

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. CC-06-10

(REPRESENTATION PETITION)

LABORERS' INTERNATIONAL UNION)	
OF NORTH AMERICA, PROFESSIONAL)	
LAW ENFORCEMENT OFFICERS)	
ASSOCIATION, AURORA,)	
)	
Petitioner,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
CITY OF AURORA,)	
)	
Respondent.)	
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Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on October 20, 2010, following a hearing on September 14, 2010, in Salem, Oregon. The record closed at the conclusion of the hearing.

Lon Holston, Field Representative, Laborers' International Union of North America, Local 483, Portland, Oregon, represented Petitioner.

Dennis E. Koho, Attorney at Law, Koho & Beatty, PC, Keizer, Oregon, represented Respondent.

On August 3, 2010, Laborers' International Union of North America, Professional Law Enforcement Officers Association, Aurora (Association) filed this petition seeking to certify a bargaining unit without an election pursuant to OAR 115-025-0000(1)(c). The bargaining unit proposed in the petition consists of the City of Aurora (City) "Professional Law Enforcement Officers, Patrol."

The City filed timely objections to the petition, asserting that (1) the position currently held by Officer Scott Reilly should be excluded from the bargaining unit because it performs substantial supervisory and managerial duties; and (2) if that position is excluded from the unit, the one remaining position would not qualify as an appropriate bargaining unit.

The issues in this case are:

1. Should Scott Reilly be excluded from the bargaining unit because he is not a public employee within the meaning of ORS 243.650(19)?
2. If Reilly is excluded from the bargaining unit, is the petitioned-for bargaining unit an appropriate unit within the meaning of ORS 243.650(1)?

RULINGS

The rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization which petitioned to represent a bargaining unit of employees at the City, a public employer. The petitioned-for unit includes two professional law enforcement officers (patrol officers) at the City.
2. The City is operated by a Council, which consists of four members and a Mayor.¹ The Mayor is the City's primary administrator. The Mayor assigns each City department a Council member as a liaison. The Council liaison provides support and assistance to the department's supervisor on personnel matters, budget, policies, and similar issues.

Background

3. Prior to March 2, 2009, the City's Police Department (Department) consisted of a full-time police chief and one full-time patrol officer. The Department also operates a reserve police officer program, which is made up of volunteers who are not employees of, or paid by, the City. Some of the Department reserve officers have prior law enforcement experience and others do not.

¹Because the Mayor is a member of the Council, any subsequent reference to actions or decisions by the Council includes the Mayor.

4. Scott Reilly worked as an officer with the Columbia County Sheriff's Office from 1997 to 1999. Reilly was a volunteer in the Department's reserve officer program from 1999 until early 2002, and again beginning in March 2007.

5. Sometime near the end of February 2009, the then-police chief terminated his employment with the City. Effective March 2, 2009, the City employed Reilly as the Interim Police Chief.

6. During Reilly's employment as the Interim Chief, the Council decided to reorganize the Department to consist of a part-time chief and two full-time officers in order to provide more patrol coverage. On June 1, 2009, the City hired Michael Reedy as its part-time Police Chief. The City also hired Interim Chief Reilly as one of the Department's two full-time officers. The other full-time officer position is held by Daniel Marshall.

7. Effective August 6, 2010, Mayor Jim Meirow appointed himself as the Department's Council liaison.

8. The Department receives grant funding from outside agencies, such as the Marion County Sheriff's Office and the Oregon Department of Transportation (ODOT). These grants include the ODOT Seatbelt Grant, the ODOT Driving Under the Influence of Intoxicants (DUII) Grant, and the Marion County Sheriff's Office Multi-Agency Traffic Team (MATT) Grant. The grants provide funds from which the City can pay overtime wages to officers for providing the services specified in the grant.

Job Classifications, Duties, and Responsibilities

9. Chief Reedy works 24 hours a week. This limits the amount of Reedy's contact with the officers, the dispatch center, and the court. The police chief's job description, which is dated February 19, 2009, states in part:

"GENERAL STATEMENT OF DUTIES

"The Police Chief plans, organizes, directs and coordinates the enforcement operation and activities of the City Police Department in law enforcement and in the protection of life and property. Communicate [*sic*] with public in matters of public safety and concern. Develops departmental goals policies and procedures. Plans and administers the annual departmental budget.

