

BEFORE THE SECRETARY
OF THE KANSAS DEPARTMENT OF LABOR

KCKCC Faculty Association)
) Petitioner)
))
vs.))
))
Kansas City KS Community College,)
(KCKCC))
) Respondent.)

Case No. 72-UCA-1-2010

INITIAL ORDER OF THE PRESIDING OFFICER
Pursuant to K.S.A. 72-5420

NOW on this 17th day of February, 2012, the above-captioned Unit Clarification or Amendment petition comes on for decision pursuant to K.S.A. 72-5420 and K.S.A. 77-514(a) before presiding officer Douglas A. Hager.

APPEARANCES

Petitioner, KCKCC Faculty Association (hereinafter “Petitioner” or the “Association”), appears by and through counsel, David M. Schauner, Chief Legal Counsel, KANSAS NATIONAL EDUCATION ASSOCIATION. Respondent, Kansas City Kansas Community College (hereinafter “Respondent” or “KCKCC”), appears by and through counsel, Deryl W. Wynn, Attorney at Law, MCANANY, VAN CLEAVE & PHILLIPS, P.A.

BACKGROUND

This matter comes before the presiding officer as designee of the Secretary of Labor pursuant to a Unit Clarification or Amendment petition filed by Petitioner. See Petition for Clarification or Amendment of Appropriate Unit, 72-UCA-1-2010. Petitioner seeks to amend the KCKCC professional employees’ bargaining unit to include “all full-time faculty transferred

from the Kansas City Kansas Area Technical School in its 2008 merger with the Kansas City Kansas Community College.” *Id.*, p. 2. Specifically, Petitioner requests unit clarification to add positions held by three individuals employed by Respondent to the existing professional employee bargaining unit. These three positions were included in the professional bargaining unit of the Kansas City Kansas Area Technical School prior to its 2008 merger with the Kansas City Kansas Community College. In negotiations for the parties 2009-2010 Negotiated Agreement, however, the parties failed to reach agreement as to the disposition of the three positions relative to the bargaining unit. Prior to contract ratification, Respondent removed the positions from the bargaining unit, making the determination that they were staff employees, not professional employees. Petitioner filed this unit clarification petition and the parties ratified their bargained agreement. The three positions, and the incumbents holding the positions when this matter was briefed are: Admissions Counselor, held by Scott Smith, Business and Industry Coordinator, held by Charles Knapp, and Academic Support Facilitator, held by Carly Eastling. The primary issue for resolution is whether Smith, Knapp and Eastling, or any incumbent holding these positions are considered to be “professional employees”, as that term is defined by the Professional Negotiations Act, K.S.A. 72-5410, *et seq.* If so, the presiding officer must determine if it is appropriate to return these positions to the existing professional employees’ bargaining unit.

ISSUES OF LAW

The issues in dispute are stated as follows:

- 1) Are the individuals employed by Respondent as Admissions Counselor, Business and Industry Coordinator and Academic Support Facilitator “professional employees” as that term is defined by the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*?

- 2) If so, is it appropriate to return these positions to the existing professional employees' bargaining unit?

Prior to any further examination of the legal issues, findings of fact will be set forth.

FINDINGS OF FACT

A. Stipulations of Fact

1. The Respondent, Kansas City, Kansas Community College (College or KCKCC) is duly organized pursuant to Article 6 of the Kansas Constitution and Chapters 71 and 72 of the Kansas Statutes Annotated. The supervision and operation of the College is entrusted to its Board of Trustees (Board).
2. The Petitioner, KCKCC Faculty Association/KNEA (Association) is the duly-recognized, exclusive bargaining representative for professional employees of the College.
3. As described by the College in Department of Labor reporting Form No. PNA 002, dated May 18, 2000, the KCKCC Faculty bargaining unit includes full-time faculty, librarians, and counselors.
4. Prior to July 1, 2008, the Kansas City Kansas Area Technical School (ATS) was under the control of the Board of Education of the U.S.D. No. 500.
5. In response to the legislature's enactment of K.S.A. 72-4479 in 2007, the Board of Education of U.S.D. No. 500 and the Board of Trustees of the Kansas City Kansas Community College entered into discussions regarding the potential merger of the Area Technical School with Kansas City Kansas Community College.
6. Pursuant to K.S.A. 71-1701 *et seq.*, the operations of KCKCC and ATS were merged effective July 1, 2008.
7. The merger of ATS and KCKCC is governed by Exhibit G.

8. Among the positions that were transferred from the Kansas City Area Technical School to KCKCC through the merger were the positions of Academic Support Facilitator, Business and Industry Coordinator, and Admissions Counselor.

9. K.S.A. 72-1393 prohibits the State Board of Education from adopting rules and regulations requiring certification of teachers, administrators, or instructors in any two-year college or in any public community junior college.

10. Exhibits A, B, C, D, E and F accurately describe, in whole or in part, the job responsibilities of [the three positions in question]. *See* Exhibits A-F.

B. Additional Facts Relating to the Merger, Negotiations and Determination by KCKCC to Remove the Three Positions in Question from the Professional Employees' Bargaining Unit

11. Discussions between U.S.D. 500 and the KCKCC regarding the merger of the ATS with the KCKCC took place over roughly a sixteen month period after the Kansas legislature's 2007 enactment of K.S.A. 72-4479. *Tr.*, p. 17.

12. After its merger with KCKCC, U.S.D. 500's Kansas City Kansas Area Technical School became the Kansas City Kansas Community College's Technical Education Center. *Tr.*, p. 36.

13. Contract negotiations for the 2009-2010 school year between KCKCC and Petitioner, as bargaining representative for the professional employees' bargaining unit, began in February, 2009. During those negotiations, the parties were unable to agree that three of the faculty positions that had been included in the professional employees' bargaining unit while ATS was a part of the U.S.D. 500 would continue to be in the professional employees' bargaining unit following the merger of the ATS with the KCKCC. *Tr.*, pp. 14, 20-23, 110. At one point in time, Jerry Pope, president of the faculty association bargaining representative believed the negotiations would end in impasse. *Tr.*, p. 10.

14. At its April 16, 2009 negotiation session, Petitioner and Respondent agreed to refer the question of who was and was not to be included in the professional employees' bargaining unit to a subcommittee comprised of faculty association and administration bargaining team members. Tr., p. 117. *See also*, Exhibit O, p. 3 (Dr. Agha-Jaffar testifying that at its April 16, 2009 meeting, the negotiations "kept hitting a stumbling block about the integration with the tech staff – are they faculty, are they staff – [and] it was determined" to address the issue by appointing a subcommittee to exchange information and talk it out.) At some point thereafter, the subcommittee met and talked about the issue. The subcommittee was comprised of Ron Bales, Mike Wilson and Deborah Taylor from the faculty association, and Dr. Morteza Ardebili, Dean Leota Marks and Dr. Tamara Agha-Jaffar for the College. Tr., p. 118. The date of the subcommittee's meeting is not clear because "nobody took notes". *Id.*

15. Dr. Agha-Jaffar testified that based upon its review of the job descriptions for the three positions in question, the administration had determined, tr., pp. 104-105, that the three positions in dispute would not be included in the professional employees' bargaining unit. Tr., pp. 102-110. Dr. Agha-Jaffar testified that the subcommittee determined "based on the existing salary of those people that we had determined to be faculty, where to position them on the salary schedule." Tr., p. 118. Dr. Jaffar testified that the status of Eastling, Knapp and Smith was not raised by either party in the subcommittee meeting. Tr., p. 119. The subcommittee never made a written recommendation regarding placement of the three positions in question in the bargaining unit. Tr., pp. 125-126. Dr. Jaffar testified that she was later "taken aback" to learn that a petition for unit clarification had been filed. Tr., p. 119.

