

**BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS**

Fraternal Order of Police (FOP) Lodge #3,)	
Petitioner,)	
)	
vs.)	Case No.: 75-UCA-3-2005
)	
City of Topeka, KS – Police Dept.)	
Respondent.)	
_____)	

INITIAL ORDER OF THE PRESIDING OFFICER
Pursuant to K.S.A. 77-526

NOW on this 29th day of September, 2006, the above-captioned matter comes on for decision pursuant to K.S.A 77-526, before Presiding Officer Douglas A. Hager.

APPEARANCES

Petitioner Fraternal Order of Police (“FOP”) Lodge #3, hereinafter “Petitioner”, appears by Counsel Kevin M. Fowler, of the law firm Frieden, Haynes & Forbes. Respondent City of Topeka, Kansas, hereinafter “Respondent” or “Employer”, appears by its Counsel, Allison M. Kenkel and David P. Mudrick, of the law firm Wright, Henson, Clark, Hutton, Mudrick & Gragson L.L.P.

FINDINGS OF FACT

1. Respondent is a public employer within the meaning of the Public Employer-Employee Relations Act, hereinafter “PEERA” or the “Act”.

2. Petitioner FOP Lodge #3 is the certified, formally recognized bargaining representative for a unit of employees employed by the Respondent. This unit originally included commissioned law enforcement officers of the Topeka Police Department in the following classifications: (a) Officer; (b) Corporal; (c) Detective; and (d) Sergeant.

3. On August 19, 2004, the Petitioner filed a petition to amend its bargaining unit to include all City of Topeka Municipal Court law enforcement officers. Said petition was docketed as Public Employee Relations Board ("PERB") Case No. 75-UCA-1-2005. In that matter, the parties agreed to expand the bargaining unit to include the position of municipal court Protective Service Officer I ("PSO I") and the case was resolved by agreement of the parties.

4. The City of Topeka, however, did not agree with the petition in case number 75-UCA-1-2005 as it related to inclusion of the position of Protective Service Officer II ("PSO II"). Subsequently, the instant petition was filed on April 29, 2005 to take up that issue. *See Tr. pg. 41.*

5. Brenda Turner (hereinafter "Turner") is a PSO II at the City of Topeka Municipal Court. She has been employed in that capacity since January, 2001. *See Tr. pg. 15.*

6. The City of Topeka Municipal Court currently employs three full-time PSO I's and one full-time PSO II. Ms. Turner has been the only individual employed as a PSO II since she assumed her position in January of 2001.

7. Turner and the individuals employed as PSO I's are commissioned law enforcement officers. *See Tr. pg 18-19.*

8. A basic duty for all the PSO's, both PSO I and PSO II, is to provide security for the court. Said court security is primarily maintained by requiring all individuals coming

into the courtroom to pass through an x-ray machine and a metal detector, typically staffed by two PSO's, prior to entering the court. Security for the court is also provided by having a PSO on duty to monitor the courtrooms during dockets and perform a role similar to that of a bailiff. The position of PSO II performs this function in the same manner as the PSO I's. *See Tr. pgs. 27-30.*

9. An additional basic job duty for all PSO's is to take the fingerprints of those individuals who have been ordered by the bench to supply fingerprints. The PSO II performs this function in the same manner as the PSO I's. *See Tr. pgs 24-27.*

10. Turner serves as the Terminal Agency Coordinator ("TAC") for the Kansas Criminal Justice Information System. This position involves training other court employees to use the system, and resolving issues that relate to the use of the system. According to Turner's testimony, the individuals employed as PSO I's do not share these responsibilities. *See Tr. pgs 60-64, 165.*

11. Turner serves on the Fleet Advisory Board for the City of Topeka. In this capacity she is responsible for the two city vehicles that are assigned to the municipal court. As part of this responsibility, the position of PSO II has custody of the car keys and maintains a list of court employees who are authorized to drive the cars. Additionally, the PSO II ensures that the cars are serviced in accordance with a schedule maintained and sent out by the Fleet Department. This is usually accomplished by taking the cars in for maintenance herself, or by directing one of the PSO I's to complete the task. *See Tr. pgs 68-72, 169-170.*