“SUPERVISION RECEIVED

“Works under the general direction of the Police Liaison and the City Council who participate in the establishment of major objectives and review work for effectiveness and results obtained. Cooperates with Department Head Staff.

“SUPERVISION EXERCISED

“Exercises direct supervision over immediate subordinate position which includes review of employee performance. Provides recommendations to the City Council on hiring, promotion, disciplinary actions and or termination of subordinate personnel.

“* * * * *

“SUPERVISORY RESPONSIBILITIES

“Provides regular supervision to regular and reserve law enforcement and office personnel, typically over 10 and seldom exceeding 4 Full Time Employees on an annualized basis.”²

10. The patrol officers’ primary responsibilities are to investigate pending criminal matters, patrol the City, and enforce traffic and criminal laws. The full-time officer’s job description provides in part:

“Position Definition: Performs law enforcement and crime prevention work including patrol and investigations. Enforces traffic laws and state and local laws and ordinances; and participates in community and individual neighborhood activities. May be required to work rotating shifts and weekends as assigned by the Chief of Police. Performs related work as required, and should have basic computer skills to complete computer generated police reports and operate mobile data terminal upon completion of LEDS Inquiry certification.

²The portions of the police chief’s job description included here are verbatim.

Supervision Received: Works under the general supervision of the Chief of Police who reviews work methods through personal inspection and discussion. May occasionally overlap a shift of another F/T or solo status reserve officer(s) with the Aurora Police Department.

Supervision Exercised: Supervision is not a normal responsibility of positions in this classification. May be required to assume responsibility of reserve officer(s), when so assigned by Police Administration.

Essential Functions:

“Writing detailed and concise reports, proficient use of duty weapons, vehicles and equipment. Understanding and executing oral and / or written instructions; remaining courteous but firm with the public; handling of firearms and application of physical force in emergency situations; and operate the police car. Ensuring that order is maintained, laws and ordinances are equitable [*sic*] enforced, thereby protecting the Constitutional rights, lives and property of the public. Assign and evaluate work of Reserve Officers.* * * .”³ (Emphasis in original.)

11. The City has a comprehensive personnel policy manual. This manual defines the terms supervisor and manager as a “City Officer, Department Commissioner, Mayor or Council.” It defines the term “City Officer” as the “City Recorder/Treasurer, Police Chief and Public Works Manager.”

12. **Hiring:** The Council has the final authority for all hiring decisions. Currently, the Council designates the Chief, a representative of the Chief, or the Council liaison to review applications for open Department positions. The selected applicants are then interviewed by a hiring panel, which makes a recommendation to the Council. Chief Reedy and the Council liaison were the interview panel members during the Department’s last two hiring processes.

³The portions of the full-time officer’s job description included here are verbatim.

13. Assignment and Direction of Work: The Chief has the authority to assign and direct an officer's work. When the Chief is not on duty, Officer Reilly contacts the Chief if he needs assistance. The officer on duty is usually responsible for supervising a crime scene.

14. Scheduling: The patrol officers work a regular schedule of 40 hours per week on separate shifts with little overlap. Chief Reedy establishes and posts the full-time officers' work schedules. The officers' regular schedules are generally the same unless there is a need to adjust for time off or training. Reedy also establishes the schedule for the reserve officers. He sends an e-mail each month to the reserve officers requesting their general availability and their ability to cover specific vacation and training hours. Reedy then schedules the reserve officers accordingly. As Interim Chief, Reilly was responsible for establishing the Department's work schedule and continued to do so for one or two months after he became an officer. Reilly sometimes notifies the Chief of Officer Marshall's availability for work because Reilly has more contact with the Chief than Marshall.