16. Letters advising the incumbents in those three positions that they were deemed to be staff employees were mailed by Dean Leota M. Marks to Scott Smith, Charles Knapp and Carly

Eastling on May 4, 2009. *See* Exhibits K, L, and N. The administrative determination to assign Smith, Knapp and Eastling to staff positions was one in which Dr. Agha-Jaffar participated. Tr., pp. 129-130.

17. The basis for the administration's determination that the positions held by Smith, Knapp and Eastling were staff positions and not faculty positions was twofold. First, it was based on the administration's determination that the positions' primary duties did not involve classroom teaching. *See, e.g.*, Tr., p. 103 (Acting Associate Provost for Academic Affairs, Dr. Tamara Agha-Jaffar testifying that the position of Business and Industry Coordinator is not appropriately included in the professional employees' bargaining unit because the position's primary duties "do not involve teaching in the classroom"); Tr., p. 134 (Dr. Agha-Jaffar testifying that the three positions in question do not share a community of interest with the remaining bargaining unit members because "[t]hey're not full-time faculty . . . not full-time teachers in the classroom"). KCKCC's Acting Associate Provost for Academic Affairs, Dr. Tamara Agha-Jaffar, supervises the instructional areas, including instructional deans and all faculty serving under them. Tr., p. 100. Dr. Agha-Jaffar is aware that the KCKCC professional employees' bargaining unit includes positions that are not teaching faculty. Tr., pp. 121-122. The unit includes academic counselors, a librarian and someone in institutional research, as well as teaching faculty. Tr., p. 122. The KCKCC professional employees' bargaining unit member performing institutional research was previously "a teaching faculty member" who "wanted to retain her faculty status" when "she took on the position in institutional research". *Id.* Second, Respondent's decision to remove the three positions in question from inclusion in the professional employees' bargaining unit was based on the administration's determination that duties performed at the main campus, and similar in nature to those contained in the job descriptions of Smith, Knapp and Eastling, are

handled by personnel deemed by KCKCC to be staff, not faculty. Tr., pp. 102-103, 105-106, 109-110, 120. Dr. Agha-Jaffar's direct testimony regarding the basis of the administration's determination that the positions held by Knapp and Eastling are staff and not faculty is instructive:

“Q. And if you would ma'am, I'm going to ask you to take a look at Exhibit B.

Do you have that in front of you?

A. Yes, sir, I do.

Q. And that is the – the position description for Business/Industry Coordinator. Am I correct?

A. Yes, Sir.

Q. All right. Is this individual – is this position a member of the bargaining unit?

A. No, Sir.

Q. And why do you say that?

A. Because, based on the job description here, the same type of job description that we have on the main campus is filled by a staff position, not a faculty position.

....

Q. Why isn't this position appropriately in the faculty bargaining position?

A. Because the primary duties are – do not involve teaching in the classroom.

Q. Is –

A. We currently – can I elaborate?

Q. Continue.

A. We currently have – if I can be clear about this, the job description here is currently handled by different individuals on the main campus, and they are all staff positions. For instance, we have somebody who coordinates the internships, we have somebody who provides orientation, we have somebody who – you know, all of these functions are performed by different staff members on the – on the main campus, usually in the advising, counseling, and/or in the enrollment area.

Q. And are the individuals who perform these [duties] on main campus, are they paid under the Agreement in the Master Contract regarding salary?

A. No, sir.

Q. Do they have a workload equal to that for the faculty under the bargaining unit?

A. No, sir, they do not.

Q. Do they have a work year identical to those under the faculty bargaining unit?

A. No, sir, they do not.

Q. I'm going to ask you now, ma'am, if you would to take a look at [Exhibit N] in front of you for Mr. Knapp – I'm sorry – Ms. Eastling. Do you have that in front of you?

A. Yes, I do.

Q. Do you recognize that document?

A. Yes, sir.

Q. And were you familiar with the terms for its issuance, why it was issued to Ms. Eastling?

A. Yes.

Q. And would you explain to the Hearing Officer how it came to be issued?

A. Basically, this was at the time when we were still looking at job descriptions and trying to work out who is going to fit in where.

Q. When you say 'we,' to whom are you referring?

A. The administration.

Q. Go on, please.

A. And we were – and we looked at the nature of the job description that was given to us, and based on that, we determined that Ms. Eastling is staff.

Q. And why do you make this determination?

A. Because she – the – if you – if I can turn to her job description.

Q. Exhibit A?

A. I can be more specific. Assessment. She handles Work Keys Assessment. On the main campus we do Accuplacer Assessment. That is currently handled by the Academic Resource Center. Different people fulfill different roles, but they are all staff. As far as documenting students who have a disability, that is handled by a staff member on the main campus at the Academic Resource Center.

Tutoring, remediation, all kinds of assessment, tutoring students, students who are – need assistance in the classroom are referred to the Academic Resource Center individual – in this case, it would be Amanda Williams, who – she is also

staff. She assigns students to specific tutors. All these job functions are handled by staff, they're just handled by different individuals.

Q. And how long have they be[en] handled by staff, more than five years?

A. Yes, sir.

....

Q. Okay. Go on, please.

A. Well, basically, we looked at job descriptions, and that's where we fit them in. The issue for us is that because the Technical Education Center – if I may elaborate – deals with a smaller number of students, so that you have individuals at the Technical Education Center who wear many different hats. Here on the main campus we are dealing with, oh, probably eight, nine times the number of students, so we – we parcel off those different responsibilities, but they're handled by staff, not by faculty.”

Tr., pp. 102-106. Dr. Agha-Jaffar's testimony regarding the position held by Scott Smith is in a similar vein, and makes it clear that Respondent based its determination that his position is staff and not faculty on the fact that duties performed at the main campus similar in nature to Smith's duties are handled by staff members, not faculty members:

Q. I'm going to ask you to look at the [May 4, 2009 letter] for Mr. Smith. Do you have that in front of you?

....

A. Yes, sir, I do.

Q. What were the circumstances for its creation, if you recall?

A. Again, we looked at the specific functions that he was performing, the job responsibilities, and we felt that that aligned itself with the main campus as staff.

Tr., pp. 108-109. After directing her attention to Smith's job description, Respondent's counsel continued with his direct examination of Dr. Agha-Jaffar:

Q. Is Mr. Smith, according to these [Exhibit D] job qualifications appropriately a member of the faculty bargaining unit?

A. No, sir, he's not.

Q. And why not?

A. Again, if you -- a lot of the function -- the functions that he's performing are currently performed by staff who are either in the Career Center, who are either in the Counseling Center, who are either in the Academic Resources Center, and we also have staff who, like Linda Wyatt, in the Counseling Center, she is staff who performed a lot of these functions, and -- and, you know, basically that's it. The job description fits with staff, not with faculty.

Tr., pp. 109-110. As its standard for determining whether positions were to be included in the faculty bargaining unit, the administration based its decision on how certain similar positions at the college were classified, not whether the specific positions in question were professional, educational or instructional in nature. Tr., p. 123. The standard used to determine Smith, Knapp and Eastling's exclusion from the professional employees' bargaining unit was based on a comparison with employees of the college who are deemed to be staff. Tr., pp. 123-124.