12. The PSO II is responsible for performing background checks on all new municipal court employees. According to Turner's testimony, this is a function that

could be performed by others in her absence. However, Turner also testified that none of the PSO I's have ever performed a background check on a new court employee. *See Tr. pg. 74-78.*

13. The PSO II is in charge of issuing warrants for individuals who have not served their jail time. The PSO II is also in charge of reviewing all the fingerprints that are taken at the court and issuing warrants for individuals who fail to get fingerprinted. According to Turner's testimony, none of the PSO I's have ever performed these tasks, but in Turner's absence they were performed by the court clerk and an Office Assistant III. *See Tr. pg. 73-75.*

14. All commissioned law enforcement officers in Kansas must complete 40 hours of continuing education every year. Turner is responsible for coordinating and scheduling the continuing education of the PSO I's. *See Tr. pgs. 19-20, 163-164. See also Findings of Fact #7.*

15. Another responsibility of the PSO II position is that of coordinating and supervising the service of warrants and subpoenas. PSO I's serve warrants and subpoenas, but they don't assign that task to others. In the absence of the PSO II, either the Judge or the court administrator Beth Visocky would coordinate the serving of any warrants or subpoenas. *See Tr. pgs. 74, 166-167.*

16. The position of PSO II is responsible for coordinating prisoner transports to and from the courthouse for trials and hearings. PSO I's transport prisoners, but don't coordinate the transfers. *See Tr. pg. 72-73, 170.*

17. The PSO II is also responsible for weekly jail population checks. This is done primarily for budgetary purposes to ensure that the municipal court isn't being

overcharged by Shawnee County and that there aren't prisoners who could be housed at less costly facilities. When Turner has been absent, this task has gone mostly undone, although Judge Ebberts and Visocsky have attempted to undertake it on various occasions. The PSO I's have no responsibility with regard to jail population checks. *See* Tr. pgs. 170-172.

18. Turner serves as the municipal court's representative on the Public Relations Committee for the Shawnee County Department of Corrections. *See* Tr. pg. 172.

19. Turner is in charge of reconciling the two purchasing cards used by the municipal court. *See* Tr. pg. 173.

20. Turner is involved with the budget process. This involvement includes making recommendations and requests during the development of the municipal court's annual budget. *See* Tr. pgs. 167-168, 403-404.

21. Turner has participated in the development of grant proposals on behalf of the City of Topeka Municipal Court. *See* Tr. pg. 178-179, 388-391.

22. The PSO II is responsible for ensuring that all departing employees return their keys, parking pass, and KBI security fob. *See* Tr. pgs. 187-188.

23. Protective Service Officer I Will Dickey (hereinafter "Dickey") testified that when Turner is working the x-ray machine, the metal detector, or monitoring a courtroom, she is performing the same type of job functions as the PSO I's. However, Dickey acknowledged that he isn't aware of what work Turner does when she is in her office. *See* Tr. pgs. 146-147, 151-152.

24. In November of 2004, Judge Ebberts (hereinafter "Ebberts") requested that Turner perform an annual evaluation for the PSO I's. These performance evaluations

were eventually completed by Turner in the first part of 2005. However, Turner had not been asked to perform an annual evaluation of any of the PSO I's since beginning her position as a PSO II in 2001. In fact, until the unit determination matter at issue in this case had been filed with the Public Employer/Employee Relations Board, the subject of written performance evaluations of PSO I's had never been raised with Turner by any of her municipal court superiors. *See* Tr. pgs. 48-60, 136, 396.

25. Turner does not have the authority to hire other employees. All final hiring determinations are made by the human resources department. Turner was instrumental in the hiring of two part-time PSO I's, but those individuals are non-bargaining unit personnel who are called in to help when full-time PSO I's are on vacation or sick leave. Ebberts testified that Turner's recommendations carry weight with him, but this was also in reference to the non-bargaining unit personnel that were hired. Visocky testified that in the event a full-time PSO I position became available, Turner would coordinate interview times, choose the individual she wanted to hire and then forward her selection on to the department head and human resources for final approval. Turner did participate in the interview process for two of the current three PSO I's, and both the individuals she recommended were eventually hired. *See* Tr. pgs. 83-84, 91, 107, 194-195, 253-256, 387, 397.

