and another Deputy Chief oversees both Fire Prevention and the Safety/Training unit. See Petitioner's Exhibit (hereinafter "P.Ex.") 9. The Operations unit deals with fire fighting and fire suppression and comprises "the largest part of the fire department". (Tr., pp. 56-7).

7. The Operations unit is divided into three twenty-four shifts, each one supervised by a Division Chief. Division Chiefs answer to the Deputy Chief in charge of Operations. Each shift works for twenty-four hours, and then has forty-eight hours off. The shifts are designated as "A" shift, "B" shift and "C" shift. (Cowley Deposition, p. 18; Tr., pp. 25-7; 408; P.Ex. 9).

8. All of Respondent's twenty-four Fire Captains work in the Operations Division as supervisors of eight individual fire stations. (Tr., p. 26; Cowley Deposition, p. 17). The fire stations are, on average, from five miles to fifteen miles apart. (Cowley Deposition, p. 9). The employees on each shift at each fire station are supervised by a Fire Captain. (See, e.g., Tr., pp. 178-196; 389-402; Cowley Deposition, p. 18, 21, 24-5).

9. Division Chiefs visit the shifts they supervise at the fire stations on an average of "once a week, maybe twice a week", (Cowley Deposition, p. 47), for "anywhere from 15 minutes to 2 hours." (*Id.*, p. 48; see also, Williams Deposition, p. 40).

10. The fire department's Operations unit employs approximately twenty-one lieutenants and seventy-five firefighters. (Curmode Deposition, p. 9; Tr., pp. 24, 57-8; P.Ex. 9) A Fire Captain will normally supervise one lieutenant and three firefighters. (Curmode Deposition, p. 69; Tr., pp. 26-7; 86; 331-2).

11. The Fire District provides a general set of guidelines to assist its employees in the performance of their duties. Fire Captains have the authority to deviate from these general guidelines if, in their judgment, it is necessary to do so. (Tr., pp. 743-8, 828-9). For example, Captains can train their men on areas they feel is necessary based upon their evaluations of their men's strengths and weaknesses. It is the Captain's responsibility, because if his subordinates don't know their jobs, someone can get hurt or killed. (Tr., p. 833).

12. The position of Division Chief within the Respondent fire district was established in the early 1980's and comprises an additional layer of management between the Fire Chief and Fire Captains as compared to the managerial structure prior to that time. (See generally, Tr., p. 423-6; Piper Deposition, pp. 56, 63).

13. Prior to creation of the division chief position, the fire marshall and deputy chief of operations shared responsibility for performance of the shift supervisor role now performed by division chiefs. (Tr., pp. 422-3).

14. Responsibilities and job duties of the Fire Captain position have "not really" changed since creation of the Division Chief position. (*Id.*, pp. 423-6). After the creation of the Division Chief position, captains had pretty much the same amount of authority as they had prior to that time. (Piper Deposition, p. 59).

15. Approximately five percent of fire station employees' time is devoted responding to emergencies. (Tr., pp. 410-11, 475).

16. In the early 1980's, the fire district implemented the Incident Command System ("ICS"). (Tr., pp. 381, 725). The ICS defines the command authority structure at an emergency situation. (Jt.Ex. 3, Standard Operating Guidelines [hereinafter "S.O.G."] No. 5.4.1; Tr., p. 143). The ICS is a system for determining command of an emergency situation based upon the nature of the emergency and the arrival of units and officers on the scene. (*See generally*, Tr., pp. 143-8, 382-3).

17. Upon a Fire Captain's arrival at an emergency scene, if an employee of junior rank is in charge at the scene, a Fire Captain must independently evaluate the situation and determine whether to assume command of the incident or to leave command with the junior officer. (Tr., p. 753-4). During an emergency, if the Fire Captain is the senior officer present at the scene, he is responsible for the incident, even if he is not in actual command. (*Id.*)

18. During an emergency, the Fire Captain is in charge, unless relieved by a higher ranking officer, and is responsible for making assignment decisions, and for developing strategies to bring any given emergency situation under control. (Tr., p. 430; R.Ex. 4).

19. Command at an incident may be transferred from the initial incident commander to a later arriving or senior command officer. (Jt.Ex. 3, S.O.G. 5.4.1, p. 6). The first fire department unit or officer to arrive on scene is in command until relieved. (*Id.*). If command has been established by a fire fighter or an acting officer, command shall be transferred to the first arriving officer. (*Id.*). The next arriving unit or officer shall assume command in the case where the first Company Officer passes command. (*Id.*).

20. The Fire Captain is in charge of the fire station at all times unless he is on leave or extended absence from the station. (Tr., pp. 389, 391-2, 722-3, 828).