15. Prior to August 2010, the officers worked nine-hour shifts. In August 2010, Mayor Meirow notified the Chief and officers that the Council was directing the officers to work five eight-hour work shifts per week, with no more than a 30-minute overlap. Meirow also notified them that vacations, training, expenditures, and work schedules would now be subject to his approval. Reilly provided input to Chief Reedy on the implementation of the new schedule.

16. Approval of Overtime/Compensatory Time: Currently, due to budget issues, officers are not authorized to receive overtime pay during their regular work week, but instead accrue compensatory time. If an officer needs to work past his scheduled shift to complete an investigation, he contacts the Chief for authorization and then adjusts his schedule later in the week to account for the hours worked beyond his shift. In August 2010, Mayor Meirow notified the Department that such compensatory time was subject to his approval.

17. Officers may also be assigned to work hours in addition to their regular 40-hour work week under the grant-funded programs. When the Department secures a grant, Chief Reedy notifies the officers of the amount of funds available and requests their availability for such work. Reedy then schedules the officers' hours based on an officer's rate of pay and available funds. Officer Reilly has told the Chief about Marshall's availability to work under a grant, but does not direct Marshall as to which hours he is to work. Officers receive overtime pay for working the grant-program hours. In August 2010, Meirow notified the Department that any overtime worked pursuant to grant programs or the ODOT truck inspections was subject to his approval.

18. Evaluate and Reward: Under the policy manual, evaluations are conducted by an employee's supervisor in June of each year, and then reviewed and signed by the Council liaison. Any merit increases based on the evaluations are effective in July.

19. Discipline and Discharge: The policy manual outlines a progressive discipline procedure, which includes written or verbal reprimands, suspension, and termination. Under the policy manual, a supervisor may demote or reduce the pay of an employee with the approval of the Council liaison or the Council. A supervisor initiates the process for an employee's discharge by consulting with the Council liaison or the Council to determine if there is cause for discharge. If it is determined that cause exists, the employee is suspended with or without pay and provided a termination hearing. The hearing is conducted by the Mayor, who makes the decision to either terminate the employee or modify the proposed discipline. The Mayor reports his decision to the Council.

Chief Reedy has not discharged any employees during his employment with the City. He understands that he would initiate any discipline process by investigating the situation, determining the appropriate level of discipline, and providing this information to the Mayor. Reedy believes he can implement lower levels of discipline, but that the Council has the final authority to suspend or discharge employees. If Officer Reilly brought a recommendation for discipline to the Chief, the Chief would investigate the situation to determine the facts and consider Reilly's recommendation in the process of developing his own recommendation.

20. Layoff and Recall: Under the policy manual, the Council has the authority to layoff and recall employees. The manual provides that employees are generally laid off based on seniority within a department, work group, or job classification. The manual also provides that qualified, laid-off employees, who have a satisfactory employment record, have preference to be hired into the same or similar position from which they were laid off for one year following their layoff.

21. Transfer and Promote: The Chief has the authority to transfer and promote employees.

22. Adjustment of Grievances: Grievances which are not directed at a supervisor are handled by the City's Human Resources Department. The policy manual establishes a problem-solving process for grievances directed at a supervisor. Under the process, after the employee attempts to resolve an issue with their supervisor, the employee files a written statement regarding the problem with the Mayor, with a copy to the Council liaison. The Mayor provides the employee a written response within five working days, unless more time is needed. Such grievances also could be directed to the Council liaison or the Council.

23. Reserve Program: Chief Reedy supervises the reserve officers. Officer Reilly is the Reserve Officer Program Coordinator. As Coordinator, Reilly oversees the reserve officers' work to ensure that they are following proper policies and procedures and performing their duties appropriately. Reilly is also available to answer reserve officers' questions. Reilly views his role as a mentor and coach. Reserve officers must ride with another officer for a period of time before they can operate their own vehicle, and may ride with another officer if they are scheduled during a time when there are no vehicles available. Reserve officers ride with both Reilly and Marshall, who also mentor and coach reserve officers. Reserve officers are notified of their need to testify by an e-mail from the court. Officer Reilly was previously copied on these e-mails, but had not received these e-mails for several months prior to this hearing. Chief Reedy also does not get a copy of these e-mails. Chief Reedy, Officers Reilly and Marshall, and the reserve program sergeant coordinate the performance review of the reserve officers.