18. Another factor that apparently entered into the administration's determination not to include the position of Academic Support Facilitator in the professional employees' bargaining unit is that Carly Eastling tutors TEC students deficient in math and reading, whereas at the main

campus, students deficient in math and reading are required to take specific for-credit classes taught by degree-qualified instructors. Tr., p. 107. Because Eastling is not qualified to teach a for-credit math class on the main campus, the instructional or educational nature of her remedial tutoring work at TEC is apparently viewed by Respondent as immaterial to the question whether she is a professional employee under applicable law. See Tr., pp. 107-108.

19. Although negotiations for the 2009-2010 school year began in February, 2009 and did not conclude until the final negotiation session held on October 6, 2009, the administration made a determination no later than May 4, 2009 that the three positions in question were staff, not faculty, even though prior to the merger of ATS with KCKCC those positions were included in the professional employees' bargaining unit at ATS. See Exhibits K, L and N.

20. Petitioner filed this unit clarification or amendment petition on September 11, 2009, prior to the parties' final contract negotiation session. See Petition for Unit Clarification or Amendment, Case No. 75-UCA-1-2010, dated September 11, 2009. On Monday, December 14, 2009 or the week before, Dr. Agha-Jaffar contacted Jerry Pope, the KCKCC faculty association president, and told him she thought the contract was "in trouble" because the unit clarification was filed. Tr., p. 12. After that conversation, Pope went to see KCKCC President, Dr. Burke, and asked him "point blank was there going to be a problem having the contract signed." Tr., p.

13. Dr. Burke assured Pope that the unit clarification process did not have any impact on signing the contract and the parties would "let the [unit clarification] process take care of itself".

C. Additional Facts Relating to the Position of Admissions Counselor

21. Scott Smith is the Admissions Counselor at the KCKCC Technical Education Center (TEC). Prior to the merger between the ATS and KCKCC, Smith was Admissions Counselor for ATS. Tr., pp. 36, 38. As a condition of holding the position of Admissions Counselor at

KCKCC's TEC, Smith was required to have "a master's degree as well as at least two years of teaching experience [and] your teaching credential." Tr., p. 37.

22. Smith has a Bachelor of Science in Education degree and a Master's degree in counselor education from Emporia State University. Tr, p. 37. Smith does not hold any license or certification relative to his counselor education degree. Tr., pp. 37, 39. KCKCC does not require Smith to hold a Kansas certificate as a school counselor as part of his employment as the Admissions Counselor. *Id.* Smith has a teaching certificate that is still in force. Tr., pp. 37-38. Prior to his work at the ATS, Smith worked as a high school counselor. Tr., p. 37.

23. Smith's job as Admissions Counselor requires him to work on "evaluating and advising students toward career programs." Tr., p. 39. Smith describes his job as spending 80% of his time working directly with students towards career programs. Tr., p. 40. Every student that enrolls will see him first during the intake process. *Id.* When students come in, he will "share about the programs that we have to offer, specifically if they have one in mind, and then [he'll] look at their background, their history, their testing, and try to help evaluate . . . proper placement for success." Tr., 39.

24. Smith's direct supervisor is the Dean of Student Services for KCKCC. Tr., p. 41. He also reports to the Dean over the TEC, "to coordinate the day-to-day activities". Tr., pp. 41-42.

25. Smith attends weekly meetings on campus with other counselors. Tr., pp. 42-43. Smith shares a common interest with other counselors on campus. Tr., p. 46.

26. While Smith was employed by the ATS, prior to its merger with KCKCC, his position as ATS Admissions Counselor was a part of the ATS faculty bargaining unit. Tr., p. 46. The faculty bargaining unit at KCKCC includes Academic Counselors. Tr., p. 122.

27. Following the merger and transition process, described in Finding of Fact No. 5, *supra*, Smith was advised by letter dated May 4, 2009 that his position was deemed that of a non-teaching TEC staff employee, effective July 1, 2009. Tr., p. 49; Exhibit K.

28. It is Smith's desire that his position be returned to the professional employees' bargaining unit for representation. Tr., p. 46.

C. Additional Facts Relating to the Position of Business and Industry Coordinator

29. Knapp was the Business and Industry Coordinator for the ATS prior to its merger with KCKCC. Tr., p. 54. His functions include internships, job development and teaching, tr., p. 55. He is currently the Business and Industry Coordinator for the TEC of KCKCC. Tr., pp. 54, 56. In his current role with the TEC of KCKCC, Knapp has not been given a new job description. Tr., p. 57. Knapp's job description from ATS, Exhibit B, does not reflect his teaching duties. Tr., p. 57.

30. Knapp has a Master's of Science Degree in Technical Education from Pittsburg State University. Tr., p. 55. His job description indicates the requirement of a bachelor's degree but does not require an advanced degree.

31. Knapp is responsible for teaching the Job Placement/Job Skills, (hereinafter "Jobs Skills"), and Soft Skills classes at the TEC. Tr., pp. 57-58. Job Skills covers "how to do an application correctly, best place to look for a job, how to do a resume, interviewing, how to dress for an interview." Tr., p. 58. Soft Skills covers "things that employers look for that are very important, things like showing up on time, being able to get along, dependability." *Id.* The setting for his courses is in a classroom, and he has used transparencies, a Power Point presentation, worksheets, handouts, lecture and discussion. *Id.* Knapp does not conduct Job Skills or Soft Skills regularly, but rather arranges the classes as faculty members come to him

individually and identify the need. Tr., pp. 58, 61. Depending on demand, Knapp teaches once or twice “a week, however often it was needed” while at ATS. Tr., p. 58. At TEC, Knapp has “increased the number of classes” to “may be 15, 20 [clock] hours a week”. Tr., pp. 58-59. In addition to classroom teaching activities, Knapp and Carla Eastling developed the syllabus and curriculum guide for Job Skills and Soft Skills. Tr., pp. 59-60. He and Eastling also developed lesson plans and the whole curriculum for Soft Skills. Tr., pp. 60, 66. Knapp developed the curriculum for the Job Skills class. Tr., p. 60.

32. Knapp teaches Job Skills in courses that are for college credit. Tr., pp. 59, 64. Students receive from one to three college credits for the courses in which Knapp teaches Job Skills. Tr., p. 59. For example, Knapp taught Job Skills in a two credit-hour Machine Shop class, titled Workplace Ethics, Course Number MACH 0102, for Mark Moehlman. Tr., p. 65; Exhibit M. The course description reads as follows: “This course is an introduction to work place skills. The course topics include: Resume’ writing, cover letters, applications, personal data sheets, portfolios, interviewing tactics, work place ethics and basic work place soft skills.” Exhibit M.

33. Knapp works with full-time faculty at TEC in delivering and assisting them in delivering programs. Tr., p. 60. Those faculty are members of the professional employees’ bargaining unit. *Id.* Knapp reports directly to the Dean of the TEC. *Id.* Other faculty that report to the Dean of the TEC are members of the faculty bargaining unit. Tr., pp. 60-61.

34. While Knapp was employed by the ATS, prior to its merger with KCKCC, his position as ATS’ Business and Industry Coordinator was considered to be a faculty position. Tr., p. 67. His position as ATS’ Business and Industry Coordinator was included in the ATS faculty bargaining unit. Tr., p. 20.