21. The Fire Captain is considered by Respondent to be a supervisor and is often described by Fire District employees as the station supervisor. (Tr., pp. 185-188, 192, 389).

22. Fire Captains are employed by Respondent as exempt, salaried employees, (Tr., p. 473), while Lieutenants and Firefighters are classified as non-exempt employees and receive a negotiated hourly wage rate. (*Id.*). Exempt employees are defined as those employees who participate in making "Policy decisions". (Jt.Ex. 2, p. 16).

23. Fire District personnel of the rank of Fire Captain and above are entitled to executive leave. Employees below the rank of Fire Captain are not. (Tr., p. 596-7).

24. Fire District personnel of the rank of Fire Captain and above receive management bonus pay. Employees below the rank of Fire Captain do not. (P.Ex. 12).

25. The Fire Captain has the overall and immediate first-line responsibility for the safety and welfare of station employees. (Tr., p. 430). The Fire Captain is ultimately responsible for running his fire station. (Piper Deposition, p. 25).

26. The Fire Captain may elect to delegate portions of his authority to the employees he supervises, but retains the ultimate responsibility for the outcome of that which he chooses to delegate. (Tr., pp. 186, 592-594).

27. A Fire Captain is a member of the Fire District hiring interview board. (Tr., pp. 460, 585). Fire Captains do not have the authority to hire for Respondent, (Curmode Deposition, p. 71, 80), nor did they possess such authority when the current bargaining unit was established in 1979. (R.Ex. 5, p. 5). Hiring authority is vested in the Fire Chief. (Tr., p. 123-4, Curmode Deposition, p. 71).

28. The Division Chief of Operations makes final decisions regarding inter-station transfers of personnel, based upon recommendations from Fire Captains. (Tr., 76, 461, 586, 757-8).

29. The current collective bargaining agreement agreed to by Petitioner and Respondent effective through December 31, 2000 provides that the Fire Captain has the authority to approve shift exchanges between station employees of the rank of Lieutenant and Firefighter. (R.Ex. 1).

30. The Fire Captain has the authority to suspend, i.e., to relieve an employee whom he supervises from duty, if the Fire Captain determines that the employee is unfit for duty. (Tr., 612-613, 715, 786, 868, 905; Piper Deposition, pp. 40-1; Curmode Deposition, pp. 77-8). Credible testimony established that this authority has been exercised by Respondent's Fire Captains in the fulfillment of their supervisory duties. (Tr., pp. 612-5, 786).

31. The fire district lay off and recall policies are a subject of negotiations between Petitioner and Respondent and are contained in a collective bargaining agreement between them. (Joint Exhibit [hereinafter "Jt.Ex."] 1). Fire Captains cannot lay off or recall employees. (Tr., pp. 61, 343, 359, 766).

32. In the event of a shortage of employees at a fire station, the Fire Captain has the authority to recommend a recall of off-duty personnel to a Division Chief. (Tr., 184-5, 479-480).

33. The Fire Captain is responsible for independently evaluating the job performance of the station employees whom he supervises through both the formal Fire District evaluation process and informally on a daily basis. (Tr., 78, 484-5, 711, 834-8).

34. The ultimate authority for promotions in the fire district rests with the Fire Chief. (Curmode Deposition, p. 72). The Fire Captains' evaluations of their employees are used by the Fire Chief when making promotion decisions. (*Id.*, Tr., pp. 197-8, 588-9, 704-5).

35. The Fire Captain has the authority to recommend whether an employee he supervises should receive a promotion. (Tr., pp. 837-8, 867-8). Fire Chief Curmode testified as to the weight given such recommendations, that they are "looked at heavily". (Curmode Deposition, p. 72).

36. Fire Captains do not have the authority to discharge employees. (Tr., p. 63, 342; Curmode Deposition, pp. 71, 80). The Fire Captain is responsible for making recommendations regarding discharge of his employees. (Tr., pp. 589, 786).

37. Fire Captains are responsible for evaluating probationary firefighters and making recommendations as to whether probationary firefighters are retained as regular employees or are discharged. (Tr., pp. 475-7, 838-9).

38. Credible testimony established that recommendations regarding discharge have been made by Fire Captains, and that, because Fire Captains are the subordinate employees' immediate supervisor and serve as fire station manager, such recommendations are given significant weight in Respondent's discharge process. (Tr., pp. 589, 786).

39. The Fire Captain has the authority to reward employees he supervises by, among other things, reducing their work load or giving verbal commendations. The Fire Captain recommends formal Fire District awards for the employees he supervises. (Tr., pp. 186-8, 477-8, 784-5). A Fire Captain sits as a member of Respondent's formal awards board. (Tr., pp. 136, 187).