24. Budget Preparation: Chief Reedy is responsible for the preparation of the Department's budget. Since Reedy was new when he prepared his first Department budget, he requested Reilly's assistance. Reedy prepared a draft of the budget based on the prior year's budget and then reviewed it with Reilly. As a result of Reilly's input, Reedy made a few changes to the budget. At Reedy's request, Reilly attended the first budget committee meeting with him and reviewed the Department's budget for the Council and the committee. Reedy asked Reilly to do this because he was not sure what information the budget committee wanted him to present. Reilly has not attended subsequent budget meetings.

25. Citizen Complaints: Officer Reilly has been involved in investigating and resolving citizen complaints.

26. Salary: Based on the full-time officer job description, the officers are paid a salary of \$27,000 to \$30,000 per year.

27. Benefits: Under City policy, all full-time employees are provided paid holiday, sick, bereavement, and vacation leaves. They also receive employer-paid medical, dental, and hospital insurance. Employees are also eligible for participation in the Oregon Public Employees Retirement System after a six-month waiting period.

28. Grant Applications: Reilly has been responsible for filling out the applications for certain grants since March 2007, when he was still a reserve officer. Under Chief Reedy, when the Department received a publication identifying available grant funds, Reilly filled out the application using the information from the prior year's application and current data. Reilly reviewed the completed application with Reedy, who

also has experience in applying for grants. The Chief then reviewed the application with the Council liaison and/or Council before it was submitted. The Seatbelt and DUII grants each took Reilly less than an hour to complete. Reedy recently told Reilly that he (Reilly) is no longer authorized to complete grant applications.

29. Fix-It Ticket Program: When officers have ideas for new methods or programs for the Department, they present these to the Chief. If the Chief decides a program might work, he either pursues it himself or designates an officer to do the work. When Reilly was acting as court bailiff one day, the judge told him about a correctable violations program called Fix-It Ticket, which existed in several other courts in which she served. Reilly told the judge that he thought the Department would be interested in the program, so the judge sent the information about the program to Chief Reedy. Reedy then requested that Reilly complete the work necessary to implement the program, which consisted of preparing a pamphlet that provided information about the program. After Reilly provided the information he had prepared to the Chief, the Chief forwarded it to the City Recorder and/or the Council for their authorization. The Council subsequently passed a resolution adopting the program, and the judge signed an order implementing the program.

30. Local Increase in Fines: Reilly was involved in the City's decision to increase local fines after the Mayor raised the idea. After Reilly consulted with the Chief, he talked with the judge about the potential increase and gathered information about increasing fines. Reilly then provided this information to the City Recorder, and subsequently to the Council, for their approval. Reilly has more opportunity than the Chief to consult with the judge on these types of matters because he frequently appears in her court.

31. Dispatch Center: Officer Reilly is the Department's representative for the Law Enforcement Data System (LEDS). The State requires that each agency have a representative to ensure that the agency is using the system in a manner consistent with the law. Since Reilly has a working knowledge of the dispatch center and is available more frequently than the Chief, he also is the Department's contact with the dispatch center. Reilly's role is usually limited to providing information from the Chief to the center and answering questions.

32. Records Clerk Training: In late July, the Department hired a new clerk. Reilly trained the new clerk on case distribution for approximately two hours and spent 30 to 45 minutes reviewing a LEDS packet with her.

33. Reilly spends 95 percent of his work time on patrol, criminal investigation, and traffic enforcement. He spends 5 percent of his work time on other activities, such as filling out grant applications.

34. Marshall worked as an officer while Reilly was Interim Chief. After Reilly became an officer, Marshall no longer considered Reilly to be his supervisor. Marshall has never created the Department's schedule, drafted the Department's budget, or applied for a grant.

