

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
STATE OF KANSAS

TEAMSTERS UNION LOCAL 795,

Petitioner,

vs.

Case No. 75-UDC-1-1992

CITY OF WICHITA, KANSAS
(Wichita Airport Authority),

Respondents.

INITIAL ORDER

ON the 30th day of March, 1993, the above captioned matter came on for formal hearing pursuant to K.S.A. 754327(e) and K.S.A. 77-523 before presiding officer Monty R. Bertelli.

APPEARANCES

PETITIONER: Appeared by Richard H. Seaton, Jr.
331 N. Waco, P.O. Box 3804
Wichita, Kansas 67201

RESPONDENT: Appeared by Stanley W. Churchill and
Anthony J. Powell
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ISSUES PRESENTED FOR REVIEW

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

WHETHER THE POSITIONS OF CAPTAIN AND LIEUTENANT SHOULD BE EXCLUDED FROM THE BARGAINING UNIT PROPOSED BY THE TEAMSTERS UNION LOCAL 795 AS A "SUPERVISORY EMPLOYEE" PURSUANT TO K.S.A. 75-4322(b).

75-UDC-1-1992-I

SYLLABUS

1. **UNIT DETERMINATION - Exclusions - Burden of proof.** The burden of proving that an individual should be excluded as a supervisor rests on the party alleging that supervisory status. Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, supervisory status has not been established, at least on the basis of those indicia.
2. **PUBLIC EMPLOYEE - Exclusions - Supervisors - Position title not controlling.** The title a position carries has little bearing on whether it is supervisory. It is the function rather than the label which is significant.
3. **UNIT DETERMINATION - Exclusions - Supervisors - When established.** The supervisory functions performed by the individual must so ally the employee with management as to establish a differentiation between them and the other employees in the unit. For supervisory status to exist this identification must be substantial.
4. **PUBLIC EMPLOYEE - Exclusions - Supervisors - Effective recommendation defined.** An "effective" recommendation is one which, under normal policy and circumstances, is made by a supervisor, and is adopted by higher authority without independent review or de novo consideration as a matter of course. A mere showing that recommendations were ultimately followed does not make such recommendations "effective" within the meaning of the statute.
5. **PUBLIC EMPLOYEE - Exclusions - Supervisors - Independent judgement required.** An employee is not a supervisor if he or she has the power to exercise, or effectively recommend the exercise of listed supervisory functions, unless this power is accompanied by authority to use independent judgment in determining how in the interest of management it will be exercised. Authority to perform one of the enumerated functions is not supervisory if the responsibility is routine or clerical.
6. **PUBLIC EMPLOYEE - Exclusions - Supervisors - Substitution for supervisor.** The test for determining whether a unit should include employees who substitute for supervisors is whether such part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant.

FINDINGS OF FACT

I. The Parties

1. Petitioner, the Teamsters Union Local 795, ("Union") is an "employee organization" as defined by K. S.A 75-4322 (i), and is seeking to become the exclusive bargaining representative, as defined in K.S.A. 75-4322(j), for all full and part-time Police/Fire/Safety Officers rank of Captain and below ("Safety Officers") employed by Respondent, Wichita Airport Authority ("Airport Authority"), for the purpose of meeting and conferring with the Respondent pursuant to the Kansas Public Employer-Employee Relations Act, with respect to conditions of employment as defined by the K.S.A. 75-4322(t).
2. Respondent, City of Wichita, Kansas ("City"), is a "public agency or employer", as defined by K.S.A. 75-4322(f), which has elected to come under the provisions of the Public Employer-Employee Relations Act pursuant to K.S.A. 75-4321 (c). Respondent is a municipality organized pursuant to the laws of the State of Kansas and is classified under those laws as a city of the first class.
3. Respondent, Wichita Airport Authority ("Airport Authority"), is a "public agency or employer", as defined by K.S.A. 75-4322(f). Respondent was created by City ordinance on September 5, 1975 pursuant to K.S.A. 3-162 et seq. to administer and operate the Wichita Mid-Continent Airport. The Airport Authority has not elected to come under the provisions of the Public Employer-Employee Relations Act pursuant to K.S.A. 75-4321(c), however in City of Wichita, Kansas v. Public Employee Relations Board, ___ P.2d ___, 1996, the Kansas Supreme Court found that the City of Wichita retained sufficient control over the conditions of employment of the Safety Officers to confer jurisdiction over the employees to the Public Employee Relations Board.