26. The PSO II does not have the authority to transfer or effectively recommend the transfer of any other employees. Visocky testified that "we don't really have anyplace to transfer anybody to" and "I couldn't transfer anybody anywhere." *See* Tr. pgs. 84, 191, 265.

27. The PSO II does not have the authority to suspend or effectively recommend the suspension of another employee. Visocsky testified that Turner does have the authority to make a recommendation on suspension and that recommendation would carry weight. Visocsky further testifies that weight would be given do to the fact that she has confidence in Turner as an employee. However, written city policy dictates the types of offenses that would likely result in suspension. *See* Tr. pgs. 84,191-192, 265-268; FOP Ex. 1, pgs. 37-38.

28. The PSO II does not have the authority to lay-off or recall other employees. Decisions regarding lay-offs and recalls are made by human resources, and Visocsky is unaware of any aspect of that system that would allow Turner to make recommendations on lay-offs or recalls. *See* Tr. pgs. 84-85, 192, 293-294; FOP Ex. 1, pgs. 33-36.

29. The PSO II does not have the authority to promote other employees or even recommend that another employee be promoted. *See* Tr. pgs. 85, 196, 294; FOP Ex. 1, pg. 22.

30. The PSO II does not have the authority to discharge or effectively recommend the discharge of any other employees. Written city policy is the basis for whether or not an offense committed by an employee is sufficient grounds for discharge. *See* Tr. pgs. 85, 196-197, 294-302; FOP Ex. 1, pg. 37-38.

31. The PSO II does not have the authority to reward or even effectively recommend that another employee be rewarded. There is no city policy or program that allows for such actions. *See* Tr. pgs. 85-87, 197-198.

32. Turner testified that she has never disciplined any of the PSO I's. She further testified that she "didn't know" if she had the authority to impose discipline, and that City

of Topeka rules and regulations contained the “steps of discipline.” The Position Description for a PSO II, which was signed by Turner, states that a PSO II “[s]upervises subordinates with respect to accountability for performance and behavior including ... [d]iscipline of employees.” Written city policy contained in the “Personnel Code” outlines a four step progressive system of discipline. These steps, in order of severity, are documented verbal warning, written warning, suspension, and termination. According to the code “Department Heads shall have the right to discipline employees up to and including termination.” Additionally, the code states that “[d]eterminations of the seriousness of the offense shall be at the discretion of the Human Resources Director. Visocky testified that “all of the supervisors at municipal court can go up to the second level of discipline, which is verbal and written, and then beyond that, which would be suspension or termination would – they would make recommendation for that.” She further testified that the disciplinary action form has a spot for the supervisor’s signature. *See* Tr. pgs. 87, 91, 162-163, 239-251; City Ex. 6; FOP Ex. 1, pgs. 37-38.

33. Turner testified that she does not have authority to resolve grievances that may be brought to her by any of the PSO I’s. When asked if she had received any instruction regarding how to handle grievances that may be brought to her attention, she stated that “I believe the city rules and regs have – say that it has to be taken over to human resources.” Visocky testified that any employee grieving a disciplinary action would go first to their supervisor, then to her, then to the department, and finally to human resources. The city rules and regulations outline a specific procedure for the handling of grievances that essentially follows the process described by Visocky. “Step One” of this procedure states the following:

“An eligible employee who believes that a violation, as set forth above, has occurred shall first, within three days of the incident giving rise to the ‘grievance’ or within three days of first having knowledge of the incident, informally discuss the grievance with the employee’s immediate supervisor.”

See Tr. pgs. 90-91, 201, 361-371; FOP Ex. 1, pgs. 40-42.

