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.	)	

FINAL ORDER

ON THE 21st day of March 2007, this case came regularly before the Public Employee Relations Board (hereafter, the Board) on the Petitioner's request to review the Presiding Officer's *Initial Order*. Present at the meeting was all current Board members Ken Gorman, Chairperson; Sally O'Grady; Wayne Maichel, Burdett Loomis, and Keith Lawing. Chairperson Gorman recused himself from this case.

Petitioner, Fraternal Order of Police, Lodge #3 (hereafter "FOP"), appeared by and through Kevin M. Fowler of the law office of Frieden, Haynes & Forbes; and Respondent, the City of Topeka (hereafter "City"), appeared by and through Allison M. Kenkel and David P. Mudrick of the law firm Wright, Henson, Clark, Hutton, Mudrick & Gragson, L.L.P.

The Board's jurisdiction is set forth in the Public Employer-Employee Relations Act (hereafter "PEERA"), K.S.A. 77-4321 et seq., and the Kansas Administrative Procedures Act, K.S.A. 77-501 et seq.

K.S.A. 77-527(d) sets out the standard of review that is applicable to the Board's review of the *Initial Order*.

> In reviewing an *Initial Order*, the agency head or designee *shall exercise all the decision-making power that the agency head or designee would have had to render*

75-UCA-3-2005

> *a final order had the agency head or designee presided over the hearing,* except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties. (Emphasis added.)

K.S.A. 77-527(d). See K.A.R. 84-2-2(i) and *Coggins v. Public Employee Relations Board,* 2 Kan. App.2d 416, 581 P.2d 817 (1978).

While the Board possesses the authority to review the record, as if it heard the case in the first instance, the Board can adopt all or part of the Presiding Officer's findings of fact and from those same facts arrive at legal conclusion that is contrary to the Presiding Officer's.

Here, the Board after reviewing the record reaches a different legal conclusion than the Presiding Officer.

The Board finds that the Protection Service Officer II (hereafter, PSO II) position is not supervisory and therefore includes it in the unit in question.

For purposes of this unit determination case, the City is refusing to regard the PSO II position as a public employee by arguing that the PSO II is a supervisory while the FOP argues that the person performing PSO II duty is a lead worker, or a low-level supervisor.

PROCEDURAL BACKGROUND

The Presiding Officer issued the *Initial Order* on October 10, 2006. In the *Initial Order*, the Presiding Officer found that the PSO II position within the City of Topeka Municipal Court is supervisory. Consequently, the PSO II position did not qualify for inclusion in the bargaining unit that covers all certified law enforcement officers employed by the City in the classifications of Officer, Protective Service Officer I (hereafter, PSO I), Corporal, Detective, and Sergeant.

On October 20, 2006, the FOP filed its *Petition for Review of Initial Order* with the Board.

The FOP argued that the Presiding Officer

> failed to construe or apply the definition of "supervisory employee" in the manner necessary to protect low-level supervisors or "lead men" who have no genuine ability to effectively exercise independent judgment or meaningful supervisory authority against the loss of their rights.

Petitioner's Memorandum on Administrative Review of Initial Order, pgs. 1-2.

The distinction between a supervisory and lead worker is critical because if the PSO II position is supervisory then the person in that position is not a public employee. If the PSO II is a lead worker position then the person in that position is a public employee; consequently, the unit in question is the appropriate unit for the inclusion of the PSO II position.

The Board decided that the FOP presented a meritorious argument and during its November 15, 2006 meeting, voted to grant the petition, with Chairman Ken Gorman recusing himself. The Board asked that the parties submit briefs setting forth their respective positions on the issue whether the PSO II position that City has assigned to the City's Municipal Court is a supervisory employee as defined by K.S.A. 75-4322(b), or a "lead worker." The Board set this matter for the March 21, 2007 meeting to allow the parties time to prepare for argument before the Board.

On March 21, 2007, the parties presented their arguments to the Board. Afterwards, the Board went into executive session to deliberate upon the parties' respective arguments. Following the executive session, the Board reconvened the public meeting and voted of 3-1 to reverse the Presiding Officer's order. Member Sally O'Grady dissented from the majority. The Board's majority found that the PSO II day-to-day duties are more indicative of a lead worker than that of a supervisor.

The Board by reversing the Presiding Officer's order granted the petition to amend the bargaining unit that covers all certified law enforcement officers employed by the City in the classifications of Officer, PSO I, Corporal, Detective, and Sergeant to include the PSO II position.

LEGAL ISSUE

Is the position of PSO II a supervisory employee, as defined by K.S.A. 75-4322(b), or is the PSO II a lead worker properly included in the bargaining unit as a public employee.