II. Stipulations

4. The parties stipulated that as the the Airport Safety Division the following full and part-time employees should be excluded from the bargaining unit as supervisory personnel:

Director of Airports
Director of Airport Operations
Chief of Airport Safety
Assistant Chief of Airport Safety (Tr.p. 10-11, 13).

5. The parties further stipulated that the positions of Safety Officer I and Safety Officer II are to be included in the bargaining unit. (Tr.p. 10-11, 13).
6. The parties are in dispute over whether the positions of "Safety Supervisors" (hereinafter referred to as "Captains") and "Assistant Safety Supervisors" (hereinafter referred to as "Lieutenants") should be included in the bargaining unit or excluded as supervisory employees. (Tr.p. 10-11, 13).

III. Safety Division Organization

7. The Safety Division of the Wichita Airport Authority is responsible for responding to the law enforcement needs at the airport, airport rescue, fire fighting, medical response, and conducting the inspections mandated by the FAA. (Tr.p. 18; Ex. A).
8. The Safety Division is run in military fashion with a strict chain of command supervisory hierarchy. The organizational chart of the Safety Division of the Wichita Airport Authority shows the following chain of command structure:
 - 1 Chief of Airport Safety
 - 1 Assistant Chief of Airport Safety
 - 4 Safety Supervisors (Captains)
 - 3 Assistant Safety supervisors (Lieutenants)
 - 21 Safety Officer I's and II's (Tr.p. 11, 15; Ex. A).
9. The wage differences between a Safety Officer I and a Safety Officer II is 12%; between a Safety Officer II and a Lieutenant is 6%; and between a Lieutenant and a Captain is 6%. (Tr.p. 24-25).
10. Safety Division employees work one 24 hour shift and then are off for 48 hours. There are three shifts denoted as A, B and C, with one Captain, one Lieutenant and seven Safety Officers assigned to each shift. (Tr.p. 20). Captain James Kilpatrick is assigned to Shift A with Lieutenant J.D. Jones. Captain Baker is assigned to Shift B with Lieutenant Mike Anderson. Shift C is supervised by Captain Hannick and Lieutenant Gary Smith. (Tr.p. 20-21).
11. A shift is divided into three work three work periods: Work period 1 is from 7:00 a.m. to 4:00 p.m; work period 2 is from 4:00 p.m. to midnight; and work period 3 is from midnight to 7:00 a.m. During work period 1 all employees are all assigned

duties. For work period 2, those employees who had law enforcement responsibilities during period 1 are allowed to sleep in the Safety Building. Those employees are then awaked to resume thier law enforcement duties for work period 3, and the employees on duty during work period 2 are allowed to sleep. (Tr.p. 19-20).

IV. As Viewed By The Employer

12. The Employer defines a "supervisor" as an employee of the rank of Lieutenant or above whether permanent or temporary. (Ex. HH). Captains are required to attend in-service training on Advanced Supervisory Practices. (Tr.p. 25; Ex. Q).

V. Shift Captains and Lieutenants

13. Shift Captains and Lieutenants perform work different from that of the Safety Officers. (Tr.p. 21-22).

A. Direct Authority

14. Shift Captains and Lieutenants do not have the authority to hire, transfer, promote, suspend, discharge or discipline a Safety Officer. They can only recommend that certain action be taken. (Tr.p. 114, 121, 122).

B. Assign work

15. The Shift Captain and Lieutenant have complete authority to assign work to the Safety Officers on their shift. (Tr.p. 51, 53). Lieutenants may have the responsibility of staffing Safety I and assigning ARF vehicles to their positions during an emergency approximately 5% of the time and whenever the Shift Captain is scheduled off or on vacation. (Tr.p. 28-29).
16. Due to the 24 hour nature of the Shift, a Lieutenant is "in charge" of the shift or assumes the responsibilities of the Captain for approximately 8 hours while the Captain is sleeping. (Tr.p. 53). Shift Captains give Lieutenants instructions on what to do during their sleep periods. Should a serious problem arise, the Shift Captain is to be awaken, (Tr.p. 116), and unless matters require immediate action, Lieutenants are expected to refer personnel matters to the Captain after the sleep period. (Tr.p. 116-117).