40. As station supervisor, the Fire Captain has the authority to determine whether he will participate in station clean-up and maintenance activities or not. The Fire Captain assigns station cleaning and maintenance to employees he supervises. Other station employees do not have that authority, unless it is delegated to them by the Fire Captain. (Tr., pp. 68-9, 178-9).

41. As the station supervisor, the Fire Captain has the authority to make apparatus assignments, i.e., the assignment of personnel to station vehicles. (Tr., pp. 69, 478, 596).

42. As station supervisor, the Fire Captain is responsible to ensure that firefighters and lieutenants follow the fire district's policies and standard operating guidelines at the fire stations. (Tr., pp. 411, 465, 590-1).

43. The Fire Captain is responsible to independently investigate suspected infractions of fire district guidelines at the station and make independent judgments with respect to the appropriate discipline to be administered to a subordinate employee if an infraction is found. (Tr., pp. 188-9, 411-2, 465, 591, 712-5).

44. Fire Captains' evaluations of their employees are considered by the Fire District in making decisions pertaining to employee discipline. (Tr., pp. 197-8)

45. A Fire Captain's evaluations of the employees he supervises are used by Respondent to determine eligibility for firefighter and fire Lieutenant merit pay increases. (Tr., pp. 588, 704-5).

46. As part of the disciplinary process, Fire Captains recommend whether firefighters and lieutenants should be terminated. (Tr., pp. 589, 786).
47. The Fire Captain has the authority to assign extra duties, and to give oral and written reprimands as disciplinary measures. (Tr., pp. 188, 412-3, 713-4, 840-3).
48. The Fire Captain has the authority to initiate and recommend suspension without pay, demotion, and termination as disciplinary measures. (Tr., pp. 185, 189, 713-5, 786, 814).
49. The Fire Captain plans, supervises, and directs the activities within the fire station. (Tr., pp. 389, 828-9).
50. The majority of the time spent by employees while working at the fire station is devoted to training to keep firefighting skills fresh. (Tr., pp. 416-7, 691-2). Firefighting is becoming more and more technical over time. (Tr., p. 416). Firefighting skills can be somewhat perishable if not exercised continually. (*Id.*). It is the Fire Captain's responsibility as station supervisor to make sure that his subordinates maintain their basic and technical firefighting skills. (Tr., p. 417).
51. The Fire Captain plans station training based on his independent evaluation of strengths and weaknesses of his station employees, makes determinations as to what training should be emphasized, and determines who will conduct the training and when and where it will occur. (Tr., pp. 185, 417, 691-704, 746, 829-33).
52. The fire district grievance policy is a subject of negotiations between Petitioner and Respondent and is contained in a collective bargaining agreement between them. (Jt.Ex. 1). Presentation of a complaint to the Fire Captain is normally the first step in resolving an employee grievance as defined by Fire District practice and the collective bargaining agreement. (Tr., pp. 191-2, 598-9; Piper Deposition, pp. 47-8).

CONCLUSIONS OF LAW/DISCUSSION

ISSUE 1

Whether the order issued by the PERB in case number 75-UD-1-1979 is final and binding on the issue whether Fire Captains should be included in the bargaining unit.

Petitioner filed its unit clarification or amendment petition on September 30, 1998, seeking to amend Respondent's current bargaining unit comprised of firefighters and lieutenants, to include the rank of Fire Captain. Petitioner alleges that Fire Captains are not "supervisors" as that term is defined and used in the PEERA, that they are eligible for inclusion in the bargaining unit, and that such inclusion would be appropriate under the present facts and applicable law.

Respondent argues that the union's petition should be dismissed because the PERB order issued in case number 75-UD-1-1979 is final and binding on the question of the Fire Captains' exclusion from the bargaining unit because the facts and law remain the same now as they were in 1979:

"Under the doctrine of *res judicata*, Petitioner bears the burden [of] establishing that the position of Fire Captain is not a 'supervisory employee' under the statute and that PERB should reverse its long-standing decision to the contrary. Under applicable law, the prior PERB order is valid until Petitioner demonstrates conclusively that it should be reversed based on a significant change in the applicable law, relevant facts, or parties to the action." (citations omitted).