FINDINGS OF FACT

1. Respondent is a public employer within the meaning of the Public Employer-Employee Relations Act, hereinafter "PEERA" or the "Act". ***(Initial Order, Finding of Fact 1)***

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. ***(Initial Order, Finding of Fact 2)***

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. ***(Initial Order, Finding of Fact 3)***

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. ***(Initial Order, Finding of Fact 4)***

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. ***(Initial Order, Finding of Fact 5)***

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. ***(Initial Order, Finding of Fact 6)***

7. Turner and the individuals employed as PSO I's are commissioned law enforcement officers. *See* Tr. pg 18-19. ***(Initial Order, Finding of Fact 7)***

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. ***(Initial Order, Finding of Fact 8)***

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. ***(Initial Order, Finding of Fact 9)***

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. ***(Initial Order, Finding of Fact 10)***

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. ***(Initial Order, Finding of Fact 11)***

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. ***(Initial Order, Finding of Fact 12)***

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. ***(Initial Order, Finding of Fact 13)***

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. ***(Initial Order, Finding of Fact 14)***

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 Visocsky would coordinate the serving of any warrants or subpoenas. *See* Tr. pgs. 74, 166-167. ***(Initial Order, Finding of Fact 15)***

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. ***(Initial Order, Finding of Fact 16)***

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. ***(Initial Order, Finding of Fact 17)***

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. ***(Initial Order, Finding of Fact 18)***

19. Turner is in charge of reconciling the two purchasing cards used by the municipal court. *See* Tr. pg. 173. ***(Initial Order, Finding of Fact 19)***

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. ***(Initial Order, Finding of Fact 20)***

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. ***(Initial Order, Finding of Fact 21)***

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. ***(Initial Order, Finding of Fact 22)***

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. ***(Initial Order, Finding of Fact 23)***

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. ***(Initial Order, Finding of Fact 24)***

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. Visocsky 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. ***(Initial Order, Finding of Fact 25)***

26. The PSO II does not have the authority to transfer or effectively recommend the transfer of any other employees. Visocsky 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. ***(Initial Order, Finding of Fact 26)***

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. ***(Initial Order, Finding of Fact 27)***

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. ***(Initial Order, Finding of Fact 28)***

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. ***(Initial Order, Finding of Fact 29)***

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. ***(Initial Order, Finding of Fact 30)***

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. ***(Initial Order, Finding of Fact 31)***

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. Visocsky 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. ***(Initial Order, Finding of Fact 32)***

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." Visocsky 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 Visocsky. "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. ***(Initial Order, Finding of Fact 33)***

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. ***(Initial Order, Finding of Fact 34)***

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. ***(Initial Order, Finding of Fact 35)***

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. ***(Initial Order, Finding of Fact 36)***

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. ***(Initial Order, Finding of Fact 37)***

38. Visocsky testified that Turner has a city issued "supervisor's handbook" in her office. Visocsky has also sent Turner an email with updates to this handbook. *See* Tr. pgs. 180; City Ex. 12. ***(Initial Order, Finding of Fact 38)***

39. Visocsky 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. ***(Initial Order, Finding of Fact 39)***

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. ***(Initial Order, Finding of Fact 40)***

41. Turner testified that since joining the Municipal Court in January 2001 she could not recall any of her supervisors conducting a performance assessment of her work as a PSO II. *See* Tr. pgs. 51, 57-58, and 59-60.

42. Since joining the City, Visocsky had not conducted a performance assessment of Turner. *See* Tr. pg. 229.

42. Judge Ebberts could not recall conducting a performance assessment of Turner's work. *See* Tr. pgs. 395-396.

43. According to Turner's testimony, on a daily basis she does not monitor the PSO I's work, nor spends time instructing or directing the PSO I's job performance. *See* Tr. pgs. 68 and 87-88.

DISCUSSION

The legislature clearly sets out the public policy and objective of the PEERA. The PEERA governs the labor relations between public employees and the public agency or a public employer. The public policy and objective motivating the enactment of the PEERA is,

> Subject to the provisions of subsection (c), it is the purpose of this act to obligate public agencies, *public employees* and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies. (Emphasis added.)

K.S.A. 75-4321(b).

For the purposes of the PEERA, public employee,

> means 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. (Emphasis added.)

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

A 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).

Because the exclusion of the PSO II position from the bargaining unit prevents the PSO II from enjoying the rights public employees enjoy under the PEERA, it is the City's burden to prove that the PSO II position is supervisory.

The list of the supervisory duties in K.S.A. 75-4322(b) is disjunctive. *Kansas University Police Officers Association v. Public Employee Relations Board of Kansas,* 16 Kan. App.2d 438, 440-1, 828 P.2d 369 (1991). Consequently, if the City proved that the PSO II exercises one of the duties listed in the statute the PSO II is a supervisory employee and not a public employee. *United Rubber Workers v. Washburn University, Case No. 75-UDC-3-1994,* page 21. The supervisory functions require the use of independent judgment in the exercise of any one of the functions. K.S.A. 75-4322(b). In addition, if that individual effectively recommends a preponderance of the listed supervisory indicia, exercising independent judgment, classifying them as a supervisor is appropriate. *Public Service Company of Colorado v. NLRB*, 271 F.3d 1213, 1217-1218 (2001).

The over reaching purpose for excluding supervisory employees from a bargaining unit is to assure loyalty of management representatives. *NLRB v. Yeshiva University*, 444 U.S. 672, 681-82, 100 S. Ct. 856 (1980).