34. Turner prepares the work schedule calendar for both herself and the PSO I’s. A work calendar is usually good for about six to nine weeks, so Turner tries to prepare one at least every nine weeks. The purpose of the work calendar is to rotate PSO’s throughout the day among different job functions. According to Turner, the schedule is routine and stays mostly constant throughout the year. Usually it is only adjusted to compensate for individuals who may be absent. In Turner’s opinion, this schedule could be filled out by a clerical person. Turner’s supervisor, Municipal Court Administrator Beth Visocsky (hereinafter “Visocsky”), however, testified that “[she didn’t] even know the whole schedule system [and had] trouble reading the whole schedule.” This testimony was given in the context of Visocsky saying that Turner doesn’t need her approval to change the schedule. *See Tr. pgs 64-68, 197. See also Findings of Fact Nos. 8 and 9.*

35. The PSO II approves and signs the leave slips of the PSO I’s. Turner testified that:

“If they want to take time off they fill out a request slip and they give it to me. I make sure we have enough manpower if they’re going to be gone, and then I sign off on it. And I sign off on it and give it to the payroll clerk.”

Turner later testified that she could approve vacation requests without having to seek approval from anyone else. Furthermore, in response to a line of questioning as to how

she determines if an employee should be given time off, or what she does if more than one employee makes a request for the same time, Turner testified as follows:

“I think—I don’t know that I’ve told them that that’s the policy, but whoever—you know, I told the other person who didn’t get the time off ‘so-and-so asked first,’ or, I don’t know, ‘We’re just too busy, you can’t be gone.’”

Visocsky also testified that the PSO II position has the authority to approve all types of leave (vacation, sick, personal, and funeral) for other PSO I’s. Additionally, Visocsky testified that Turner supplied information during the budget process regarding what might be needed from part-time officers to cover for the vacation leave, sick leave, and training needs of the full-time officers. *See* Tr. pgs. 74, 78-83, 108, 161-162, 186, 270, 275-276; City Ex. 6; City Ex. 16.

36. The PSO II is responsible for investigating complaints related to the protective service officers. However, Turner testified that if she receives a citizen complaint she also takes the complaint to her supervisor Beth Visocsky. Judge Ebberts has asked Turner to handle citizen complaints. If the complaint is verbal, Judge Ebberts asks Turner to “investigate them to determine what sort of action we might need to take.” If the complaint is in writing, he will “ask her to do everything in writing. That’s pretty much what I do for all the supervisors.” *See* Tr. pgs. 108, 120-122, 184-185, 387-388; City Ex. 15.

37. When asked to compare the position of PSO II with sergeants of the Topeka Police Department, Protective Service Officer I Will Dickey testified that “it’s more of a—if anything, a low level supervision, more of a lead than a supervisor.” However, Officer Dickey also testified that if a citizen came into the courthouse and asked to speak to his supervisor, he would direct them to “Brenda [Turner].” *See* Tr. pgs. 143, 152.

38. Visocky testified that Turner has a city issued "supervisor's handbook" in her office. Visocky has also sent Turner an email with updates to this handbook. *See* Tr. pgs. 180; City Ex. 12.

39. Visocky considers Turner to be a part of her "management team", and has sent her emails that indicate this status. *See* Tr. pg. 183, City Ex. 10.

40. When asked whether he had any doubts whether Turner is a supervisor, Judge Ebberts replied "I do not, no." He also testified that Turner had admitted to him that she was a supervisor. According to Ebberts, Turner admitted this during a discussion regarding whether one of the PSO I's would have to stay at work late to fulfill staffing needs. Ebberts testified, "[a]nd during the conversation she ---I asked her, well, you are their supervisor and she said, 'yes, I am their supervisor.'" *See* Tr. pgs. 391-392.

ISSUE OF LAW IN DISPUTE

The sole issue to be determined in this matter is whether the position of "Protective Service Officer II", for the City of Topeka Municipal Court, is a supervisory employee as defined by K.S.A. 75-4322(b).

CONCLUSIONS OF LAW/DISCUSSION

For purposes of the Kansas Public Employer-Employee Relations Law ("PEERA"), the term public employee is defined to mean the following:

"any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees."

K.S.A. 75-4322(a).

After carving out the supervisory employees exception, and other exceptions, to the definition of public employee, the PEERA goes on to provide a statutory framework to determine whether an employee fits within these exceptions. With regard to the “supervisory employees” exception, the pertinent statute provides that:

“Supervisory employee means 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.

K.S.A. 75-4322(b).