35. Following the merger and transition process, described in Finding of Fact No. 5, *supra*, Knapp was advised by letter dated May 4, 2009 that his position was deemed that of a non-teaching TEC staff employee, effective July 1, 2009. Tr., pp. 62-63; Exhibit L.

36. It is Knapp's desire that his position be returned to the professional employees' bargaining unit. Tr., pp. 67-68.

D. Additional Facts Relating to the Position of Academic Support Facilitator

37. Carly Eastling is currently employed as the Academic Support Facilitator at the TEC of KCKCC. Tr., p. 73; Exhibit A. Prior to the merger between the ATS and KCKCC, Eastling was Academic Support Facilitator for ATS. Tr., p. 73; Exhibit A. She served in that role for two years prior to the merger. Tr., p. 70.

38. Eastling has a Bachelor's Degree in Education. Tr., p. 72. Eastling also has a Master's Degree in Special Education from the University of Kansas. *Id.* Before becoming the Academic Support Facilitator at ATS, she was a special education teacher for seven years for U.S.D. No. 500. Tr., p. 71.

39. Since becoming ATS' Academic Support Facilitator, Eastling's job duties had grown, due to her background in special education, in which Eastling holds a Master's degree. Tr., p. 73. Eastling's primary job duties include remedial tutoring of students in math, reading and writing, tr., pp. 70-71, 75-76, administering assessment and placement tests, tr., pp. 71-73, 75-78, and finding accommodations for disabled students, tr., p. 79-80. "[W]e make sure that [students with a disability] have accommodations, whether they need an interpreter, a certain type of machine to help them read . . . [and] get the proper supplies and necessary equipment" Tr., p. 80. Eastling spends more than half her time teaching students remedial skills in math and English. Tr., p. 83.

40. Eastling administers the Accuplacer placement test, which is an assessment test to determine if students are ready for college-level classes. Tr., p. 77. “The Accuplacer test is used primarily to determine placement in academic courses, trying to evaluate academic readiness and place them in a comparable class.” Tr., p. 43. Prior to enrollment, prospective students take the Accuplacer test. *Id.* After students enroll, Eastling administers the Work Keys test to see if the student needs tutoring in math, reading and other areas covered by the test. Tr., p. 78. Eastling teaches to both current and prospective students. Tr., p. 76.

41. Eastling develops course materials for True Colors, Study Skills, Soft Skills and Test Taking Skills. Tr., p. 84. Eastling creates Power Points from a number of different resource materials. *Id.* Some course materials were developed with Charles Knapp. *See* Finding of Fact No. 31. Eastling also develops course materials for some of the remedial math and reading courses she teaches. Tr., pp. 81.

42. Eastling sets up times upon request by other faculty to tutor students in areas of need. Tr., p. 82. She teaches students individually and in groups. Tr., p. 75. Students are sent to Eastling when they need remediation because they do not perform well on a pre-test in their regular for-credit class. *Id.* Based upon the topics or lessons the students need to learn, depending on the course they are referred from, Eastling develops remedial lessons which she teaches over several weeks, with approval from the referring faculty member. Tr., p. 82

43. Eastling also sets up and presents meetings and workshops for non-traditional students. Tr., p. 83. The meetings and workshops may present advice for non-traditional students through guest speakers, scholarship information, information about issues in their programs, and the like. Tr., pp. 83-84.

44. Eastling attends faculty meetings for the TEC as well as division meetings at the Academic Resource Center. Tr., pp. 78-79.

45. While Eastling was employed by the ATS, prior to its merger with KCKCC, her position as ATS Academic Support Facilitator was included in the ATS faculty bargaining unit. Tr., p. 85. Her contract at ATS was for a 186-day teaching year with 20 extra days in the summer working providing students with remedial instruction. Tr., pp. 85-86.

46. Following the merger and transition process, described in Finding of Fact No. 5, *supra*, Eastling was advised by letter dated May 4, 2009 that her position was deemed that of a non-teaching TEC staff employee, effective July 1, 2009. Tr., pp. 62-63, 97; Exhibit N. Eastling objected to the administration's characterization of her responsibilities as that of a non-teaching staff person and showed Dean Leota Marks her teaching contracts from her years of employment with U.S.D. 500's ATS. Tr., p. 97.

47. It is Eastling's desire that her position be returned to the professional employees' bargaining unit for representation. Tr., p. 85.

DISCUSSION AND CONCLUSIONS OF LAW

In general terms, Respondent urges that it "has already been confronted with the issues raised by Petitioners in the instant case". Respondent's Post Trial Memorandum of Authorities and Arguments in Support, p. 1. Respondent cites to a previous order of the Secretary. *Id. See* Initial Order, KCKCC Faculty Association/KNEA v. Kansas City Kansas Community College, Case No. 72-UCA-1-1995, dated August 28, 1996. The presiding officer has reviewed and considered the Secretary's 1996 Initial Order in great detail. Respondent's assertion that it has already been confronted with the issues raised in the instant case is without merit. The positions

that were the subject of the 1996 Initial Order were employed by the KCKCC prior to its merger with the ATS and included the Coordinator of Academic Assistance-Learning Research Center, Instructors of the Adult Studies Advancement Program and the Interim Director/Coordinator Physical Therapy Assistants' Program. None of the positions in question in the instant matter were considered in the 1996 decision. Further, the duties of the positions deemed by the 1996 decision to be ineligible for inclusion in the professional employees' bargaining unit were distinctly different and distinguishable from those at issue here, despite Respondent's assertion that the position of Academic Support Facilitator has "job duties nearly identical" to a position deemed not to be a professional employee by the 1996 decision. Respondent's Post Trial Memorandum of Authorities and Arguments in Support, p. 13.

Respondent also suggests that because it and the former Unified School District No. 500 Area Technical School "were thrust into a merger" following a 2008 legislative enactment and were "given until July 1, 2010 to address and resolve the complications that naturally follow such a 'shotgun marriage'", the presiding officer should deny Petitioners' request. In effect, Respondent asks the presiding officer to ignore the Secretary's statutory obligation to determine an appropriate bargaining unit by deferring to what some might characterize as Respondent's unilateral removal of the three positions here at issue from the previously-recognized ATS bargaining unit, and what some might describe, in a formulation more charitable to Respondent, as the parties' collective failure in negotiations to reach an agreement regarding disposition of the three disputed positions relative to the merged institutions' resulting bargaining unit.¹ The presiding officer cannot acquiesce to Respondent's request as the law mandates that "[i]n each case where the question is in issue, the secretary *shall decide*, on the basis of the [community of

¹ For a clearer understanding of the facts and circumstances informing the presiding officer's understanding of how these three positions came to be removed from the former ATS' bargaining unit, see Findings of Fact Nos. 11-20.

interest among professional employees and other statutory factors] whether the unit appropriate for the purposes of professional negotiation shall consist of all persons employed by the board of education who are engaged in teaching or performing other duties of an educational nature, or some subdivision thereof” K.S.A. 72-5420 (emphasis added). Since no authority is cited for the Secretary to disregard this statutory mandate, the presiding officer will address the merits of this unit clarification or amendment petition. An understanding of applicable law is first in order.