The distinction of a public employee and supervisory employee is critical for the Board's review of the Presiding Officer's *Initial Order.* K.S.A. 75-4327(c). *See* Raymond Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 252 (1980). An appropriate unit is one that groups together public employees with a common interest. *IAAF Local No. 2616 v. Sedgwick County Fire District No. 1*, Case No. 75-UCA-3-1999, page 14. Some factors that the Board must consider are set forth in K.S.A. 75-4327(e) and K.A.R. 84-2-6. Additionally,

the Board has historically relied on guidance from federal labor cases when determining whether a position is supervisory. *United Rubber Workers,* Case No. 75-UDC-3-1994, page 16.

The over reaching purpose for excluding supervisory employees from a bargaining unit is to assure loyalty of management representatives. *NLRB v. Yeshiva University*, 444 U.S. 672, 681-82, 100 S. Ct. 856 (1980).

To achieve this purpose the Board must decide if the PSO II position "merely a superior worker [lead worker] who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management." *NLRB v. Griggs Equipment, Inc.,* 307 F.2d 275, 279 (1962). To arrive at its conclusion that the PSO II position is not supervisory, the Board reviewed the facts to ascertain if the PSO II used independent judgement to assign and directs the work of the PSO I's.

The Board has extensively researched and analyzed the legal issue of a supervisory employee under PEERA. Therefore, the Board refers the parties to these initial orders: *Teamsters Local Union #955 vs. Wyandotte County, Kansas, Case No. 75-UCA-3-19992*; *United Rubber Workers Local Union 851 vs. Washburn University of Topeka, Case No. 75-UDC-3-1994* and *International Association of Firefighters, AFL-CIO, CLC, Local No. 2612 vs. Sedgwick County Fire District No. 1, Case No. 75-UCA-3-1999.* A review of these decisions finds that the Board has consistently followed the principle that it will not construe supervisory status too broadly to deny a public employee their rights under the PEERA.

In its decisions, the Board has recognized that a lead worker has attributes of a supervisor including authority over subordinates and exercises some independent judgment; however, this did

not prove sufficient to bestow supervisory status if the exercise of that authority is in a routine and clerical manner. *Teamsters Local Union #955,* 75-UDC-3-1992, page 34 and *United Rubber Workers Local Union 851,* Case No. 75-UDC-3-1994, page 34. This conclusion is consistent with federal case law.

Lead men, or straw bosses, are not necessarily supervisors even if they give minor orders and supervise the work of others. *Phillips v. Kennedy,* 542 F.2d 52, 56 (1976). Also see, *Poultry Enterprises, Inc. v. NLRB,* 216 F.2d 798, 801 (1954)

"The leadman or straw boss may give minor orders or directives or supervise the work of others, but he is not necessarily a part of management and a 'supervisor' within the Act." *NLRB v. Doctors' Hospital of Modesto, Inc.,* 489 F.2d 772, 776 (1973). Lead workers may even approve workers requests for time off, alter worker work hours and examine other employees' work. *NLRB v. Schill Steel Products, Inc.,* 340 F.2d 568, 571 (1965).

As shown above, the linchpin query is whether the PSO II exercises the amount of independent judgement ascribable to a supervisory employee.

"The line between merely routine exercises of authority and those requiring independent judgment is to be drawn by the Board; therefore, the courts usually defer to the Board's expertise." *Laborers and Hod Carriers Local 341 v. NLRB,* 564 F.2d 834, 837 (1977).

In a recent decision, the NLRB evaluated the meaning of independent judgment.

> To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term. " Independent" means "not subject to control by others." *Webster's Third New International Dictionary* 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Webster's Third New International Dictionary* 1223 (1981). Thus, as a starting point, to exercise "independent

> judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. As more fully explained below, however, these requisites are necessary, but not in all instances sufficient, to constitute "independent judgment" within the meaning of the Act. As we said above, although we start with the " ordinary meaning of the words used," *INS v. Phinpathya*, supra, 464 U.S. at 189, we also consider the Act as a whole, its legislative history, policy considerations, and judicial precedent. Here, we must interpret "independent judgment" in light of the contrasting statutory language, "not of a merely routine or clerical nature." It may happen that an individual's assignment or responsible direction of another will be based on independent judgment within the dictionary definitions of those terms, but still not rise above the merely routine or clerical.

Oakwood Health Care, Inc., 348 NLRB No. 37 (2006), page 7.

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 121 S. Ct. 1861 (2001), the United States Supreme Court provides the following observations of independent judgment.

> First, it is certainly true that the statutory term "independent judgment" is ambiguous with respect to the *degree* of discretion required for supervisory status. See *NLRB v. Health Care & Retirement Corp. of America, supra,* at 579, 114 S.Ct. 1778. Many nominally supervisory functions may be performed without the "exercis[e of] such a degree of ... judgment or discretion ... as would warrant a finding" of supervisory status under the Act. *Weyerhaeuser Timber Co.,* 85 N.L.R.B. 1170, 1173 (1949). It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies. Second, as reflected in the Board's phrase "in accordance with employer-specified standards," it is also undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer. So, for example, in *Chevron Shipping Co.,* 317 N.L.R.B. 379, 381 (1995), the Board concluded that "although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or when problems occur."