C. Effectively to Recommend
a. Hiring

17. In the hiring process, Captains and Lieutenants conduct background investigations on applicants. The background checks are conducted according to guidelines established by the Chief. (Tr.p. 32). They prepare a report presenting information deemed pertinent to the applicant's qualification. Included in the report is a recommendation on whether the applicant should be considered further. (Tr.p. 30-31). The recommendations of the Captain or Lieutenant are usually followed. (Tr.p. 33).
18. After the background check, applicants go through an interview process. The interviews are usually conducted by the Chief, Assistant Chief and the three Captains. Each has an equal voice in the ranking of the applicants. The Lieutenants do not normally participate in the interview process. (Tr.p. 34-35).

b. Transfers

19. Where transfers are required due to manpower shortages or personal request, the Shift Captains are consulted for a recommendation which is weighted heavily in the decision process. (Tr.p. 35-36; Ex. WW). Requests for transfer usually begin with the Shift Lieutenant and then go up through the chain of command. (Tr.p. 37; Ex. WW).

c. Suspend, Discharge, or Discipline

20. Shift Captains and Lieutenants have the authority to relieve any employee who is unfit for duty. (Tr.p. 63).
21. Shift Captains and Lieutenants are usually the ones who initiate disciplinary action, and they make recommendations as to the form of disciplinary action to be taken. (Tr.p. 67-68). Where a reprimand is recommended it must be reviewed by all higher levels of command up to the Chief. The Director of the Airport must review any disciplinary recommendation involving time off or loss of pay. Shift Captains and Lieutenants do not have the authority to discharge a Safety Officer. Only the Director of Airports has that authority. (Tr.p. 67-68).
22. The disciplinary recommendations of the Shift Captains and Lieutenants are usually accepted. (Tr.p. 38-40). The only time recommended discipline would not be approved is if a reviewing supervisor determined the Lieutenant or Captain

misread the regulation alleged to have been violated, or used the wrong regulation, or there were circumstances surrounding the situation of which the Captain or Lieutenant was not aware at the time of making the recommendation. (Tr.p. 43).

d. Promote

23. An applicant without experience in police or firefighting is usually hired as a Safety Officer I. The Safety Officer I is considered a Safety Officer in training, and normally spends one year in that position. (Tr.p. 99). A Safety Officer I is eligible for promotion to Safety Officer II after that year of training. Promotion must be recommended by the Safety Officer's supervisor. If the Shift Captain and Lieutenant agree to the promotion and recommend same, such recommendation is sent to the Assistant Chief. The recommendation is always followed. (Tr.p. 44-45; Ex. XX).
24. It would be out of the ordinary for a Lieutenant alone to make a recommendation concerning the promotion of a Safety Officer. (Tr.p. 115).

e. Reward

25. Safety Officers are evaluated annually by the Shift Captain with input from the Lieutenant. Using a standard evaluation form, the Safety Officer's abilities and performance are appraised and comments made. The evaluation is discussed with the Safety Officer before being directed up the chain of command. Wage increases are determined, in part, based upon the performance appraisals. The Captain's recommendations are usually always followed. (Tr.p. 58; Ex. EE).
26. Shift Captains and Lieutenants also have the authority to recommend non-scheduled merit increases where the Safety Officer exhibits meritorious work habits and skills. (Tr.p. 48; Ex. YY).

f. Grievance Resolution

27. According to the strict chain of command, Safety Officers do not take their grievances to the Chief or the Assistant Chief. Shift Captains and Lieutenants are responsible for resolving personal grievances between Safety Officers. If the grievance cannot be handled or resolved by the Captain or Lieutenant, only then is it pursued up the chain of command. (Tr.p. 24, 61-62, 123).

VI. Training Captain

28. There is a position for a Training Captain but it was not filed at the time of the hearing. The position is responsible for arranging all training that is required by state or federal law and regulation, and maintaining the necessary records to document compliance. (Tr.p. 20, 75).
27. The Training Captain works an 8 hour day, 40 hours per week. (Tr.p. 109).
28. The Training Captain has no employees assigned to him and over which he has direct supervision. (Tr.p. 110). The Training Captain may take over a Shift Captain's responsibilities if both the Shift Captain and Lieutenant are not available. Such represent a minimal responsibility of the Training Captain - "one tenth of a percent." (Tr.p. 97).
29. The Training Captain has taken part in background checks and interviews, (Tr.p. 111), and does not normally recommend discipline. (Tr.p. 111).