The Professional Negotiations Act (hereinafter “the Act”), found at K.S.A. 72-5413 *et seq.*, is Kansas’ statutory framework for labor relations between “professional employees” and “board[s] of education”, as those terms are used in the statute. Under the law, “professional employees” have “the right to form, join or assist professional employees’ organizations, to participate in professional negotiations with boards of education through representatives of their own choosing for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service”. K.S.A. 72-5414. Because these rights extend only to “professional employees”, the threshold question for determination in this case² is whether the positions in question are within the Act’s definition of “professional employee”.

The Act defines the term “professional employee” to mean:

“any person employed by a board of education in a position which requires a certificate issued by the state board of education or employed by a board of education in a professional, educational or instructional capacity, but shall not mean any such person who is an administrative employee.”

² Filed as a unit clarification or amendment petition, this case requests that the Secretary clarify or amend the bargaining unit description to include the three positions in dispute. The source of the Secretary’s authority to determine the scope of the bargaining unit is founded in K.S.A. 72-5420. For an in-depth discussion of unit clarification, including discussion of the Secretary’s authority to determine the scope of the bargaining unit, *see* Initial Order, Butler County Community College Education Association v. Butler County Community College, El Dorado, Kansas, Case No. 72-UCA-1-1993, dated June 15, 1994, pp. 33-50, 100-111. *See also*, Initial Order, Colby Community College Faculty Alliance v. Colby Community College, Colby, Kansas, Case No. 72-UCA-4-1992, dated November 1, 1993, pp. 17-23.

K.S.A. 72-5413(c)(emphasis added). The first alternative definition is commonly understood to refer to those individuals typically identified as primary and secondary education “teachers” in public and private school systems. The second alternative encompasses those positions employed by a board of education in a “professional, educational or instructional capacity”. As the Act sets forth these capacities in the disjunctive, employment within any one of them is sufficient to confer the status of “professional employee”. Initial Order, *Colby Community College Faculty Alliance v. Colby Community College*, Case No. 72-UCA-4-1992, dated November 1, 1993, p. 20. The Act defines “board of education” to mean “the board of education of any school district, the board of control of any area vocational-technical school, and the board of trustees of any community college.” K.S.A. 72-5413(b). An “administrative employee”, in the case of an area vocational-technical school or community college, is “any person employed by the board of control or the board of trustees in an administrative capacity and who is acting in that capacity and who has the authority, in the interest of the [board], to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” K.S.A. 72-5413(d).

The legislature did not define what “professional, educational or instructional capacity” means. However, the Secretary has adopted the definition of “professional” as set forth in the Public Employer-Employee Relations Act (PEERA), K.S.A. 75-4321 *et seq.* Under PEERA:

“‘professional employee’ includes any employee: (1) Whose work is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; involves the consistent exercise of discretion and judgment; requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of

higher learning; or (2) who has completed courses of prolonged study as described in paragraph (1) of this subsection, and is performing related work under the supervision of a professional person in order to qualify as a professional employee as defined in paragraph (1) of this subsection;”

K.S.A. 75-4321(d). This definition was previously applied in a similar unit clarification dispute between these parties. *See* Initial Order, KCKCC Faculty Association/KNEA v. Kansas City, Kansas Community College, Case No. 72-UCA-1-1995, dated August 28, 1996, p. 26.

The terms “educational” and “instructional” as used in K.S.A. 75-5413(c) have also been described by the Secretary. In *KCKCC*, Case No. 72-UCA-1-1995, the Secretary defined the terms as follows:

- Educational: “to draw out a person’s talents as opposed to putting in knowledge or instruction.”
- Instructional: “in the role of a teacher.”
“to furnish with knowledge: Teach.”
“ ‘to instruct’ encompasses the more structured form of learning in a traditional classroom setting, where the teacher is lecturing on a specific subject, and the students are listening and responding to questions.”

KCKCC, Case No. 72-UCA-1-1995, p. 26. In short, instructional capacity means in the role of a teacher. *See* Initial Order, Colby Community College Faculty Alliance v. Colby Community College, Colby, Kansas, Case No. 72-UCA-4-1992, dated November 1, 1993, p. 22. Educational capacity, by contrast, is a broader and more comprehensive term embracing mental, moral and physical education. *Id.* These definitions will guide the presiding officer as he considers whether the positions of the employees in question are those of “professional employees.”

If it is determined that these positions, or any of them, are those of professional employees within the contemplation of the Act, it must then be determined whether their inclusion in/return to the existing professional employees’ bargaining unit is appropriate:

“In each case where the question is in issue, the secretary shall determine, on the basis of the community of interest between and among professional employees of the board of education, the wishes of the professional employees and/or the established practices among the professional employees including, among other things, the extent to which such professional employees have joined a professional employees organization, whether the unit appropriate for the purposes of professional negotiation shall consist of all persons employed by the board of education who are engaged in teaching or performing other duties of an educational nature, or some subdivision thereof, except that a unit including classroom teachers shall not be appropriate unless it includes all such teachers employed by the board of education.”

K.S.A. 72-5420. A bargaining unit is a group of employees who may properly be grouped together for the purposes of meeting and conferring relative to terms and conditions of employment. Initial Order, *Maize Teachers’ Association v. Unified School District No. 266, Maize, Sedgwick County, Kansas*, Case No. 72-UCA-1-2001, dated June 29, 2001, p. 6. The primary concern of any bargaining unit determination is to group together only those employees who have substantial mutual interests in wages, hours and other terms and condition of employment.

Commonly referred to as the community of interest doctrine, it stands for the proposition that in making a unit determination, the Secretary will weigh the similarities and differences with respect to wages, hours and other conditions of employment among the members proposed for a unit, rather than relying solely on traditional job classifications. Under the Act, the criteria for determining an appropriate unit for professional negotiations include “the community of interest between and among the professional employees, the wishes of the professional employees and/or established practices among the professional employees” K.S.A. 72-5420.

Because the term “community of interest” is not susceptible to a precise definition or rote application, a case-by-case analysis and approach must be utilized. Initial Order, *Butler County Community College Education Association v. Butler County Community College*, (hereinafter “*BCCC E.A. v. BCCC*”), Case No. 72-UCA-1-1993, dated June 15, 1994, p. 49. Factors

commonly considered in this analysis include common supervision, functional integration of operation and duties, similar skills, training and qualification, interchangeability and interaction between employees, similar work conditions, common wages and benefits, payment of wages, working hours, regularity of work and geographical proximity. These factors are not exclusive and no single factor or group of factors is controlling. The weight assigned to each factor is within the sole discretion of the Secretary.

The Secretary has previously noted that in making community of interest determinations with regard to professional employee bargaining units, personnel other than full-time faculty present a particularly acute issue in the higher education setting because of the diversity of their functions. *BCCC E.A. v. BCCC*, p. 56. This issue has been presented on various occasions to the Secretary and the Secretary has consistently looked for guidance to decisions from other jurisdictions interpreting similar statutory designs. The NLRB, and other state PERBs, as well as the Secretary, have historically included in faculty bargaining units those ancillary personnel whose “ultimate function, aiding and further the educational and scholarly goals of the University, converges with that of the faculty, though pursued through different means and in a different manner.” *BCCC E.A. v. BCCC*, p. 56 (*citing to* New York University, 83 LRRM 1549 (1973) and Rensselaer Polytechnic Institute, 89 LRRM 1844 (1975)). In *BCCC E.A. v. BCCC*, the presiding officer examined the position taken by other jurisdictions, and described as “fairly typical” this discussion about the inclusion of non-teaching professionals in a professional employee bargaining unit:

“Although these ‘satellite personnel’ [personnel involved in initiating, developing, and coordinating teaching and research programs, professionals providing technical assistance in service directly related to teaching and research programs, professionals working primarily and directly with students and student affairs, and professionals with traditional administrative duties] are not primarily concerned with the instruction of students, they share with the rest of the permanent staff a

community of professional interest inasmuch as they are engaged in directly supportive activities that are clearly and closely associated with the function of teaching. . . [T]hey do have many common interests. All are professionals, and their functions dovetail.”