Pages 715-16.

In assessing whether the PSO II uses independent judgment in exercising the responsibility to assign and direct the PSO I's work, the "statutory words 'responsibility to direct' are not weak or jejune but import active vigor and potential vitality." *National Labor Relations Board v. Security Guard Service, Inc.*, 384 F.2d 143, 147 (1967). Further,

> 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.

NLRB v. Quinnipiac College, 256 F.3d 68, 77 (2001)

It is not important how many times the PSO II exercises their authority. What is important is whether the authority to assign and direct exists and are there tangible examples of the authority in the record. *Oil, Chemical and Atomic Workers International Union v. NLRB,* 445 F.2d 237, 243-244 (1971). Nor, is the City's designating the PSO II as a supervisor is not controlling. *Rosa Porta Plant, Inc. v. NLRB,* 404 F.2d 1180, 1182 (1969).

29 Am. Jur. Proof of Facts 2d 253, page 32, provides the following statement distinguishing independent judgment from acting in a routine and clerical way.

> What is involved in the use of independent judgment is the use of discretion in collecting, analyzing, evaluating, and considering pertinent information for the purpose of determining whether or how a statutorily enumerated power will be exercised. Accordingly, an employee who has the authority to transfer or assign tasks to workers does not qualify as a supervisor under 29 USCA § 152(11) if such assignments or transfers are made solely on the basis of worker availability and therefore do not involve the exercise of independent judgment. Similarly, an individual's direction of other employees is routine and therefore not supervisory where such direction is governed by detailed schedules, directives, rules, or procedures. But direction requires the use of independent judgment, giving rise to supervisory status, where the individual has the power to choose, on his own, and without comprehensive guidelines limiting the area of his judgment, when, where,

> and how work is to be performed, and which workers are to do it, according to what the situation requires. (Footnote deleted)

The record shows that the City assigned Turner to tasks beyond court security. For example, see Findings of Fact Nos. 10, 11, 12, 17, 18, 19, 21, and 22. Turner only does several of these tasks while other court employees have completed some of these tasks in Turner's absence. Simply because Turner performs these other tasks does not mean that she "normally performs different work" from the other PSO's. Turner testified that very little of her time is spent performing many of these other tasks and that her time is spent performing court security like the other PSO's and each has a set schedule. For example, see Tr. pgs. 27-29, 64-65 and 68-72. The City, on the other hand, does not provide any evidence showing that because of these extra tasks Turner "normally performs different work" from the PSO I's. The Board opines that the PSO II as a lead worker could be assigned additional tasks because of the individual's experience and knowledge. For example, Turner testified that before she transferred to the municipal court she already had access to Kansas Criminal Justice Information System. *See* Tr. Pg. 62-63.

To convince the board that the PSO II "normally performs different work" from the other PSO's, the City must show that these additional duties are performed on a regular basis. Consequently, without this evidence the Board is reluctant to exclude the PSO II position from the PEERA protections.

The City points out that the PSO II position has an office with a computer. This point alone does not convince the Board that the PSO II position is supervisory as the PEERA defines that term. As mentioned above, a public employer can afford lead workers a different status, which could include an office with a door and computer access.

The Presiding Officer determined that the PSO II is a supervisory position because the position requires the use of independent judgment to assign and direct the work of the PSO I's. Because the legislature has written K.S.A. 75-4322(b) in the disjunctive, the Board's review will be limited to the indicia of supervisory authority that the Presiding Officer found emanating from the PSO II position.

The Board after reviewing the facts has reached the opposite conclusion. While the PSO II position has some attributes of authority and independent judgment, the Board finds that the level of these attributes is not sufficient to raise the PSO II position to that of a supervisory employee. The PSO II position is a lead person exercising authority to assign and directs the work of PSO I's in a routine and clerical manner exerting no more that a de minis amount of energy and time assigning and directing PSO I's work.

No one disputes that maintaining adequate security for the municipal court is in the City's best interest. The PSO II's role in assuring that the municipal court has adequate security is the focus of this case. Whether the PSO II position is of such a nature that requires independent judgment to assure there is enough staff on duty to provide adequate security is the decisive issue for this case. The facts do not show a clear distinction between the PSO II and PSO I concerning their abilities to provide security to the municipal court. Turner testified that she and the PSO I's perform identical tasks while on assignment at a work station. *See* Findings of Fact No. 8 and 9. The record shows that each PSO has the training, professionalism and ability to perform their work befitting the status of a commissioned law enforcement officer. These are, therefore, not the

conditions that require the PSO II to oversee officers of lesser ability or knowledge and where the PSO II must spend time and effort in training, directing or monitoring PSO I's.

Since all of the PSO's possess the qualifications to perform the necessary level of security, it appears that to assure adequate security at least one PSO should be available to monitor the courtroom during dockets, work at the x-ray and metal detector station, and be available to take fingerprints. *See* Tr. Pgs. 28-30 and 105-106. When a PSO is not at an assigned work station, then security is not adequate. When this occurs, PSO's shift from one work station to a vacant one or the PSO II asks for Visocsky's approval before contacting a part-time PSO. Turner testified that all the PSO's understand which work stations they must cover. *See* Tr. pg. 106-107.