The statutory exclusion of supervisory employees from bargaining units is based upon, and yet slightly different from, the language of a similar exclusion found in the National Labor Relations Act, (“NLRA”), at 29 U.S.C. § 152(11). See *Kansas Univ. Police Officers Ass’n v. Public Employee Relations Bd.*, 16 K.A.2d 438, 439 (1991)(noting that K.S.A. 75-4322(b) was “lifted” from the NLRA, but contains the additional phrase “who normally performs different work from his subordinates”). Federal case law has interpreted the NLRA’s 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.

A. Burden of Proof

The parties’ first disagreement in their written legal arguments concerns the question who bears the burden of proof of supervisory status. The Petitioner’s position is that the burden of proving supervisory status lies with Respondent City of Topeka. See Petitioner’s Post-Hearing Memorandum, 75-UCA-3-2006, April 7, 2006, p. 5. Not surprisingly, Respondent disagrees. See Response to Petitioner’s Post-Hearing Memorandum, 75-UCA-3-2005, April 17, 2006, p. 1.

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 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 the Protective Service Officer II is a public employee, and therefore eligible for inclusion in a bargaining unit. Respondent in turn asserts that although the PSO II is a person employed by a public agency, the position is that of a supervisory employee, and thus excepted from the definition of public employees, and ineligible for inclusion in a bargaining unit. It is Respondent's burden to prove the excepted status of the Protective Service Officer II in issue, i.e., that the PSO II position is that of a supervisory employee and ineligible to be in the bargaining unit. See also, *Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1076 (10th Cir.2005).

B. Test of Supervisory Status

Based upon the statutory definition, "supervisory employee" is an appropriate classification only if the individual in question:

- (1) "normally performs different work from h[er] subordinates;" and
- (2) has 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 grievance,"
or
has authority "effectively to recommend a preponderance of such actions"; and
- (3) "the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

See K.S.A. 75-4322(b).

Thus, Respondent must first demonstrate that the employee in question "normally performs different work from his or her subordinates." K.S.A. 75-4322(b). It is clear

from the record that Turner performs many of the same basic job functions of a protective service officer alongside, and in the same manner as, the PSO I's. *See* Findings of Fact Nos. 8, 9 and 23. However, it is abundantly clear from the record that in addition to performing many of the same basic security functions for the municipal court, the PSO II also regularly performs a variety of responsibilities significantly different from the work of PSO I's. *See* Findings of Fact Nos. 10-23. Petitioner's assertion that Turner "spends a small amount of her time pursuing activities outside of her responsibilities as a Protective Service Officer II", is misplaced. Some of the activities Turner engages in, such as serving on a public relations committee, are outside the scope of her normal duties as a protective service officer. However, Turner also engages in a myriad of activities that are directly related to the protective service function and her responsibilities as a PSO II. *See* City Ex. 6. The PSO II position "normally performs different work from his or her subordinates."

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 confers 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. *See, e.g., City of Davenport v. Public Employment Relations Board*, 264 N.W.2d 307, 314 (Iowa 1978) ("In addition, 'the statute 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.”) (quoting *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 147 (5th Cir. 1967)).

While Respondent’s understanding of the supervisory employee definition is not materially different than that of Petitioner, the parties do differ over the question of whether the record supports a determination that the requirements described above have all been met. Petitioner is correct when it asserts that Respondent has failed to prove that Turner has the authority to engage in or even effectively recommend many of the 12 supervisory functions listed by statute. Any power that Turner would have to transfer, promote, or reward another employee would be speculative at best. *NLRB v. Security Guard Service, Inc.* 384 F.2d 143, 149 (5th Cir. 1967) (“A supervisor may have potential powers, but theoretical or paper power will not suffice”). There is no city program by which Turner could officially reward an employee, there are no available positions to which she could promote another employee, and even Turner’s supervisor testified that she “couldn’t transfer anybody anywhere.” See Findings of Fact Nos. 26, 29, 31. Further, any decisions regarding lay-offs or recalls would be made at levels above Turner and implemented through the human resources department. See Finding of Fact No. 28.