BCCC E.A. v. BCCC, pp. 56-57 (citing to Board of Higher Education of the City of New York, 1 N.Y. PERB ¶1-407 at 4021, *aff'd*, 2 N.Y. PERB ¶2-3056). “Nearly identical reasoning was used by the Michigan Employment Relations Commission, Wayne State University, GERR No. 444, B-11 (1972), and the New Jersey Public Employment Relations Commission, State Colleges of New Jersey, GERR No. 293, E-1 (1969), in reaching similar conclusions.” *BCCC E.A. v. BCCC*, p. 57.

Under the PNA, there are two ways in which a position can be that of a “professional employee”. First, the employee in question can be employed in a position which requires a certificate issued by the state board of education. K.S.A. 72-5413(c). Second, he or she can be employed by a board of education in a professional, educational or instructional capacity. *Id.* Where a purported professional employee has varied and multiple job duties, the decisions have turned on whether the duties alleged to make the position that of a professional are primary or supplementary. *See Dexter-National Education Association v. Unified School District No. 471*, Dexter, Kansas, Case No. 72-UCA-1-1983, dated January 18, 1983, pp. 5-6. That is to say, where a purported professional employee has varied and multiple job duties, the focus should be on those duties that comprise the position’s primary responsibilities, not those that are ancillary to it or that command an insubstantial portion of the job’s attention. K.S.A. 72-1393 prohibits the State Board of Education from adopting rules and regulations requiring certification of teachers, administrators, or instructors in any two-year college or in any public community junior

college. Consequently, this alternative definition of what constitutes a “professional employee” has no application with regard to these positions and will not be further addressed.

Admissions Counselor-Scott Smith

The position held by Admissions Counselor Scott Smith can be that of a “professional employee” under the PNA only if employed by a board of education in a professional, educational or instructional capacity. Persons employed in a “professional capacity” are those whose work is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; involves the consistent exercise of discretion and judgment; requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning, but does not include administrative employees.

The evidence shows that Smith’s job as admissions counselor is focused on “evaluating and advising students toward career programs”, Finding of Fact No. 23, thus his work is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work and it involves the consistent exercise of discretion and judgment. Eighty percent of Smith’s time is devoted to working directly with students toward career programs. *Id.* As a condition of holding the position of Admissions Counselor, Smith was required to have “a master’s degree as well as at least two years of teaching experience”, so his work also requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. *See* Finding of Fact No. 21. Smith has a Master’s Degree in Counselor Education. Finding of Fact No. 22. No contention is advanced that Smith is an administrative employee. *See* Respondent’s Post Trial Memorandum

of Authorities and Arguments in Support, pp. 18-20; Respondent's Reply Memorandum and Arguments in Support, p. 5.

Further, Smith's position as Admissions Counselor was included in the professional employees' bargaining unit at ATS. Other counselors are included in the professional employee bargaining unit at KCKCC, and similar positions are included in other professional employee bargaining units throughout the state. *See, e.g.*, Order to Amend, Cloud County Community College Faculty Association v. Cloud County Community College, Case No. 72-UCA-1-1999, dated June 4, 1999 (in addition to all full-time Instructors, bargaining unit includes "Career Counselor/Advisor" and others); Order [to Amend], Paola Education Association v. Unified School District No. 368, Paola, Kansas, Case No. 72-UCA-2-1993, dated April 9, 1993 (professional bargaining unit amended to include Classroom Teachers, Counselors, Librarians, School Nurses and others); Order to Amend, Professional Employees' Association v. Coffeyville Community College, Coffeyville, Kansas, Case No. 72-UCA-1-2000, dated September 3, 1999 (professional employees' bargaining unit amended to include "Director of Academic Advisement", "International Student Advisor & Career Development Coordinator", and others); Unit Determination Order, Kansas Higher Education Association v. Johnson County Community College, Case No. J-UD-1-1978, dated October, 1978 (appropriate bargaining unit amended to include counselors, librarians, instructional aides and others).

An extensive discussion and analysis was made under the Act by a former presiding officer and designee of the Secretary of Labor regarding whether similar positions at another Kansas community college were those of "professional employees". In the Initial Order issued in *BCCC E.A. v. BCCC*, Case No. 72-UCA-1-1993, dated June 15, 1994, at pages 71 through 81 the presiding officer persuasively set out his analysis and reasoning in determining that

employees performing functions quite similar to many of the functions performed by the positions here in dispute were those of professional employees.³

For example, the individual employed by Butler County Community College, (hereinafter “BCCC”), as its Counselor at McConnell Air Force Base was responsible for providing counseling, advising and career planning services to present and potential students. Her duties included advising students on courses they should be taking for a potential degree, assisting with problems relating to classes and transferring credit hours, coordinating Asset Placement Tests, and providing counseling for personal problems and dealing with class problems and student complaints. In addition, the position taught classes every semester in career planning and other classes when there was a special need. Based on these duties, the presiding officer had no hesitation in finding that the work performed by this position was intellectual in nature and varied in character as opposed to being routine mental, manual, mechanical or physical work. Because the position description indicated that a master’s degree in counseling or a related field was required, the presiding officer concluded that the position required knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. “This satisfies the ‘professional capacity’ requirement of [K.S.A. 72-5413(c)].” *BCCC E.A. v. BCCC*, pp. 71-72. In addition, the presiding officer concluded that

³ The presiding officer notes that in the *BCCC E.A. v. BCCC* unit clarification decision, Petitioner requested that BCCC’s Admissions Counselor be included in the BCCC professional employees’ bargaining unit, much as the instant Petitioner has requested that TEC’s Admissions Counselor be included in KCKCC’s professional employees’ bargaining unit. In *BCCC E.A. v. BCCC*, the presiding officer ruled that the BCCC Admissions Counselor was not a professional employee under the Act based upon the application of Kansas law to the facts of record regarding the job duties and functions of that position. *BCCC E.A. v. BCCC*, p. 65. The “primary responsibility” of the BCCC Admissions Counselor was “recruitment at a designated number of high schools to enroll students for the College. . . [and] require[d] visiting high schools, doing follow up on prospective students, and assisting in preparing the College for campus visits by prospective students.” *BCCC E.A. v. BCCC*, p. 64. In determining whether a position meets the definition of professional employee under the Act, such that it is eligible for inclusion in a professional employees’ bargaining unit, it is the duties and function of the position that are determinative, not the label or title given the position.

the position's teaching responsibilities would qualify as a professional employee under the "instructional capacity" criteria. *Id.*, p. 72. Because the position's duties and functions could "be characterized as 'directly supportive of activities that are clearly and closely associated with the function of teaching'", the position possessed a "sufficient community of interest to be included in the existing bargaining unit." *Id.*, p. 73.