Because of the nature of the work, before the Board excludes the PSO II position from the bargaining unit the City must prove that the PSO II assigned PSO's to work stations based on the PSO II's assessment of the individual's skills, training, and abilities and how those attributes best serve the municipal court's security. Stated another way, it is a supervisor's responsibility to optimize a worker's skills, training, and ability to the benefit of the employer and assign those tasks with little to no direction from management.

Turner explained that the assignment of security details is based on a 6 to 9 week work calendar designed "[t]o rotate the officers throughout the day so you're not doing the same thing all day long." *See* Tr. pg 64-65. Turner further stated that clerical staff could complete the work calendar.

From the record, for the Board to conclude that the PSO II does not use independent judgement to assign PSO I's a security task is reasonable. The basis for the PSO II assignment of

daily work tasks is rotating PSO's from one task to anther. To the Board this shows that the PSO II's assigning work is merely routine and clerical.

If there are changes to the prearranged work calendar it is when a PSO's is absent. After reviewing the record, it is the Board's opinion that the PSO II's decision to approve or decline leave requests does not require the exercise of the independent judgement indicative of a supervisory employee. It is accurate to say that the PSO II uses some independent judgement in deciding if there is adequate coverage at the work stations before granting leave. *See* Tr. pgs. 80-81. However, the City's *Personnel Rules and Procedures* limit the PSO II's approval of leave (FOP Ex. 2) to such an extent that the only decision the PSO II makes is to ensure that the minimum number of PSO's is available to provide security by checking the work calendar.

Visocsky testified that the PSO II, besides approving vacation and sick leave, also approves personal leave and funeral leave. Nevertheless, before approving the leave request the PSO II checks the work calendar to see if there will be enough PSO's at least to cover the priority work stations. *See* Tr. pgs. 161.

According to Turner, the decision while dependent on the necessity to have adequate staffing she follows the rules and procedures when approving or denying vacation leave requests. *See* Tr. pgs. 78-81. Turner testified that for adequate staffing there must be at least three PSO's on duty. This number can be a combination of full-time and part-time PSO's. On those few occasions when two or three PSO's asked for the same day off, Turner explained that she cannot be more than two PSO's absent from work. The rules and procedures that the City's employees must follow before using available types of leave illustrate the substantial limitations on the PSO II exercising a

supervisory level of independent judgment in approving leave requests. To decide whether there are enough PSO's to provide security the PSO II would check the work calendar to find out if another PSO has the day off or if a part-time PSO can be call-in. None of these options involve independent judgement. To persuade the Board on this point, the City would have to show that the PSO II's discretion is more than checking a work calendar, counting PSO's, or seeking approval to call in a part-time PSO. For example, supervisory judgement takes into consideration that on the day the employee has asked off would the employer need that particular employee's expertise, skill, or training. In making that determination, the supervisor is considering whether granting the request for leave on a given day would be detrimental to the employer's interest.

The Board finds that within the following parameters the only judgement the PSO II makes is when does a specific rule and procedure apply to the individual request and based on this conclusion the PSO II approves or declines the request for leave. To the Board the strict adherence to a procedure, policy or guideline is different from making a decision based on an exercise of independent judgement.

The pertinent portion of the vacation leave procedure is, as follows.

> 4) HOW / WHEN TO REQUEST USE
> A. Request for the use of vacation time shall be made on a "request for leave" form.
> B. Request for the use of vacation time shall be made to the employee's immediate supervisor.
> C. Request by 40 hour employees for five or more consecutive work days or by 24 hour employees for three or more consecutive work days of vacation leave shall be made at least ten work days in advance of the requested leave except for extreme emergency situations.
> D. Request by 40 hour employees for the use of less than five consecutive work day or by 24 hour employees for less than three of vacation leave shall be made at least forty-eight hours prior to the requested leave except for extreme emergency situations.

> E. Employees shall be granted sixty days, *January 1 through March 1* in which to reserve specific dates for vacation leave. Once approved, the vacation dates may not be canceled except under extreme emergency conditions. *Length of service with the City shall prevail in the event two or more employee's request to reserve the same vacation dates and the appropriate member of management determines that not all employees may be given vacation leave on the requested date.*
> F. Approval of vacation *leave requests made subsequent to March 1* in any calendar year shall be subject to a *"first come-first served" basis without regard to length of service.* (Emphasis added.)

City *Rules and Procedures*, page 19.

These guidelines for approval limit the PSO II's approval when more than one PSO I requested the same day off. The basic decisions that the PSO II make is <u>when</u> did the PSO I request vacation, and, depending on when they made the request, what the decision must be when two PSO I's request the same off.

Likewise, the Board believes the City's *Rules and Procedure* severely limit the PSO II's approval of sick leave. The following rules and procedures leave the PSO II little, if any, independent judgment to approve or deny the request. These rules and procedures appear to only impose notification requirements on an employee requesting non-emergency and emergency use of sick leave.