In addition, the PSO II does not have outright authority to suspend or discharge another employee, although there is some merit to the argument that Turner could effectively recommend such actions. However, while the city policy outlining the types of employee offenses that would constitute suspension or termination does not “constitute the entire list of such offenses”, it is sufficient in scope to call into serious question any

notion that the PSO II position would be making such a recommendation using “independent judgment.” *See* Findings of Fact Nos. 27, 30. *See also* FOP Ex. 1.

The legal conclusion drawn from Turner’s inability to engage in or effectively recommend the aforementioned supervisory functions is that Turner cannot “effectively...[r]ecommend a preponderance” of the twelve enumerated statutory indicia of supervisory authority. Therefore, the determination whether the PSO II position is that of a supervisory employee turns on whether it possesses the outright authority to perform at least one of the twelve. In this case, a preponderance of substantial, competent evidence in the record demonstrates the PSO II’s authority to both “assign” and “responsibly . . . direct” the work of her subordinates.

As part of its duties, the PSO II position is responsible for approving and signing off on all types of leave for the PSO I’s. In deciding whether to approve or reject leave requests, the PSO II has complete authority, and does not have to seek further approval from another supervisor, such as Beth Visocky. *See* Finding of Fact No. 35. The PSO II exercises this authority in the interests of the employer, by ensuring that sufficient manpower is available to perform the duties necessary for the protective service functions of the municipal court. To a certain extent the PSO II does use guidelines in this decision making that would seem to make the leave approving process “routine.” For example, Turner tries to give priority in approving leave to those employees who asked for the time off first. However, she also uses her own “independent judgment” based on the number of full-time employees able to work, the availability of part-time employees, and the amount of work that needs to be performed at a given date and time. This is illustrated by the following testimony given in response to a question on direct-

examination regarding whether the PSO II actually had "supervisory judgment" to approve or disapprove leave requests:

"Like I said before, *as long as I have enough manpower*, that's there's enough manpower at the court to carry out the basic functions, and if I can call a part-time person in."

See Tr. pgs 80-81 (Emphasis added).

Turner then gave the following response when asked whether she had to say no to one of the employees if two employees asked for the same time off and part-time help was not available:

"Yes. Except for like Wednesdays, we don't have too much scheduled. If it's just for, you know, a couple hours I could get by with just two people being there because we don't have anything scheduled on Wednesdays. So we don't have as much fingerprinting to do. We don't have a docket going."

See Tr. pgs. 81-82.

For budgetary purposes Turner does have to obtain the approval of her supervisor before she can call in part-time help. However, Turner's independent judgment even factors heavily into her supervisor's decision to approve a request for part-time help, due to the fact that Turner provides input during the budgetary process regarding the number of hours she believes might be needed from part-time officers to cover for the leave and annual training needs (which is scheduled and coordinated by Turner) of full-time officers. Turner is also responsible for preparing the work schedule calendar for both herself and the PSO I's, the purpose of which is to rotate the PSO I's amongst the basic job functions of a protective services officer.

Turner testified that in her opinion the work calendar could be filled out by a clerical person, but her supervisor Beth Visoscky testified that she didn't know the

schedule system and had trouble reading it. *See* Finding of Fact No. 34. Additionally, Turner is responsible for coordinating the service of warrants, the transport of prisoners, the maintenance and usage of municipal court vehicles, and the aforementioned annual training requirements of the PSO I's. *See* Findings of Fact Nos. 14-16. It is unlikely that a clerical person could adequately account for these and other factors, such as full-time employee leave balances and remaining funds available for part-time staffing, in preparing an effective work schedule. It is far more likely that Turner has the authority to assign work, and she uses her "independent judgment" to assign that work in a manner that serves the interests of her employer. As she herself stated in her testimony, the interest she is serving is ensuring that "there's enough manpower at the court." In *Superior Bakery, Inc. v. NLRB*, 893 F.2d 493, 496 (2nd Cir. 1990), an individual was found to be a supervisor on the basis that he had authority to assign work to employees and to set their schedules. As stated by the court in that case, "[p]resumably the employee....would be exercising independent judgment in this function because he would select the people necessary to do the work at the times he chose." Turner is acting in a similar supervisory role when she denies a leave request due to inadequate staffing, or when she sends a PSO I to transport a prisoner or have a car serviced. *See* Finding of Fact No. 11. The PSO II position in question has the authority to assign work, and does so using independent judgment on behalf of the employer.