The *BCCC* position of Special Needs Coordinator was responsible for providing physical accommodations or learning aids needed by a learning disabled or physically impaired or challenged student, for example, providing interpreters for the deaf and mobility aids for blind students. *Id.*, p. 74. The incumbent in that position worked with faculty to assure accommodations were made and assisted with problems that arose which might produce a barrier to the success of such students academically. *Id.* In addition, the *BCCC* Special Needs Coordinator was generally available for counseling and advising the special needs students as to the direction of their course work and on courses required for a particular degree. *Id.* The presiding officer ruled that the work performed by the Special Needs Coordinator was intellectual in nature and varied in character as opposed to routine mental, manual, mechanical or physical work. *Id.*, p. 75. Since the applicable position description necessitated a master's degree in Education or a related field, the position required knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. *Id.* These facts satisfied the "professional capacity" criteria of K.S.A. 72-5413(c). *Id.* As the Special Needs Coordinator was available for counseling and advising special needs students on course work and courses needed for a particular degree, as well as with personal problems that could affect the students' academic success, she was rendering services which were within the "instructional capacity" criteria of the professional employee definition utilized by the Secretary.

Id. The position of Special Needs Coordinator, like that of the Counselor at McConnell Air Force Base, shared a sufficient community of interest with other positions in the unit that its inclusion therein was appropriate because the position was performing functions that can be characterized as “directly supportive activities that are clearly and closely associated with the function of teaching”. *Id.*, pp. 76-77.

The *BCCC* position of Director of On-Site Advising spent 80 percent of her time working with students. A master’s degree in counseling was required for the position. Her responsibilities included academic advising, career counseling, some personal counseling, placement testing and enrollment. *BCCC E.A. v. BCCC*, p. 77. Such work is intellectual in nature and varied in character as opposed to routine mental, manual, mechanical or physical work. The position satisfied the professional capacity criteria of the Act. *Id.*, p. 78. Such duties also satisfy the “instructional capacity” criteria used by the Secretary to define professional employees under the Act. *Id.* Like the *BCCC* positions previously described, this position shared a sufficient community of interest that its inclusion in the bargaining unit was appropriate. *Id.*

Based upon application of appropriate provisions of the Professional Negotiations Act to the facts of record, the same conclusion is reached with regard to the position here in question. Based on the evidence presented at hearing, it is clear to the presiding officer that Smith is a “professional employee” within the meaning of that term under the Kansas Professional Negotiations Act. Smith’s position requires a master’s degree in counseling. Finding of Fact No. 21. Smith has both a Master’s degree in Counseling and his teaching certificate. Finding of Fact No. 22. Smith spends 80% of his time working directly with students, evaluating and advising them based on their background, interests and test scores toward career programs offered at TEC. Finding of Fact No. 23. It is clear to the presiding officer that the work

performed by this position is intellectual in nature and varied in character as opposed to being routine mental, manual, mechanical or physical work, and it involves the consistent exercise of discretion and judgment. Because the position description indicates that a master's degree in counseling is required, the presiding officer concludes that the position requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. This satisfies the Act's definition of professional employee under the "professional capacity" alternative of K.S.A. 72-5413(c). Smith's position is that of a "professional employee" under the Act, thus Smith has "the right to form, join or assist professional employees' organizations, to participate in professional negotiations with boards of education through representatives of their own choosing for the purpose of establishing, maintaining, protecting or improving terms and conditions of professional service". K.S.A. 72-5414. .

Consideration of all the factors commonly used in a community of interest analysis leads the presiding officer to conclude that Smith's position is appropriately included in the existing professional employees' bargaining unit, just as it was prior to the merger and Respondent's subsequent decision to remove the position held by Smith from the professional employees' bargaining unit. Smith reports to the TEC Dean, Finding of Fact No. 24, as do TEC's other professional employees. Smith meets with and interacts with other counselors of the combined institutions, sharing common interests with them. Finding of Fact No. 25. Prior to the merger, and Respondent's determination to remove Smith's position from the professional employees' bargaining unit, his position was a part of the bargaining unit. Finding of Fact No. 26. Smith wishes to remain in the professional employee bargaining unit. Finding of Fact No. 28. Based on a careful consideration of all the statutory factors, including the wishes of the professional employees, the established practices of the professional employees, and a "community of

interest” analysis encompassing common supervision, functional integration of operation and duties, similar skills, training and qualification, interchangeability and interaction between employees, similar work conditions, common wages and benefits, payment of wages, working hours, regularity of work and geographical proximity, it is the conclusion of the presiding officer that Mr. Smith’s position shares a sufficient community of interest with the other professional employees of the bargaining unit that it is appropriate that it be returned to the existing professional employees’ bargaining unit.

Business and Industry Coordinator, Charles Knapp

Regarding the position of Business and Industry Coordinator, Charles Knapp, the presiding officer notes that although Knapp has a Master’s of Science Degree in Technical Education, his position description calls only for a bachelor’s degree in business education or a related field, and demonstrated work experience but does not appear to require knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. *See Exhibit B; Finding of Fact No. 30.* Consequently, his position does not qualify as that of a professional employee under the “professional capacity” prong of the statutory definition.

However, if Knapp is employed at TEC in an “educational” or “instructional” capacity, as those terms are used in the Act, then his position is that of a “professional employee.” “Educational” has been defined as to “draw out a person’s talents as opposed to putting in knowledge or instruction.” “Instructional” has been defined as “in the role of a teacher,” “to furnish with knowledge: Teach,” and “encompass[ing] the more structured form of learning in a traditional classroom setting, where the teacher is lecturing on a specific subject, and the students are listening and responding to questions.” *KCKCC, Case No. 72-UCA-1-1995, p. 26.*

Knapp's primary duties include classroom teaching for 15 to 20 hours a week. Finding of Fact No. 31. As TEC's Business and Industry Coordinator, Knapp teaches the Job Skills and Soft Skills in for-credit classes. Finding of Fact No. 32. Job Skills covers "how to do an application correctly, best place to look for a job, how to do a resume, interviewing, how to dress for an interview", while Soft Skills covers "things that employers look for that are very important, things like showing up on time, being able to get along, dependability." Finding of Fact No. 31. Knapp conducts these classes through power point presentations, and with worksheets, handouts, lecture and discussion. *Id.* When he is conducting classes on Soft Skills and Job Skills, Knapp is engaging in activities that could correctly be considered both educational and instructional.

In addition to time spent in the classroom, Knapp developed the curriculum for the Jobs Skills class. Finding of Fact No. 31. Along with Carly Eastling, Knapp also developed the lesson plans, syllabus and curriculum for Soft Skills. *Id.* He works with full-time faculty in delivering and assisting them in delivering programs. Finding of Fact No. 33. As it appears that a majority of Knapp's time is spent working in an "educational" or "instructional" capacity, as those terms are used in the Act, the presiding officer concludes that Knapp's position is that of a "professional employee."

Knapp reports to the Dean of the TEC, like Respondent's other professional employees. *Id.* Prior to the merger, Knapp was a member of the ATS professional employees' bargaining unit. Finding of Fact No. 34. It is Knapp's desire to be returned to the professional employees' bargaining unit. Finding of Fact No. 36. After carefully considering all the statutory factors, including the wishes of the professional employees, the established practices of the professional employees, and a "community of interest" analysis encompassing common supervision, func-

tional integration of operation and duties, similar skills, training and qualification, interchangeability and interaction between employees, similar work conditions, common wages and benefits, payment of wages, working hours, regularity of work and geographical proximity, it is the conclusion of the Secretary's designee that Mr. Knapp's position shares a sufficient community of interest with the other professional employees of the bargaining unit that it should be returned to the existing professional employees' bargaining unit.