> 4) HOW I WHEN TO REQUEST USE
> A. <u>Non-Emergency use of Sick Leave</u>
> 1. Shall be requested at least forty-eight hours in advance of the anticipated absence.
> 2. The employee must request the usage of non-emergency leave in writing on a form provided by management by filing the completed leave request with the employee's supervisor prior to leaving the job site.
> B. <u>Emergency use of Sick Leave</u>
> 1. The employee shall notify the employee's supervisor of the unavailability of the employee for work prior to the start of the work shift or as soon as practical thereafter.
> 2. The employee shall request the use of sick leave prior to leaving the work site in the event the employee becomes ill on the job.

> 3. In the case of either 1 or 2 above, the employee must complete and file a sick leave request form with the employee's supervisor within two working days from the date the employee returns to work or the use of accumulated sick leave shall not be allowed.

Id., page 24.

Lastly, under the City's sick leave policy all special conditions and abuses of sick are referred to the Department of Human Resources.

Based on this procedure, the City has not convinced the Board that the PSO II exercises independent judgement before approving requests for sick leave.

The City's *Rules and Procedures* set out that approval of a personal leave day is at the supervisor's discretion and "shall be granted only at such times, as sufficient staffing is available to carry out the mission of the division." *Id.*, page 14. The City requires that employees must submit the request to use the personal leave day "at least two working days in advance of the requested leave day." *Supra.* The facts of this case lead the Board to the conclusion that although the rules and procedures describe approval as discretionary, the PSO II's exercise of this discretion is not based on independent judgement attributable to a supervisor, but if there are enough PSO's to fulfill the day-to-day court security. As the Board has previously explained, the PSO II's approval based on whether there is sufficient number of PSO's is merely of a routine and clerical nature and does not require an independent analysis of the circumstances.

As for funeral leave, the Board finds that the following conditions effectively remove the PSO II as the final approval authority.

> 5) <u>CONDITIONS NECESSARY FOR APPROVAL</u>
>
> A. Approval shall be contingent on the concurrence of the Department Head.

B. Approval shall be contingent on normal departmental staffing requirements.

City *Rules and Procedures*, page 27.

Even if the PSO II after reviewing the work calendar determines that there is not enough PSO's to provide the minimum amount of security coverage, the PSO II must notify the court administrator for permission to call in part-time PSO's. If the PSO II is a supervisory employee, as the City argues, then it makes sense that the PSO II should have the authority to call in the assistance that the PSO II deems necessary to provide security after assessing that the security of the municipal court is jeopardized due to lack of personnel.

Based on the facts when it comes to staffing needs the PSO II position more likely than not has the responsibility to only ensure there is the correct number of PSO's on duty. Secondly, when the PSO II sets the work calendar it covers a 6 to 9 week period. The job assignments are rotational and the PSO II does not assign tasks on whom is best suited for the work assignment. Thirdly, the City rules and regulations dictate when and how the PSO II approves leave requests. Lastly, if the situation occurs where the number of PSO's working is less than the minimum required, the City does not permit PSO II to exercise independent judgement in deciding whether to contact a part-time PSO to fill in for the absent full time PSO(s). The PSO II must submit the request for a part-time PSO to the court administrator for approval.

Along the same lines, the Presiding Officer found that the PSO II has input in 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. . . ." Within the context of this case, the City has not persuaded the Board that the PSO II's input suggests that the PSO II be a supervisor. The Board

concludes while the opinion is based on the PSO II's experience and knowledge of the work calendar, the budgetary information the PSO II gleans from the work calendar is merely reporting the hours worked by full-time PSO's. This said the instances of Turner offering budgetary input was scarce. Visocsky could only identify once that Turner offered input and that time was the for the budget just before the January 30, 2006 hearing. Even then Turner's input was an estimate of the hours part-time they would need PSO's and that was based on Turner's experience in making out the work calendar and the number of hours of leave each PSO accrued. *See* Tr. pgs. 275-276. It is the Board's opinion that a person can provide this input who is not a supervisor but any employee having access to the work calendar and the number of vacation hours, each PSO accrues. Therefore, providing this information does not require independent judgment and is more likely than not a routine and clerical function.

The PSO's perform activities that are incidental to providing security services to the municipal court that Turner coordinates. *See* Findings of Fact Nos. 14-16. The PSO's serve warrants, transport prisoners, take court vehicles in for periodic maintenance, and each PSO must maintain their annual training requirements. However, as the facts show Turner's coordination of these activities is not necessarily a supervisory function. The Board finds that a non-supervisory employee could perform the coordination of these activities. For these activities, the evidence convinces the Board that the PSO II position is nothing more than a conduit for transmitting instructions and requests. For example, the Fleet Department controls the scheduling of vehicle maintenance and the court administrator directs when a PSO transports a prisoner. *See* Tr. pgs 72-74 and 170.