35. Mayor Meirow considers Reilly to be an invaluable employee who has done many great things for the Department. He believes that many of Reilly's duties, such as grant writing, should be done by the Chief.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. Officer Scott Reilly is a public employee within the meaning of ORS 243.650(19).
3. The petitioned-for bargaining unit is an appropriate unit.

DISCUSSION

The Association petitions to represent a bargaining unit which consists of the two law enforcement officers currently employed by the City. The City argues that one of the officers, Officer Reilly, should not be included in the petitioned-for bargaining unit because he is either a supervisor within the meaning of ORS 243.650(23) or a managerial employee. The City also points out that if Officer Reilly is excluded from the bargaining unit, the petitioned-for unit is not appropriate because it would include only one eligible bargaining unit member.

Supervisory Status

We first consider whether Officer Reilly is a supervisor under the Public Employee Collective Bargaining Act (PECBA). If he is a supervisor, he must be excluded from the bargaining unit. ORS 243.650(19).

ORS 243.650(23) defines a supervisory employee as:

“any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or

discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.”

In applying this definition of supervisory employee, “we review the evidence to determine whether the employees at issue have actual authority to take, or the ability to effectively recommend, action in any of the twelve areas enumerated in the statute,” and whether this exercise of such authority requires the use of independent judgment. *The Dalles Police Association v. City of The Dalles*, Case No. UC-7-08, 22 PECBR 995, 1006 (2009).

We conclude, without difficulty, that Officer Reilly is not a supervisory employee. There is no evidence in the record that Officer Reilly has the authority to carry out, or effectively recommend, action in any of the twelve enumerated areas of authority. The authority to hire, suspend, layoff, recall, and discharge employees and the authority to adjust grievances has been retained by the City Council and/or Mayor. In some cases, the exercise of this authority may be based on a recommendation of the Chief. The Chief has the authority to assign, direct, transfer, promote, evaluate, and issue lower levels of discipline. Recently, even the Chief’s authority to approve vacations, compensatory time, overtime, training, expenditures, and work schedules became subject to the Mayor’s approval.

The City urges us to declare Officer Reilly a supervisory employee because he oversees the reserve officer program, helped train the police clerk, helped develop and present the budget, applied for grants, worked with the court and dispatch center, and helped implement various Department programs. We disagree.

Reilly’s role as the reserve program coordinator does not qualify him as a supervisor under the PECBA. ORS 243.650(23) defines a “supervisor” as one with the authority to act, or recommend action, regarding “other employees.” The term “other employees” includes only employees “*who work for a wage or salary.*” *International Association of Fire Fighters v. LaPine Rural Fire Protection District*, Case No. UC-38-91, 13 PECBR 403, 408 (1992) (citing *Roberts’ Dictionary of Industrial Relations* (BNA, 1971)) (emphasis in original). See also *Teamsters Local 223 v. City of Gold Hill*, Case No. UP-63-97, 17 PECBR 892, 901 (1999). The Department’s reserve officers are unpaid volunteers who are not “other employees” under ORS 243.650(23).

Officer Reilly’s role in training, grant writing, acting as a conduit for information, and implementing the Fix-It Ticket and other Department programs also does not involve the exercise of any of the enumerated areas of supervisory authority under the

PECBA. Officer Reilly is clearly a very competent and experienced officer who has taken on a number of administrative responsibilities in addition to his normal patrol and law enforcement duties. However, “[a]n employee’s supervisory status is established not by demonstrating the employee’s level of expertise or degree of responsibility, but by showing that the employee exercises independent judgment in critical personnel matters.” *Laborers’ International Union of North America, Local 483 Law Enforcement Professional Association v. City of Gervais*, Case No. UC-16-08, 23 PECBR 143, 160 (2009) (citing *IAFF Local 851 v. Lane Rural Fire/Rescue District*, Case No. RC-7-03, 20 PECBR 512, 529 (2003)). None of Reilly’s administrative activities involve the exercise of independent judgment in any of the enumerated personnel matters which indicate supervisory status under the PECBA.