Respondent's Post-Hearing Brief, p. 17. One of the cases cited by Respondent in support of the foregoing statements is the Kansas Supreme Court decision in the 1959 employment security case of *Warburton v. Warkentin*. In that matter the Court held that the judicial doctrine of *res judicata* does not ordinarily apply to administrative tribunals. *Warburton v. Warkentin*, 185 Kan. 468, 477 (1959). The Court explained its ruling thus:

"Administrative bodies are not ordinarily bound by their prior determinations or the principles or policies on which they are based. The doctrine of *res judicata* does not ordinarily apply to decisions of administrative tribunals. It is intrinsically a judicial doctrine not to be applied unwittingly to legislative or executive activities which administrative bodies are sometimes empowered to exercise in addition to the judicial one. There is present in administrative law an aspect of discretion which is absent in the strict application of *res judicata* in the judicial system, and it is this difference which permits agencies to do again what courts may not, and which therefore requires examination of particular cases."

In addition, the presiding officer notes that Kansas' public employer-employee relations law provides a process for clarification of a unit determination. See K.A.R. 84-

2-7. Petitioner has established a *prima facie* showing of a change of facts from those present in the original unit determination over 20 years ago. Accordingly, it is the recommendation of the presiding officer that the first issue be answered in the negative, i.e., that the PERB's 1979 order not be deemed to be final and binding on the substantive question herein. Where there is a *prima facie* showing of a significant change in the facts, or applicable law, it is appropriate that the Board revisit the question. In this matter, such a *prima facie* showing was made, and in the absence of a timely motion for summary judgment, it was appropriate that the matter proceeded to hearing for the development of a complete record on which to ultimately base a ruling.

ISSUE 2

Whether Respondent has the burden of proving that Fire Captains are supervisory employees.

The PEERA gives "public employees" the right to form, join and participate in the activities of employee organizations, i.e., "labor unions", for the purpose of meeting and conferring with public employers regarding grievances and conditions of employment. K.S.A. 75-4324. The Act defines "public employees" to mean "any person employed by any public agency, except those persons classed as supervisory employees", K.S.A. 75-4322(a), and certain other specified classes which the parties agree are not applicable for purposes of this case. The PERB has long ruled that the burden of proving that an individual should be excluded pursuant to one of the exclusionary categories of K.S.A. 75-4322(a) rests on the party alleging that exclusionary status. This rule is consistent with Kansas law holding that the burden of proof or persuasion rests with the party pleading the affirmative existence of the matter. See, e.g., *In re Wrights Estate*, 170 Kan. 600 (1951)(burden of proof on any point is on party asserting it); *Amos v. Livingston*, 26 Kan. 106 (1881)(general rule is that he who asserts an affirmative has the burden of proving it).

Here, Petitioner seeks to show that Fire Captains are public employees, and therefore subject to the PEERA. Respondent in turn asserts that although the Fire Captains are persons employed by a public agency, they are supervisory employees, and thus excepted from the coverage of the Act.

Therefore, with regard to the second issue, it is the presiding officer's recommended conclusion that Respondent bears the burden of proving the exclusionary status of the Fire Captains in issue, i.e., that they are supervisory employees and ineligible for inclusion in the bargaining unit.

ISSUE 3

Whether the position of Fire Captain of the Sedgwick County Fire District No. 1 should be excluded from the existing bargaining unit represented by the International Association of Fire Fighters, Local Union No. 2612, pursuant to K.S.A. 75-4322(b) as a "supervisory employee".

As noted above, PEERA gives "public employees" the right to form, join and participate in the activities of employee organizations, i.e., "labor unions", for the purpose of meeting and conferring with public employers regarding grievances and conditions of employment. K.S.A. 75-4324. The Kansas PEERA provides an election machinery and process by which public employees can choose an employee organization or union to represent them. The PERB conducts representation elections and certifies the results. Where an organization represents the majority of employees in "an appropriate unit", K.S.A. 75-4327(b), the PEERA requires the public employer to recognize the organization to effectuate the bargaining process afforded by state law. K.S.A. 75-4327(a); Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 252 (1980)(hereinafter "Goetz").

"[A] threshold question", Goetz, at p. 252, however, is whether the group of public employees the employee organization seeks to represent constitutes an "appropriate unit" under the Act. PEERA provides that it is the Board's responsibility to determine the scope of an appropriate unit, i.e., which employee positions should be included in the bargaining unit.

"When a question concerning the designation of an appropriate unit is raised by a public agency, employee organization or by five or more employees, the public employee relations board, at the request of any of the parties, shall investigate such question and, after a hearing in accordance with the provisions of the Kansas administrative procedure act, rule on the definition of the appropriate unit in accordance with subsection (e) of this section."

K.S.A. 75-4327(c).

A long-standing rule used by the Board in resolving unit determination disputes is that the approved bargaining unit need not be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be an appropriate unit. See *City of Wichita v. F.O.P.*, 75-UCA-1-1994, p. 17-8, and the cases cited therein.