The Board agrees that the PSO II position can direct other PSO's to take a court vehicle to have its oil changed or transport a prisoner; however, this is not dependent on the exercise of independent judgement. To accomplish any of these tasks, all Turner does is find someone to do the task. To the Board, this is at best a minor exercise of authority most common to a lead worker and does not require the PSO II to exercise of independent judgement to select the PSO best suited for the task, or which PSO, for purposes of court security, can leave the court's premises to in essence run an errand.

Based on the above analysis, the Board determines that the PSO II position does not exercise the independent judgement indicative of a supervisory employee to assign the work of the PSO I's. The PSO II position is more of a lead worker with limited authority to assign work. The City's rules and procedures direct to a substantial degree the PSO II's exercise of authority. The nature of the work the PSO's perform by remaining at a particular security detail indicates that the PSO II lays out work that is planned in advance. Lastly, the PSO I's performance of these tasks is without significant monitoring and direction from the PSO II. *See* Tr. pgs. 28-31, 64-68, 87, 106-107.

Another supervisory element that the Presiding Officer found associated with the PSO II position is the authority to exercise independent judgement to direct PSO I's work efforts. The Presiding Officer focused on the PSO II's responsibility to investigate citizen complaints of how a PSO I have acted in performing their job. *See* Findings of Fact No. 36. Visocsky testified that she has investigated citizen complaints when Turner was on leave. *See* Tr. pg. 185.

The Board does not rely merely on the fact that the PSO II or the court administrator investigates complaints for a non-supervisory employee could conceivably conduct an investigation

of a complaint. The Board looks at the extent to which the PSO II can direct the PSO I after having investigated the complaint.

The record clearly shows that the PSO II does not have the authority to impose discipline effectively recommend discipline should the nature of the complaint, if proven valid, warrant disciplinary action. *See* Findings of Fact Nos. 27and 30.

Perplexing to the Board is the extent to which the PSO II can direct the actions of a PSO I following the investigation of a complaint. The record includes a series of communications between Visocsky and Turner concerning one complaint. *See* Exhibit 15. The Board will limit its discussion to how this exhibit does not persuade the Board that the PSO II is a supervisory position.

The first e-mail from Visocsky to Turner explains as part of the City's efforts to improve customer service Turner needed to remind the PSO's of the importance in treating every municipal court visitor with "courtesy and respect." Following the investigation Turner reported her findings to Viscosky and that she had reminded the PSO's to treat each person courteously and professionally. The communication between Viscosky and Turner does not show that Turner did anything other than following Viscosky's directions to investigate the complaint and remind the PSO's to treat each visitor according to the City's policies. It appears to the Board that Turner's supervisors predetermined how Turner was to handle the complaint, which was reminding the PSO's on how they are to treat every visitor. This did not require Turner using independent judgement but was simply following her supervisor's instructions.

Turner's "suggestion" that the PSO's pat down the complainant the next time he comes to the court is to the Board nothing more than a minor order applicable to an isolated instance and its

relevance is limited. This conclusion is supported by Turner's May 16, 2005 e-mail to Viscosky explaining Turner's familiarity with the complainant and his concern, not only of going through the metal detector but having the wand used near his chest. Therefore, since the "pat-down" order is minor and is limited to one person, the Board does not find this instance supportive of the City's argument that the PSO II is a supervisory position.

Although Turner testifies that there may be a couple complaints a month, the record contains no evidence showing the nature of the complaints or the type of direction Turner gave to the PSO. Due to the limited amount of information in the record, the Board cannot determine the extent of independent judgement Turner uses that would be indicative of a supervisory employee directing a subordinate. Therefore, the Board can easily conclude that the PSO II position is that of a lead person with limited authority to direct the work of the PSO I's following an investigation of a citizen complaint. It is reasonable from the record for the Board to surmise that any direction the PSO II imposes on the PSO I's conform to the court's security procedures. (See Turner's May 16, 2005 e-mail to Visocsky wherein Turner mentions showing the PSO I's the security procedures.) Likewise, based on the nature of the PSO's job, the Board can conclude that the law enforcement community has developed the acceptable ways to handle court room security and that all certified law enforcement officers know these procedures. Another factor, the Board considers important is the experience level of the PSO's and how that would influence the PSO II direction of PSO I's work. The record suggests that the PSO's, including full-time and part-time PSO's, are experienced members of the law enforcement community. For the single instance identified in Exhibit 15, the PSO I complained about is a retired Topeka police officer. The Board questions the extent to which

Turner would have to use independent judgement to direct a former police officer with approximately 27 years of law enforcement experience on how to search a visitor. The record suggests that the PSO's are experienced law enforcement officers; therefore, even if the PSO II investigates a complaint, the Board wonders how much supervisory direction the PSO II has over the PSO I's work performance.

Finally, if the PSO II is a supervisory position, then the City must hold the employee occupying that position responsible and accountable for the actions of the PSO I's. This presumes that the PSO II would monitor the activities of the PSO I's and that the City evaluates the PSO II's performance as a supervisor. The record contains no evidence showing that the City formally or informally evaluated Turner on her duties as a PSO II. *See* Findings of Fact Nos. 41 and 42. Without evidence, i.e., performance evaluations, that the City holds the PSO II accountable for supervising PSO I's the Board is reluctant to exclude the PSO II position from being a member of a bargaining unit.