Academic Support Facilitator, Carly Eastling

Carly Eastling serves as TEC's Academic Support Facilitator. Finding of Fact No. 37. Her primary job functions include remedial tutoring of students in math, reading and writing, administering and evaluating the results of assessment and placement testing, developing course materials, including power point presentations, for True Colors, Study Skills, Soft Skills and Test Taking Skills classes, as well as for some of the remedial math and reading courses she teaches, and finding accommodations for disabled students. Findings of Fact Nos. 39-43. More than half her time is spent teaching students remedial skills in Math and English.⁴ Finding of Fact No. 39. Like the work of the Special Needs Coordinator determined by the Secretary to be a professional employee in *BCCC E.A. v. BCCC*, at p. 75, Eastling's work providing physical accommodations and learning aids for students with a disability is the work of a professional employee. This work is intellectual in nature and varied in character as opposed to routine mental, manual,

⁴ Unlike the position of Coordinator of Academic Assistance—Learning Resource Center, determined by the Secretary's Designee in *KCKCC F.A./KNEA v. KCKCC* not to qualify as a professional employee under the Act, see Initial Order, *KCKCC F.A./KNEA v. KCKCC*, Case No. 72-UCA-1-1995, pp. 8-15, the Academic Support Facilitator here spends over half her time performing remedial Math and English tutoring and other teaching-related activities. In contrast, the Coordinator of Academic Assistance—LRC position alleged by Respondent to be "nearly identical", Respondent's Post Trial Memorandum of Authorities and Arguments in Support, p. 13, to the Academic Support Facilitator position spent fifty percent of her time administering a student-to-student peer tutoring program, recruiting, training, managing, scheduling and monitoring the program's student tutors. The Coordinator of Academic Assistance—LRC had no teaching or tutoring duties herself. Initial Order, *KCKCC F.A./KNEA v. KCKCC*, pp. 11-12.

mechanical or physical work and it involves the consistent exercise of discretion and judgment. Further, the record suggests that this work was assigned to Eastling on the basis of her background and Master's degree in special education. The evidence of record further demonstrates that the evaluation of placement testing results, preparation of course materials and the teaching and tutoring in remedial Math and English performed by Eastling is intellectual in nature and varied in character as opposed to being routine mental, manual, mechanical or physical work, and involves the consistent exercise of discretion and judgment but also that the position she holds requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning. While her position description does not expressly indicate that an advanced degree is required for her position, Ms. Eastling holds a master's degree in special education. Finding of Fact No. 38. Further, her credible, uncontradicted testimony established that her job duties had grown in the years she'd held the position at ATS based upon her background in special education. Finding of Fact No. 39. Based upon the evidence of record, the conclusion could readily be drawn that Eastling's position meets the Act's definition of professional employee as one being employed by a board of education in a "professional" capacity.

The presiding officer concludes in the alternative that Eastling is employed in an "instructional" capacity. In her role as a remedial and tutoring instructor, Eastling is performing the role of a teacher, whether in small groups, or in sessions with individual students. *See, e.g.,* Initial Order, Colby Community College Faculty Alliance v. Colby Community College, Colby, Kansas, Case No. 72-UCA-4-1992, dated November 1, 1993, p. 22 (noting that "instructional capacity" encompasses one-on-one methods of instruction); Black Hawk College Professional Technical Unit v. State Educational Labor Relations Board, 150 LRRM 2681 (1995)(In

overruling decision by Illinois Educational Labor Relations Board dismissing petition for self-determination election to merge Black Hawk College professional and technical employees unit with Black Hawk College faculty unit on grounds that resulting unit would not be an appropriate one, the Court noted that vast majority of employees in the professional technical unit are professional employees including the Studies Skills Specialist, the Tutor Coordinator, and those performing supporting duties such as counseling students having difficulties in class, assisting students in job placement, assisting students needing to transfer classes, administering tests, supervising English as a second language program, designing the presentation of materials in class, and others). In the role of a teacher, Eastling is performing in an instructional capacity.

Like the other two positions here in dispute, and based on similar facts, *see* Findings of Fact Nos. 44-47, and much the same reasoning, the presiding officer finds and concludes that Eastling's position is appropriately included in the existing professional employees' bargaining unit and should be returned to said unit.

CONCLUSION

The presiding officer has given careful consideration to the issues presented by this matter. Petitioner has met their burden of proving that the employees at issue are "professional employees" within the meaning of the statute and that their return to the existing professional employees' bargaining unit is appropriate for all the reasons previously noted. As this matter came on before the Secretary of Labor, whose authority is exercised by the presiding officer, on a petition for unit clarification or amendment, and not on a prohibited practice charge, this proceeding is without authority to make whole any party aggrieved by Respondent's removal of employees from the professional employees' bargaining unit.

ORDER

IT IS THEREFORE ORDERED, that upon expiration of the parties' current negotiated agreement, Respondent and Petitioner shall amend the professional employee bargaining unit description so as to add or return said three positions, that is, the TEC Admissions Counselor, Business and Industry Coordinator, and Academic Support Facilitator, by accretion, to Respondent's professional employees' bargaining unit.

IT IS FURTHER ORDERED, that upon expiration of the parties' current negotiated agreement in effect on the date this Initial Order is issued, Respondent and Petitioner shall extend coverage of any and all applicable terms and conditions of employment to the three positions herein accreted to the professional employees' bargaining unit, that is, the TEC Admissions Counselor, Business and Industry Coordinator, and Academic Support Facilitator.

IT IS SO ORDERED.

DATED, this 17th day of February, 2012.



Douglas A. Hager, Designee of the Secretary
Office of Labor Relations
Kansas Department of Labor
401 SW Topeka Blvd.
Topeka, KS 66603

NOTICE OF RIGHT TO REVIEW

This Initial Order of the Presiding Officer is your official notice of the presiding officer's decision in this case. The order may be reviewed by the Secretary of Labor, either on the Secretary's own motion, or at the request of a party, pursuant to K.S.A. 77-527. Your right to petition for a review of this order will expire eighteen days after the order is mailed to you. See K.S.A. 77-527(b), K.S.A. 77-531 and K.S.A. 77-612. To be considered timely, an original petition for review must be received no later than 5:00 p.m. on March 6, 2012, addressed to: Chief Counsel Glenn H. Griffeth, Office of Legal Services, Kansas Department of Labor, 401 SW Topeka Boulevard, Topeka, Kansas 66603-3182.

CERTIFICATE OF MAILING

I, Loyce McKnight, Office of Legal Services, Kansas Department of Labor, hereby certify that on the 17th day of February, 2012, a true and correct copy of the above and foregoing Initial Order of the Presiding Officer 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:

David M. Schauner, Chief Legal Counsel
KANSAS NATIONAL EDUCATION ASSOCIATION
715 SW 10 th Street
Topeka, KS 66612
davis.schauner@knea.org
Attorney for the Petitioner

Deryl W. Wynn, Attorney at Law
MCANANY, VAN CLEAVE & PHILLIPS, P.A.
707 Minnesota Avenue, Fourth Floor
Kansas City, KS 66101
dwynn@mvplaw.com
Attorney for the Respondent



Loyce McKnight