The determination of appropriateness requires a three-step inquiry:

- 1) Does the job classification satisfy the initial inquiry in the definition of "public employee", i.e., "any person employed by any public agency";
- 2) Is the individual in the job classification excludable from the unit pursuant to one of the exclusionary categories set forth in K.S.A. 75-4322(a);
- 3) Does the job classification share a sufficient community of interest with the other classifications proposed for the unit?

Only when a position satisfies each prong of this test is it appropriate to include the position in the bargaining unit. Neither party argues that the Fire Captains are not persons employed by a public agency, so we need not further discuss the first prong above.

With regard to the second prong, Respondent alleges, as noted previously, that the Fire Captains in question are "supervisory employees" as that term is defined in the Act. Further examination of the supervisory employee exclusion is therefore in order.

K.S.A. 75-4322(b) defines "supervisory employee" as:

"... 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 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. . . ."

This statutory exclusion of supervisory employees from bargaining units is based upon the language of a similar exclusion found in the National Labor Relations Act at 29 U.S.C. § 152(11). *Kansas Univ. Police Officers Ass'n v. Public Employee Relations Bd.*, 16 K.A.2d 438, 439 (1991). Federal case law has interpreted this exclusionary language as signifying congressional intent to assure the private employer, for whom the National Labor Relations Act is applicable, of a loyal and efficient cadre of supervisors and

managers independent of the interests of the rank and file worker and their union. See *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 661-2 (1974). See also, *City of Wichita v. F.O.P.*, 75-UCA-1-1994, pp. 26-31, *United Rubber Workers Local Union 851 v. Washburn University of Topeka*, 75-UDC-3-1994, pp. 15-21, and the lengthy discussions therein. This purpose is equally applicable to public sector employers. *Elk Grove Firefighters Local No. 2340 v. Willis*, 400 F.Supp. 1097, 1101 (N.D.Ill.1975). In point of fact, "[t]he need for the distinction [between managerial employees and rank-and-file employees] is perhaps greater in public employment where there are no vested 'employers' as owners or a management associated with employing owners." *Shelofsky v. Helsby*, 32 N.Y.2d 54, 61 (1973), *dism.*, 414 U.S. 804 (1973). Exclusion of supervisory employees also protects rank-and-file employees against undue influence by management in the selection of union leaders. See *URW v. Washburn*, *id.*, at pp. 19-20.

The enumerated supervisory functions listed in PEERA's "supervisory employee" definition at K.S.A. 75-4322(b) are disjunctive. The existence of any one of these powers is the test of supervisory status, see, e.g., *Kansas Univ. Police Officer's Ass'n*, *id.*, at pp. 440-1 (upholding lower court order on basis that supervisory employee status is shown where purported supervisory employee had the authority to issue reprimands and recommend discipline, assign various duties and perform evaluations), provided, however, that such exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment. In the instant matter, based upon the findings of fact outlined above, it is the conclusion and recommendation of the presiding officer that Respondent has amply carried its burden of showing by a preponderance of evidence that the Fire Captains here in question possess the authority, in the interest of the employer, to suspend, discipline, reward, and assign employees under their supervision, and have the authority responsibly to direct employees, and that such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. It is the further conclusion and recommendation of the presiding officer that the Fire Captains at issue have the authority to effectively recommend a preponderance of the supervisory indicia at K.S.A. 75-4322(b), specifically, those previously stated, and the functions of "transfer" and "promote".

Petitioner argues at length that due to Respondent's paramilitary organizational structure, creation of the position of Division Chief and its incident command system, the Fire Captains do not exercise sufficient supervisory authority with independent judgment to qualify under the statutory test as "supervisory employees". A comprehensive review of the extensive record in this matter, however, fails to find support for this assertion. As to the statutory indicia of supervisory authority concluded to have been met herein, this recommended decision will briefly review evidence in the record that was particularly compelling in reaching the ultimate conclusion suggested in this matter.

Factors Evidencing Supervisory Authority

"... having authority in the interest of the employer to ... suspend ... assign, reward, or discipline other employees, or responsibly to direct them. . ."
K.S.A. 75-4322(b).

Two preliminary items should be noted. First, that as to the remaining statutory indicia of supervisory authority not listed in bold immediately above, it is the presiding officer's recommended conclusion that the evidence in this case demonstrates that Fire Captains do not have them, though they may effectively recommend as to certain of these indicia, as will be discussed later. Respondent impliedly concedes as much in its post-hearing brief, asserting only that the Fire Captain clearly has the authority to independently discipline, reward, assign, evaluate and direct. Respondent's Post-Hearing Brief, p. 21.