ISSUE

WHETHER THE POSITIONS OF CAPTAIN AND LIEUTENANT SHOULD BE EXCLUDED FROM THE BARGAINING UNIT PROPOSED BY THE TEAMSTERS UNION LOCAL 795 AS A "SUPERVISORY EMPLOYEE" PURSUANT TO K.S.A. 75-4322(b).

The Teamsters Union Local 795 ("Union") filed a unit determination and certification petition in 1992 seeking to represent a bargaining unit at the Wichita Airport Authority ("Airport Authority") composed of employees in the following positions:

INCLUDE: Safety Supervisors ("Captains")
Assistant Safety Supervisors ("Lieutenants")
Safety Officer I
Safety Officer II

The parties have stipulated to the following partial description of the bargaining unit:

INCLUDE: Temporary and regular part-time employees in the positions of:
Safety Officer I
Safety Officer II

EXCLUDE: Director of Airports
Director of Airport Operations
Chief of Airport Safety
Assistant Chief of Airport Safety

The City of Wichita and the Airport Authority seek to exclude the positions of Captain and Lieutenant from the bargaining unit proposed by the Union based on those employees being "supervisory" personnel excludable pursuant to K.S.A. 75-4322(b). For a complete review of the underlying rationale for the exclusion of supervisors from a bargaining unit see City of Witchita v. Fraternal Order of Police, Lodge No. 5, 75-UDC-1-1994 (Sept. 1995).

I. Public Employee

K.S.A. 75-4324 guarantees public employees the right to form, join, and participate in employee organizations. "Public employee" is defined in 75-4322(a) to mean "any person employed by any public agency, except those persons classed as supervisory employees, professional employees or school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees." "Public agency" is defined as "every governmental subdivision, including any county, township, city, school district, special district, board, commission or

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instrumentality or other similar unit whose governing body exercises similar governmental powers, and the state of Kansas and its state agencies." (K.S.A. 75-4322(f)).

There is evidence in the record to support a conclusion that the positions of Captain and Lieutenant share a sufficient community of interest with the Safety Officers to make their inclusion in the proposed bargaining unit appropriate. The City and Airport Authority offered no arguments contrary to that conclusion. Likewise, there is no question that the City of Wichita is a "public agency" or that a Captain or Lieutenant is a "person employed by a public agency," and neither party offered an argument to the contrary. Therefore, a person in the position of Captain and Lieutenant qualifies as a "public employee" within the meaning of PEERA and should be included in the proposed bargaining unit unless found to be in one of the five excluded categories of K.S.A. 75-4322(b).

II. Supervisory Employee Exclusion

[1] In any proceeding where the composition of a bargaining unit is at issue under PEERA, the burden of proving that an individual should be excluded as a "supervisor" rests on the party alleging that supervisory status. See United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); City of Witchita v. Fraternal Order of Police, Lodge No. 5, Case No. 75-UDC-1-1994 (Sept. 1995);

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Teamsters Local Union #955 v. Wyandotte County, Kansas, Case No. 75-UDC-3-1992 (September 3, 1993); Ohio Masonic Home, 131 LRRM 1289, 1503 (1989). The burden is upon the City to produce evidence showing that Captains and Lieutenants meet the statutory requirements to be excluded as "supervisors."

The Kansas PEERA exclusion of individuals with supervisory authority from employee status is similar to Section 2(3) of the National Labor Relations Act.¹ Likewise, the federal and Kansas statutes provide similar definitions of "supervisory employee." Compare K.S.A. 75-4322(b) which defines "supervisory employee" to mean:

" . . . any individual who normally performs different work from his or her subordinates, having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement. . . ."

and with its federal counterpart, Section 2(11) which reads:

"The term 'supervisor' means any individual having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement."

¹ Compare, K.S.A. 75-4322(a) which defines "Public employee" to mean "any person employed by any public agency, except those persons classed as supervisory employees, professional employees or school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees," and Section 2(3) of the NLRA which defines "employee" to include "any employee . . . but shall not include . . . any individual employed as a supervisor, . . ."