In addition to having the authority to assign work to other employees, the PSO II position also has the authority "responsibly to direct" subordinates' work efforts. This authority is demonstrated by an example in the record of Turner investigating a citizen complaint. During her testimony, Turner stated that if a citizen has a complaint it is

directed to her, and she investigates it. The municipal court department head, Judge Ebberts, also testified that he has asked Turner to handle citizen complaints related to the protective service officers. *See* Findings of Fact 36. The example of one these complaints contained in the record involved an individual who complained about the treatment he received from a PSO I while going through a municipal court security station.

Turner was directed to handle the investigation by her superiors, and was advised to remind the officers of the need to treat members of the public with respect and courtesy. However, it was Turner herself that investigated the incident, and then used her independent judgment as to the best way to address the situation on behalf of her employer. In this specific case she took corrective action by reminding the officers to pat down and hand search individuals who wished to avoid going through scanning equipment for medical reasons. *See* City Ex. 15. In *NLRB v. Quinnipiac College*, 256 F.3d 68 (2d Cir. 2001), the court offered the following analysis on whether the individual in that case had the authority “responsibly to direct” other employees:

To be responsible is to be answerable for the discharge of a duty or obligation. In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs. *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 490 (2d Cir.1997). “[A]ccountability for another's failure to perform a duty establishes as a matter of law an employee's supervisory power responsibly to direct.” *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 267 (2d Cir.2000). Record evidence shows that a shift supervisor was reprimanded for the actions of two security employees and told that “as Shift Supervisor it is your responsibility to ensure all security personnel assigned to the campus are following college/security policies and procedures during your shift.” Another document shows that a shift supervisor was told, after being involved in an incident along with another security employee, “It was incumbent upon you, as the Supervisor, to [e]nsure that this situation not be allowed to get this far out of control.”

In this case Turner was responsible for investigating the incident, taking corrective steps, and then reporting the results to her superiors. These actions are clearly in line with the type of authority the court deemed to be supervisory in the above case. It could be argued that this was an isolated incident, and not a true example of Turner's authority "responsibly to direct" other employees. However, Turner herself testified that complaints come up "a couple times a month." Turner then testified that after investigating an incident, "I usually then talk to the officer about his action and say, 'This is what the complaint was about,' and make a suggestion of how to better handle it next time." Based on the testimony, and other evidence in the record, it is the presiding officer's conclusion that Turner exercises the authority "responsibly to direct" the work of other employees, and she does so using her own independent judgment on behalf of the employer .

CONCLUSION

To be considered a supervisory employee under K.S.A. 75-4322, an individual must have the authority to perform one of the enumerated supervisory functions, provided that the exercise such authority is not merely routine or clerical in nature, but requires the use of independent judgment. In this case, there is sufficient evidence in the record to conclude that the position of PSO II, currently held by Brenda Turner, exercises authority, requiring the use of independent judgment, to assign work and responsibly to direct other employees on behalf of her employer. This authority makes the position in question that of a supervisor and an exception to the definition of public employee found

at 75-4322(a). Therefore, the PSO II position does not qualify for inclusion in the bargaining unit. The petition is denied.

IT IS SO ORDERED.

Dated this 29th day of September, 2006.



Douglas A. Hager, Presiding Officer
Public Employee Relations Board
427 SW Topeka Boulevard
Topeka, Kansas 66603-3182
(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 October 20th, 2006, addressed to: Public Employee Relations Board, 427 SW Topeka Blvd., Topeka, Kansas 66603-3182

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager, Office of Labor Relations, Kansas Department of Labor, hereby certify that on the 2nd day of October, 2006, 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:

Initial Order, 75-UCA-3-2005, Fraternal Order of Police, Lodge No. 3 v. City of Topeka, Kansas Police Department

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And to the members of the PERB on 10¹³, October, 2006.

Sharon A. Tunstall
Sharon Tunstall