Second, that although Petitioner went to great effort in its pleadings, in depositions, and at hearing to argue and attempt to demonstrate that Fire Captains normally perform the same work as their subordinates, it is the presiding officer's recommendation to the Board that this question not demand undue attention. While the Fire Captains often do perform much of the same work as their firefighters and lieutenants, it is clear from the record that there is great difference in their respective work, responsibilities and authority. Further, the Kansas Court of Appeals has previously considered and rejected the argument made by Petitioner as to this "supervisory employee" definition, i.e., that the statutory language sets up a two-part test, the first

being that the employee at issue normally performs different work from their subordinates. *Kansas Univ. Police Officer's Ass'n, id.*, at pp. 439-40.

A closer examination of the record as it relates to the aforementioned statutory supervisory indicia reveals the following.

"Suspend"

Respondent's Fire Captains possess the authority to suspend, i.e., to relieve an employee whom they supervise from duty, if a Fire Captain determines that the employee is unfit for duty. Substantial testimony from witnesses called by both parties established this fact. *See Tr.*, 612-613, 715, 786, 868, 905; Piper Deposition, pp. 40-1; Curmode Deposition, pp. 77-8. The following cross-examination testimony from Respondent's deputy chief of operations was particularly telling:

[By Petitioner's Counsel, Mr. Rebman]

Q Can you suspend an individual?

A Can I? Yes.

Q And can a captain suspend an individual?

A Yes.

Q Can he suspend an individual for being tardy?

A Can I? Yes.

Q Can a captain.

A Yes.

Q Person shows up tardy after repeatedly being warned or disciplined. On the day he arrives at the station tardy, the captain can send him home without pay.

A Yes. It will be determined whether it's with or without pay. He can suspend. He can send someone home.

Q But he can't determine with or without pay?

A No. That's going to be determined by the county manager's office. In other words, he's suspended from duties. We'll decide later whether it's with or without pay.

HEARING OFFICER: What documents a decision
of that nature?

THE WITNESS: What document? In other words, we have - - I guess we have a form from the courthouse from the personnel department that relates to whether it's an oral counseling, written reprimand or a suspension, so, in other words, it would be a matter of them filling out the paperwork or whatever then it going through the chain of command up through to the county manager's office.

HEARING OFFICER: So a captain who suspends someone, let's say just for example to be consistent here, for coming in late, would suspend that person and then would have some kind of paperwork to fill out?

THE WITNESS: Yes.

HEARING OFFICER: Is that given to the firefighter who's been suspended or the lieutenant?

THE WITNESS: Either that day or at a later time depending, there again, on the type of action and whether or not the captain is able to have the paperwork filled out that particular time.

HEARING OFFICER: So they would fill that paperwork out either at that time or at a later time.

THE WITNESS: Yes.

HEARING OFFICER: A copy would be given to the effected person?

THE WITNESS: Yes.

HEARING OFFICER: And a copy of it would go up through the chain of command. Who would it go to initially?

THE WITNESS: It would go to - - the station captain would be the one to initiate it. It would then go to the operations division chief for his initials. It would then come to me. I would then give it to the fire chief. The fire

chief would send it to his supervisor, the public safety director, and Mr. Lamkey then would take it to the county manager and the county manager then would make the decision whether it was a one-shift, two-shift, three-shift four-shift suspension and then whether it would be with or without pay.

HEARING OFFICER: And in the two and a half years that you've been the deputy chief approximately, just a ballpark figure here, how many times have you received something of that nature from a captain?

THE WITNESS: A suspension? Maybe twice. Once or twice.

Tr., pp. 612-5. Petitioner's post-hearing legal memoranda failed to address this statutory factor. See Petitioner's Proposed Findings of Fact and Conclusions of Law; Petitioner's Legal Brief to the Hearing Officer. Regardless, the presiding officer's recommended conclusion is that while there are several layers of review above them, the Fire Captains employed by Respondent in this matter have the authority to suspend their subordinates.

Because the Fire Captains are in charge of their stations and the men in their command, and because they have the ultimate responsibility for the safety and welfare of their men, Fire Captains have the front-line authority to relieve from duty and send home an employee whom, in their discretion, in the exercise of their independent judgment, they believe is unfit for duty.