The Public Employee Relations Board has held that by adopting the federal definition of supervisor in the PEERA definition of "supervisory employee," it can be inferred that the Kansas legislature signified its intention that certain well-established principles developed in federal cases for determining who are supervisory employees under the NLRA should be applied under our statute. United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); City of Witchita v. Fraternal Order of Police, Lodge No. 5, 75-UDC-1-1994 (Sept. 1995). This position was also adopted by the Kansas Court of Appeals in Kansas Univ. Police Officers Ass'n v. Kansas Pub. Employee Relations Bd., 16 Kan.App.2d 438, 439 (1991).²

² Because the definition of supervisory employee in the Kansas statute is taken from the NLRA, we presume our legislature intended what Congress intended by the language employed. See Stromberg Hatchery v. Iowa Employment Security Comm., 33 N.W.2d 498, 500 (Iowa 1948). "[W]here . . . a state legislature adopts a federal statute which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense." Hubbard v. State, 163 N.W.2d 904, 910-11 (Iowa 1969). As a result, federal court decisions construing the federal statute are illuminating and instructive on the meaning of our statute, although they are neither conclusive nor compulsory. Peasley v. Telecheck of Kansas, Inc., 6 Kan.App.2d 990, 994 (1981)[Case law interpreting federal law after which Kansas law is closely modeled, although not controlling construction of Kansas law, is persuasive]; See also Cassady v. Wheeler, 224 N.W.2d 649, 652 (Iowa 1974).

In 1970, the Kansas legislature was faced with the problem of writing a comprehensive law to cover the question of professional employee collective bargaining. It had the one advantage of being able to draw from the long history of the NLRB as a guide in performing its task. In particular, as it relates to the case under consideration here, the legislature created a definition, very much like the one in the NLRA, of those characteristics which, if possessed by an employee, would disqualify that employee from participation in a bargaining unit.

It is a general rule of law that, where a question of statutory construction is one of novel impression, it is proper to resort to decisions of courts of other states construing statutory language which is identical or of similar import. 73 Am.Jur.2d, Statutes, §116, p. 370; 50 Am.Jur., Statutes, §323; 82 C.J.S., Statutes, §371. Judicial interpretations in other jurisdictions of such language prior to Kansas enactments are entitled to great weight, although neither conclusive nor compulsory. Even subsequent judicial interpretations of identical statutory language in other jurisdictions are entitled to unusual respect and deference and will usually be followed if sound, reasonable, and in harmony with justice and public policy. Cassady v. Wheeler, 224 N.W.2d 649, 652 (Ia. 1974); 2A Sutherland Statutory Construction, §52.02, p. 329-31 (4th ed. 1973); Benton v. Union Pacific R. Co., 430 F.Supp. 1380 (19) [A Kansas statute adopted from another state carries with it the construction placed on it by that state.]; State v. Loudermilk, 208 Kan. 893 (1972).

Where there is no Kansas case law interpreting or applying a specific section of the Kansas Professional Negotiations Act, the decisions of the National Labor Relations Board ("NLRB") and of Federal courts interpreting similar provisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.* (1982), and the decisions of appellate courts of other states interpreting or applying similar provisions under their state's public employee relations act, while not controlling precedent, are persuasive authority and provide guidance

The question of supervisory status is "a mixed one of fact and law." See NLRB v. Yeshiva University, 444 U.S. 672, 691 (1980). However, as should be evident from the array of criteria within K.S.A. 75-4321(b), the inquiry is predominately factual. It involves a case-by-case approach in which the Public Employee Relations Board ("PERB") gives practical application of the statute to the infinite and complex gradations of authority which may exist in public service.

III. Captains and Lieutenants Generally

[2] The City cites the Airport Authority's designation of the Captain and Lieutenant positions as "supervisory" to support the proposition that it should not be included in the Union's proposed bargaining unit. The title a position carries has little bearing on whether it is supervisory. Opinion Kansas Attorney General, No. 96-25. p. 5 (March 12, 1996). As stated in NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d 235 (CA4, 1958):

"It is equally clear, however, that the employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title."