Administrative Affinity

The City also argues that Reilly should be excluded from the bargaining unit because he performs substantial managerial duties and therefore lacks a community of interest with the other bargaining unit member. In addressing such arguments about employees who work for public employers other than the State, we determine whether an employee should be excluded from a bargaining unit based on the employee’s administrative affinity.⁴ *Portland Community College v. Portland Community College Faculty Federation*, Case No. UC-14-00, 19 PECBR 146, 169 (2001). We will find an administrative affinity sufficient to create a community of interest distinct from other bargaining unit members when “(1) the employee formulates management policies or has the discretion to take actions that, in effect, control and implement management policies, and (2) such policies have a substantial effect on the way in which unit members perform their jobs or on their conditions of employment.”⁵ *Executive Department, State of Oregon v. Oregon Public Employees Union*, Case No. UC-7-89, 12 PECBR 59, 69 (1990).

We first note that based on Reilly’s patrol and law enforcement duties, he and Marshall clearly have a sufficient community of interest to constitute an appropriate bargaining unit. To determine whether a bargaining unit is “appropriate,” this Board

⁴Whether to exclude managers who work for the State of Oregon is addressed by statute. ORS 243.650(19) specifically excludes “managerial employees” from the definition of the term public employee; this statutory exclusion, however, is limited to managerial employees of the State of Oregon. ORS 243.650(16).

⁵For an overview of prior Board cases addressing whether a sufficient administrative affinity exists to exclude an employee from a bargaining unit, see *Portland Community College Faculty Federation*, 19 PECBR 146, 171-172.

considers “such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees.” ORS 243.682(1)(a). Under Board rules, “community of interest” includes “similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, common supervisor, etc.” OAR 115-025-0050. We apply these factors here. The evidence shows that Reilly and Marshall are employed in the same position, use the same skills in carrying out their duties, and have at least 95 percent of their duties in common. They also work under the same supervisor and have the same chain of command. While they do not work on the same shift, their regular schedule is 40 hours a week and they have the same opportunity for compensatory time and overtime. As full-time officers, Reilly and Marshall also have the same salary range, leaves, and benefits.

We further conclude that none of Reilly’s other work creates an administrative affinity that is sufficiently distinct to exclude his position from the bargaining unit. Reilly clearly performs some useful, although very limited, administrative work for the Department. He acts as a conduit for information between the Chief and Marshall, the court, and the dispatch center, mostly due to the limited hours worked by the Chief. But only the Chief or the Council can decide to pursue new policies or programs resulting from these contacts. For example, Reilly’s involvement in the Fix-It Ticket Program was essentially limited to passing on the judge’s idea to the Chief, and then designing a pamphlet under the direction of the Chief and Council. His involvement in the local increase in fees was similarly limited. Reilly also did not develop the Department’s budget, but merely assisted the Chief during his transition into his new position. Reilly’s preparation of grant applications was routine and essentially consisted of filling out paperwork. The evidence does not show that Reilly formulates or controls management policies in a manner that has a substantial impact on a unit member’s job performance or working conditions.⁶

ORDER

1. An appropriate bargaining unit is: All Professional Law Enforcement Officers, Patrol, of the City of Aurora.

2. The Elections Coordinator shall check the showing of interest against the original list of employees provided by the City. If she determines that a majority of the

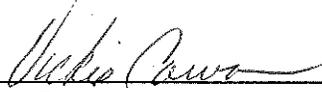
⁶The City’s final argument is dependent on its first two. It asserts that if Reilly is excluded as either a supervisory or managerial employee, the remaining unit of one member would be inappropriate. We have rejected the underlying premise of this argument: Reilly is appropriately included in the bargaining unit. The petitioned-for unit includes two employees, so we need not address the City’s contention that a one-person unit would be inappropriate.

employees in the designated bargaining unit wish to be represented by the Association for purposes of collective bargaining, this Board shall certify the Association as the exclusive representative of the bargaining unit.

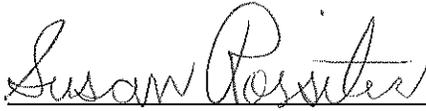
DATED this 7 day of December 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.