"Assign"

Respondent's Fire Captains possess the authority, in the interest of the employer, to "assign" duties to their subordinate employees, and to make apparatus assignments and use their independent judgment in doing so. See Findings of Fact Nos. 40, 41, 47 and 51. While there is some disagreement among the parties as to the appropriate meaning of this statutory factor, PERB has consistently interpreted this factor to refer to the authority to assign duties and other work-related responsibilities. See, e.g., *URW v. Washburn University, id.*, at p. 24; *City of Wichita v. F.O.P., id.*, at pp. 35-39; *Kansas University*

Police Officers Association, 75-UDC-6-1988, pp. 3, 13. In the appellate court decision with respect to the latter of these administrative matters, the Kansas Court of Appeals affirmed the agency's interpretation of the term, noting that "PERB's interpretation of [K.S.A.] 75-4322(b) comports with the legislative intent, is reasonable, and should be given controlling effect". *Kansas Univ. Police Officer Ass'n, id.*, p. 441. There, the statutory factor "assign" was interpreted by PERB as meaning the assignment of work, duties and routes. A similar interpretation is recommended here. In view that Fire Captains have the authority to "assign" work duties, such as those relating to training, cleaning and maintenance, and to "assign" personnel to apparatus, in the interests of the employer, and do so using their own independent judgment, it is the presiding officer's recommended conclusion that this statutory factor indicates supervisory status for the Fire Captains.

"Reward"

Respondent's Fire Captains possess the authority, in the interest of the employer, to reward their subordinate employees. *See* Finding of Fact No. 39. The following direct examination testimony by Respondent's witness, a former division chief with 21 years experience working for Respondent, was representative of the evidence presented on this point:

Q Can a fire captain reward his people?

A Yes.

Q How?

A I think the easiest way is verbal rewards, praise. He can recommend some type of rewards for actions at an incident. He can recommend recognition for performance in the station. There's quite a few things he can do to reward.

Q Give me some other examples.

A Nominate for the firefighter of the year.

Q For example, if they've had a particular rigorous shift the shift before, can on the next shift the captain alter the schedule to lighten their duties?

A He can, yes.

Q To reward them for the job well done?

A He could.

Q He has that authority?

A Yes.

Tr., pp. 477-8. The presiding officer's recommended conclusion is that Fire Captains employed by Respondent have the authority, in the interests of the employer and using their independent judgment, to "reward" their subordinates, as that term is used in the "supervisory employee" definition of PEERA.

"Discipline"

Respondent's Fire Captains possess the authority, in the interest of the employer, to discipline their subordinate employees within the meaning of PEERA. See Findings of Fact Nos. 42-44, 46-48. Fire Captains are responsible for ensuring that their subordinates follow fire district operating guidelines and policies. They must investigate suspected infractions at the fire station they command. If the Fire Captain ascertains that a firefighter or lieutenant has committed an infraction, the Captain determines what action, if any, should be taken. Fire Captains have the authority to assign extra duties and to give oral and written reprimands as disciplinary measures. If a written reprimand is warranted, the Fire Captain issues it to the employee, and sends it up the chain of command to the personnel department to be placed in the employee's personnel file. Under Respondent's progressive disciplinary system, the Fire Captain makes independent recommendations regarding more severe disciplinary measures, such as suspension and termination. As previously noted, Fire Captains have the authority to relieve station employees from their duties if they report to work unfit for duty.

In addition, Fire Captains have the authority to independently evaluate the employees they supervise. Such evaluations may affect merit pay increases and be used in making disciplinary decisions. In accordance with the reasoning expressed by the Court of Appeals in *Kansas Univ. Police Officers Ass'n, id.*, and in accordance with this agency's original decision in the unit determination between these parties, the statutory term "supervisory employee" is applicable where the employee in dispute has the authority to investigate suspected infractions and determine whether they are serious

enough to justify further action, issue written reprimands, assign extra duties, and evaluate employees.

“Responsibly to Direct”

Fire Captains are in charge of their fire stations and the men under their command. As station supervisors, they are fully responsible for the decisions they or their men make under their authority. Where a Fire Captain is the senior officer at an incident, they are responsible for the outcome of that incident, even if they are not in command. See Findings of Fact Nos. 17-21, 25, 26, 49-51.

Respondent's purpose is to save lives and property. Finding of Fact No. 4. Respondent depends on the decisions made and the discretion exercised on its behalf by the Fire Captains, both on scene at an emergency, and in the daily running of the fire stations. Time spent at the fire stations is largely devoted to preparation to perform Respondent's primary function. Training consumes much of this time and helps keep the men current with firefighting techniques and assures proficiency in the duties and procedures necessary to accomplish Respondent's mission and purpose. While general training guidelines are established by Respondent, it is the up to each Fire Captain to evaluate the training needs of individuals under their command, to determine their individual weaknesses and to train them accordingly. For these reasons, and others noted throughout this writing, it is the presiding officer's recommendation that Fire Captains possess the authority "responsibly to direct" the activities of their subordinates, as that term is used in PEERA, that they do so in the interest of the employer with the exercise of their own independent judgment.