It is the function rather than the label which is significant. City of Wichita v. Fraternal Order of Police, Lodge No. 5, Case No. 75-UDC-1-1994 (Sept. 1995); United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994

in interpreting the Kansas PNA, Oakley Education Association v. USD 274, 72-CAE-6-1992, p. 17 (December 16, 1992); See also Kansas Association of Public Employees v. State of Kansas, Department of Administration, Case No. 75-CAE-12/13-1991 wherein the same conclusion has been reached under the Kansas Public Employer-Employee Relations Act.

(September 16, 1994); See also Phillips v. Kennedy, 542 F.2d 52 (CA 8, 1976); Arizona Public Service Co. v. NLRB, 453 F.2d 228 (CA 9, 1971); Int'l Union of Elec., Radio and Machine Workers v. NLRB; 426 F.2d 1243 (D.C.Cir. 1970). Consequently, the fact that the Airport Authority may label and refer to the Captain and Lieutenant positions as "supervisory" is not controlling for purposes of PEERA unit determinations. The positions must actually possess the prescribed supervisory duties and authorities.

IV. Shift Captains and Lieutenants *Statutory Criteria*

The enumerated functions in the K.S.A. 75-4322(b) definition of supervisory employee are listed disjunctively, City of Witchita v. Fraternal Order of Police, Lodge No. 5, Case No. 75-UDC-1-1994 (Sept. 1995); NLRB v. Elliott-Williams Co., 345 F.2d 460 (CA7, 1965), possession of any one of them may be sufficient to make an employee a supervisor. City of Witchita v. Fraternal Order of Police, Lodge No. 5, Case No. 75-UDC-1-1994 (Sept. 1995); NLRB v. Broyhill Co., 514 F.2d 655, 658 (CA 8, 1975). While it has been said that it is the existence of the power and not its exercise which is determinative, Jas. E. Matthews & Co. v. NLRB, 354 F.2d 432, 434 (CA 8, 1965), what the statute requires is evidence of actual supervisory authority "visibly translated into tangible examples." City of Witchita v. Fraternal Order of Police, Lodge No. 5, Case No. 75-UDC-1-1994 (Sept. 1995); United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See also Oil, Chemical and Atomic Workers Int. Union v. NLRB, 445 F.2d 237, 243 (D.C.Cir. 1971). The power

must exist in reality, not only on paper. Id.; NLRB v. Security Guard Service, Inc., 384 F.2d 143, 149 (CA 5, 1967). As explained in NLRB v. Griggs Equipment, Inc., 307 F.2d 275, 279 (CA5, 1962):

"The concept of supervision has some elasticity, but it must have substance and not be evanescent. Statutory supervision requires some suiting of the action to the words and the words to the action. The supervision must have both conceptual and practical aspects and must be meaningful in respect to the position occupied by the employee. A supervisor may have potential powers, but theoretical or paper power will not suffice. Tables of organization and job descriptions do not vest powers. Some kinship to management, some empathic relationship between employer and employee, must exist before the latter becomes a supervisor for the former."

[3] Stated another way by the NLRB in Detroit College of Business, 132 LRRM 1081, 1083 (1989), the supervisory functions performed by the individual must "so [ally] the individuals with management as to establish a differentiation between them and the other employees in the unit." See also Adelphi University, 79 LRRM 1545 (1972); New York University, 91 LRRM 1165 (1975). The determination of supervisory status depends upon how completely the responsibilities of the position identify the employee with management. For supervisory status to exist this identification must be substantial. City of Wichita v. Fraternal Order of Police, Lodge No. 5, Case No. 75-UDC-1-1994 (Sept. 1995); United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); See also NLRB v. Doctor's Hospital of Medesto, Inc., 489 F.2d 772, 776 (CA 9, 1973); Ross Porta-Plant, Inc. v. NLRB, 404 F.2d 1180, 1182 (CA 5, 1968). Clearly, the exclusion from "public employee" status applies only

to supervisory personnel who are "the arms and legs of management in executing labor policies." *Id.*; Packard Motor Co. v. NLRB, 330 U.S. 485, 494 (Douglas, J. dissenting, 1947). To ascertain whether an individual so allies oneself with management as to establish a differentiation from the other employees in the bargaining unit one must examine the factors evidencing supervisory authority present to determine the nature of the individual's alliance with management.