Based on the above reasons, the City does not persuade the Board that the PSO II position is supervisory. The Board finds the PSO II position is more like a lead worker with limited authority and independent judgement to perform duties in a routine and clerical manner. The PSO II position shall be included in the bargaining unit.

Final Order Entered on this 16th day of August, 2007.

PUBLIC EMPLOYEE RELATIONS BOARD

By:

Burdett Loomis, Board Member

Keith Lawing, Board Member

Wayne Maichel, Board Member

For the following reason, I respectfully dissent. I do admit that this is a very close case. Nonetheless, unlike the majority of the Board, I find tangible examples in the record showing that the PSO II position is supervisory and the person in that position exercises independent judgement of a supervisor to assign and directs the work of the PSO I's.

The record convinces me that the Presiding Officer's order is well reasoned and the record supports the conclusion that the PSO II position is supervisory. I agree with the Presiding Officer that the PSO II's work is substantially different from that of the PSO I's. The City assigns the PSO II to many tasks outside the scope of municipal court security. The record convinces me that the PSO II, while performing security detail like the PSO II's, spends only a minimum amount of time on similar duties. Another factor that persuades me that the PSO II is a supervisory position, is the PSO II's responsibility to investigate public complaints and recommend and direct the PSO I's to take corrective action based on the findings of the investigations. To me, for a PSO II to complete an investigation the PSO II must retain independent judgement to effectuate the City's policy toward customer service effectively. I agree with the Presiding Officer that incident reported in the record clearly shows the PSO II exercising supervisory authority, as the PEERA contemplates.

The majority's application of the facts to the definition of supervisory employee is too restrictive and does not give adequate weight to the totality of the circumstances. Some factors that I believe the majority failed to give a fair enough measure to the following.

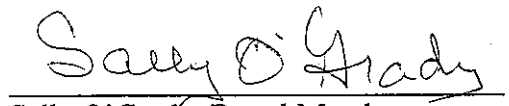
The City designates the PSO II position as supervisory and the court administrator and Judge Ebberts consider the PSO II as the supervisor responsible for court security and the division management hold the PSO II accountable for ensuring that the court has adequate security.

Commensurate with that designation, the City assigns the PSO II to many tasks not normally performed by the other PSO's. For example, the PSO II is the Terminal Agency Coordinator, serves on the Fleet Advisory Board, the municipal court's Public Relations Committee for the Shawnee County Department of Corrections, and attends meetings and sessions for supervisors.

The PSO II is the point person for the security of the municipal court. The position coordinates all the security functions for the municipal court. This includes establishing the work calendar, coordinating the transport of prisoners and service of warrants, and weekly jail population counts. For me the facts show that for the PSO II uses independent judgement to coordinate these functions properly.

Lastly, Turner's testimony leads me to conclude that she believed she has the status of a supervisory employee. Turner testified that because she had more responsibilities than the PSO I's that City should increase her salary to equal that paid to her counterparts who possess identical responsibilities. *See* Tr. pgs. 103-104 and 111-113.

For the above reasons, I respectfully dissent.



Sally O'Grady, Board Member

Notice of Right to Seek Judicial Review

The foregoing journal entry is a final order of the Public Employee Relations Board pursuant to K.S.A. 77-527. This order is subject to review by the district court in accordance with the Act for Judicial Review and Civil Enforcement of State Agency Actions (K.S.A. 77-601 et seq.) Unless a motion for reconsideration is filed pursuant to K.S.A. 77-529, a petition for judicial review must be filed with the appropriate district court within 30 days after the final order has been served upon the parties. Since this Final Order is being served upon the parties by mail, the parties are allowed a total of 33 days from the date on the certificate of mailing below to file their petition for judicial review in the appropriate district court. See K.S.A. 77-613(b) and (e).

Pursuant to K.S.A. 77-527(j), K.S.A. 77-613(e), and K.S.A. 77-615(a), any party seeking judicial review must serve a copy of its petition for judicial review upon the Public Employee Relations Board by serving its designated agent at the following address:

A.J. Kotich, Chief Counsel
Kansas Department of Labor - Legal Services
401 Topeka Blvd.
Topeka, KS 66603-3182

CERTIFICATE OF MAILING

I, Sharon L. Tunstall, Office Manager for the Public Employee Relations Board, do hereby certify that on this 16th day of August 2007 true and correct copies of the above and foregoing Final Order were served upon the parties by depositing the copies in the U.S. Mail, First Class, addressed to:

Mr. Kevin M. Fowler, Attorney at Law
Frieden, Haynes & Forbes
555 S. Kansas Avenue, Suite 303
Topeka, KS 66603

Mr. David Mudrick, Attorney at Law
Wright, Henson, Clark, Hutton, Mudrick & Gragson, LLP
100 SE 9th Street, Second Floor
P.O. Box 3555
Topeka, KS 66601

And to the members of the PERB on August 16, 2007.

Sharon L. Tunstall

Sharon L. Tunstall