“... or effectively to recommend a preponderance of such actions ...”

Possession of any one or more of the enumerated supervisory functions in K.S.A. 75-4322(b) is sufficient to make such individual a "supervisory employee" under PEERA, provided that such authority is exercised in the interests of the employer and requires the exercise of independent judgment. In the alternative, an individual should be classed as a "supervisory employee" if they "effectively [] recommend" a preponderance of the twelve enumerated supervisory functions. K.S.A. 75-4322(b).

It is the presiding officer's recommendation, outlined above, that the Fire Captains at issue possess such authority with regard to five of the enumerated functions: "suspend", "reward", "assign", "discipline" and "responsibly to direct" their subordinates. It is implicit in such conclusion that Fire Captains also "effectively recommend" such functions. In addition, the presiding officer concludes that the Fire Captains effectively recommend a preponderance of the twelve enumerated functions, those five just listed, and at the very least, the two additional functions of "transfer" and "promote". See Findings of Fact Nos. 28, 34 and 35. In view that the Fire Captain is the station officer with ultimate responsibility for the daily operation of his fire station and supervision of his employees, it is only natural that the employer would rely heavily on the recommendations of the Fire Captains as to many decisions, such as transfers and promotions, that would be made in such an organization at a level in the chain of command higher than that of an affected employees' direct supervisor.

ISSUE 4

Whether inclusion of the Fire Captains in the existing bargaining unit would be appropriate, if the Captains are found not to be supervisory employees.

In view of the recommended resolution of the third issue above, this point is moot. The presiding officer will not needlessly extend this writing by its further consideration.

CONCLUSION

Based upon his review and consideration of all of the relevant evidence in the record and of the parties' arguments and authority, it is the presiding officer's conclusion and recommendation that in the performance of their job duties and responsibilities, Respondent's Fire Captains act in the capacity of a "supervisory employee" as that term is defined in Kansas law, and as that term is defined in relation to the previously described objectives of the state's public employee-employer relations law.

The Fire Captains are expected to act, have the authority to act, and are acting, as an extension of management with respect to employer policies affecting the current

members of the bargaining unit. For the vast majority of the time during any given shift, the Fire Captains are the highest ranking officer on site at each fire station, many of which are located at some distance from any others. Each Fire Captain is charged with responsibility for the safety and welfare of the men in his command. Each is charged with the duty to implement and enforce fire district policy as it pertains to members of the current bargaining unit. Lives and property depend on Respondent's actions. This places the Fire Captains in a position in which their inclusion in the bargaining unit could create a conflict of interest. The Fire Captains should not be expected to serve two masters, the employer and the union. While all public employees have the right to form, join and participate in activities of labor unions, for the purposes recognized and fostered by the PEERA, state law also protects the public employer's right to a supervisory staff to assist in achieving the goals and objectives of the public employer, independent of the bargaining unit and rank-and-file interests. While based upon the specific facts present in those instances several other state firefighter bargaining units include positions with the title of captain, based upon the facts in this record, it is clear that the Fire Captain positions here in dispute are not public employees, being excepted from that class of employees by their being "supervisory employees", as that term is defined by state law.

It is therefore the recommendation of the presiding officer that the position of Fire Captain of the Sedgwick County Fire District No. 1 should be excluded from the existing bargaining unit represented by the International Association of Fire Fighters, Local Union No. 2612, as a "supervisory employee" pursuant to K.S.A. 75-4322(b).

IT IS SO ORDERED.

Dated this 25th day of April, 2000.



Douglas A. Hager, Presiding Officer
Div. of Employment Security & Labor Relations
1430 SW Topeka Blvd.
Topeka, Kansas 66612
(785) 368-6224

NOTICE OF RIGHT TO REVIEW

This Initial Order is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Public Employee Relations Board, either on the Board's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-527(b), 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 May 15, 2000 addressed to: Public Employee Relations Board & Labor Relations, 1430 SW Topeka Blvd., Topeka, Kansas 66612-1853.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Manager for Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 26th day of April, 2000, 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:

Mr. Robert Overman
Morris, Laing, Evans, Brock & Kennedy, Chtd.
200 West Douglas, 4th floor
Wichita, KS 67202-3084

Mr. Steve A. J. Bukaty
Steve A. J. Bukaty, Chtd.
8826 Santa Fe Dr., Ste. 218A
Overland Park, KS 66212

And to the members of the PERB on 5th, May, 2000.

Sharon G. Tunstall
Sharon Tunstall