1. "Normally performs different work from his or her subordinates"

The first factor set forth in K.S.A. 75-4322(b) is that the employee "normally performs different work from his or her subordinates." A review of the record reveals no dispute that the Shift Captains and Lieutenants and the Training Captain perform work different from that of the Safety Officers.

2. *"Having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances."*

There is no evidence in the record to show that the Shift Captains and Lieutenants and the Training Captain have the authority directly to hire, transfer, suspend, layoff, recall, promote, discharge, reward, or discipline other employees. Clearly the Shift Captains and Lieutenants do have the authority to assign duties and responsibilities to the Safety Officers on their shifts.

3. "Effectively to recommend a preponderance of such actions."

[4] The City asserts that Captains and Lieutenants can effectively recommend hiring, transferring, suspending, layoff, recall, promotion, discharge, assignment, rewarding, or disciplining other subordinate Safety Officers. An "effective" recommendation is one which, under normal policy and circumstances, is made by a supervisor, and is adopted by higher authority without independent review or de novo consideration as a matter of course. City of Wichita v. Fraternal Order of Police, Lodge No. 5, Case No. 75-UDC-1-1994 (Sept. 1995); United Rubber Workers Local Union 851 v. Washburn University Of Topeka, Case No. 75-UDC-3-1994 (September 16, 1994); City of Davenport v. PERB, 98 LRRM 2582, 2590-91 (Ia. 1978). So viewed, a mere showing that recommendations were ultimately followed does not make such recommendations "effective" within the meaning of the statute. An employee will not be found to be a supervisor where he lacks the power to recommend effectively decisions respecting a preponderance of the supervisory indicia of hiring, transferring, supervision, recall, promotion, discharge, rewarding, or disciplining of other employees. See Id., Iowa Electric Light & Power, 717 F.2d 433 (8 C.A. 1993).

The record supports the conclusion that the Captain and Lieutenants can make effective recommendations as to hiring, transfers, suspension, discharge, discipline, promotion, and rewarding of Safety Officers. The report prepared by the Shift

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Captains and Lieutenants following the hiring background checks presents information deemed pertinent to the applicant's qualification and include a recommendation on whether the applicant should be hired which is usually followed. Shift Captains have an equal vote in the ranking of applicants for hiring.

Disciplinary actions usually originate with the Captain or Lieutenant and the reports contain a recommendation as to the type of discipline. The disciplinary recommendations of the Shift Captains and Lieutenants are generally accepted. The only time recommended discipline would not be approved is if a reviewing supervisor determined the Lieutenant or Captain misread the regulation alleged to have been violated, or used the wrong regulation, or there were circumstances surrounding the situation of which the Captain or Lieutenant was not aware at the time of making the recommendation.

For a Safety Officer I to be promoted to Safety Officer II the promotion must be recommended by the Safety Officer's Shift Captain. The Captain and Lieutenant must agree to the promotion and recommend same before the recommendation is sent to the Assistant Chief. That recommendation is always followed.

Safety Officers are evaluated annually by the Shift Captain with input from the Lieutenant. Wage increases are determined, in part, based upon the performance appraisals. The Captain's recommendations are usually always followed. Shift Captains and

Lieutenants also have the authority to recommend non-scheduled merit increases where the Safety Officer exhibits meritorious work habits and skills.

Finally, where transfers are required due to manpower shortages or personal request, the Shift Captains are consulted for a recommendation which is weighted heavily in the decision process. Requests for transfer usually begin with the Shift Lieutenant and then go up through the chain of command for recommended action.

From the totality of the record showing Shift Captains and Lieutenants perform work different from that of the Safety Officers, have the authority to assign duties and responsibilities to the Safety Officers on their shifts, and can make effective recommendations as to hiring, transfers, suspension, discharge, discipline, promotion, and rewarding of Safety Officers, the Shift Captains and Lieutenants qualify as "supervisory employees" and should be excluded from the proposed bargaining unit.

V. Training Captain

Besides the three "Shift" Captains there is a fourth Captain position designated the "Training" Captain. The fact that the Shift Captains have been found to be "supervisors" does not mean that the "Training" Captain is also a "supervisor." As noted by the Kansas Attorney General, "The federal courts have consistently held that whether an individual qualifies as a supervisor as defined by the act is a question of fact, the resolution of which

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depends on the particular facts and circumstances of each case. E.g. NLRB v. Joe B. Foods, Inc., 953 F.2d 287, 291, 294, 296 (7th Cir. 1992)."

The "Training" Captain is responsible for arranging all training that is required by state or federal law and regulation, and to maintain the necessary records to document compliance. Rather than working 24 hours on duty and having 48 hours off, the Training Captain works an 8 hour day, 40 hours per week. The Training Captain has no employees assigned to him and over which he has direct supervision. The Training Captain has taken part in background checks and interviews, but the record is unclear as to the frequency of such activity. Additionally, the Training Captain does not normally recommend discipline.

Beyond the fact that the Training Captain has no employees assigned to him and over which he has direct supervision making it difficult to argue the position is supervisory, there is no evidence in the record to show that the Training Captain has the authority directly to hire, transfer, suspend, layoff, recall, promote, discharge, reward, or discipline any other employees. And, except for occasionally participating in the hiring process, there is nothing in the record to support a conclusion that the Training Captain can effectively recommend a preponderance of such activities.

[5] While it can be argued the Training Captain does have the authority to assign the Safety Officers to training sessions, such activity is done to meet the requirements of state or federal law and regulation. Even where supervisory functions are being performed by an employee, K.S.A. 75-4322(e) expressly insists that a supervisor 1) have authority, 2) to use independent judgment, 3) in performing such supervisory functions, 4) in the interest of management. These latter requirements are conjunctive. See International Union of United Brewery v. NLRB, 298 F.2d 297, 303 (1961). Consequently, an employee is not a supervisor if he or she has the power to exercise, or effectively recommend the exercise of listed functions unless this power is accompanied by the authority to use independent judgment in determining how in the interest of management it will be exercised. City of Witchita v. Fraternal Order of Police, Lodge No. 5, Case No. 75-UDC-1-1994 (Sept. 1995). State and federal law requires the training, and the record is void of any evidence of use of independent judgment by the Training Captain in providing same.

[6] Evidence was also produced by the City to show that the Training Captain may take over a Shift Captain's responsibilities if both the Shift Captain and Lieutenant are not available. The argument being that during those times the Training Captain has the same authority as the Shift Captain. The test for determining whether a unit should include employees who substitute for

supervisors is whether such part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant. N&T Associates, Inc., 116 LRRM 1155 (1984). The primary consideration is whether the substitution is on a regular or substantial basis or whether it involves only infrequent and isolated occurrences. See Lovilia Coal Co., 120 LRRM 1005 (1988). The record reveals substitution for a Shift Captain by the Training Captain represent a minimal responsibility of the Training Captain - "one tenth of a percent." Accordingly, such substitution cannot be considered so regular or substantial as to require exclusion of the Training Officer from the bargaining unit as a "supervisor."

ORDER

IT IS THEREFORE ADJUDGED, that the positions of Safety Supervisors (Shift Captains) and Assistant Safety Supervisors (Shift Lieutenants) should be excluded from the proposed bargaining unit as supervisors pursuant to K.S.A. 75-4322(b).

IT IS FURTHER ADJUDGED, that the position of Safety Supervisors (Training Captain) should not be excluded from the proposed bargaining unit as a supervisor pursuant to K.S.A. 75-4322(b).

IT IS THEREFORE ORDERED, that the appropriate bargaining unit shall be composed as follows:

INCLUDE: Safety Supervisors (Training Captains)
Safety Officer II
Safety Officer I
Full and part-time employees in the included positions.

EXCLUDE: Director of Airports
Director of Airport Operations
Chief of Airport Safety
Assistant Chief of Airport Safety
Safety Supervisors (Shift Captains)
Assistant Safety Supervisors (Shift Lieutenants)

Dated this 30th day of July, 1996.



Monty R. Bertelli, Presiding Officer
Hearing Officer
Employment Standards & Labor Relations
1430 Topeka Blvd.
Topeka, Kansas 66612

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 Employer-Employee Relations Board, either on its own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-531, and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on August 19, 1996 addressed to: Public Employee Relations Board, Employment Standards and Labor Relations, 1430 Topeka Blvd., Topeka, Kansas 66612.

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CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 31st day of July, 1996, 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:

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455 N. Main
Wichita, Kansas 67202

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

Sharon G. Tunstall