

The issue in this case is: Is the proposed bargaining unit appropriate?

RULINGS

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

FINDINGS OF FACT

Introduction

1. The City is a public employer.
2. The Association is a labor organization that represents a bargaining unit of all Department employees.
3. The Association and the City were parties to a collective bargaining agreement in effect from July 1, 2005 to June 30, 2008.
4. The Department has one chief of police, one captain, three patrol sergeants, one detective sergeant, two detectives (officers), fifteen patrol officers, one Department secretary, one administrative secretary, and one part-time evidence officer. The four sergeants oversee the work of the 15 patrol officers and the two detectives. The four incumbent sergeants have held their positions since 1994, 1996, 2003, and October 2007.

Hiring Employees

5. Under the City charter, the City council is responsible for hiring the municipal judge, the City attorney, and the City manager. The City manager is responsible for all other hires, promotions, and terminations.
6. The Department hiring process begins when an applicant takes a test administered by the Department. A board—composed of a captain, a sergeant, a community member and, occasionally, a patrol officer—interviews those applicants who receive high scores on the test. The interview board scores and prepares written comments on each applicant. The scoring sheet and comments are submitted to the chief who then recommends the hiring of a particular individual to the City manager.
7. Sergeants do not have authority to layoff, recall, demote, promote, or permanently assign employees.

Responsibilities of Sergeants

8. Sergeants ensure that Department policies and procedures are carried out.

The Department policy and procedure manual specifies that shift sergeants have the following administrative responsibilities:

“Assist in the development of and direct activities that assure the accomplishment of the department goals and objectives.

“Establish shift goals and objectives and the direction of activities toward the accomplishment of said goals and objectives.

“Scheduling of personnel to ensure adequate staffing levels.

“Identification and analysis of public safety problems and trends on the shift.

“Awareness of community issues and problems which impact on the delivery of police services.

“Evaluation of personnel performance, employee discipline and other labor relations matters.

“Inspection of operational activities in order to determine compliance with, and effectiveness of, procedural modifications when required.

“Inspection of shift members, assuring compliance with department dress codes and equipment regulations.

“Evaluations of shift members’ performance.

“Review of all reports prepared by shift members, particularly those involving arrests and major crimes.

“Provide direction and coordination of non-operation branch members activities when required in order to ensure department effectiveness.

“Provide training for and oversee the training of all members of the shift.”

The Department policy and procedure manual specifies that shift sergeants have the following operational responsibilities:

“Direction of shift activities, including patrol functions, investigations, crime prevention, community relations and special projects.

“Design and implementation of enforcement and prevention programs.

“The shift Sergeant shall ensure the following:

“Reassignment of personnel from one area to another or to special duties as required: i.e. investigations, special enforcements, etc.

“Hiring of personnel on overtime or adjust shift coverage, if needed, to provide minimum staffing.

“Approval of overtime necessary for a member to complete an assignment.

“Investigate complaints of citizens against officers.

“Supervise and coordinate major incidents.

“Keep the Chief of Police and Captain informed of major incidents, problems, anticipated problems and events of interest as they arise during the shift. Include personnel problems and performance that should be recognized.

“Ensure personnel adhere to all policies and procedures.

“Cover and/or take all calls as necessary, according to workload demands.

“Command officers are the Chief of Police, Captain, and Sergeants.

“Immediate command of field operation during incidents which require command coordination.

“Immediate on-scene evaluation of incidents handled by field Sergeants providing direction, coordination and support when necessary.

“Provide timely feedback concerning field operations through daily written reports, oral reports and participation in staff discussions when appropriate.

“Provide direction and coordination of program activities established by the patrol Sergeant.”

9. Sergeants direct the daily work of the Department.

The chief and captain are on duty during the day shift (8:00 a.m. to 5:00 p.m.), Monday through Friday. Sergeants are the highest ranking officers on duty during all other shifts and run the Department during these shifts. A sergeant is on duty during the Monday and Friday day shifts, but not during the Tuesday through Thursday day shifts. Accordingly, the chief, captain, and detectives' sergeant try to be available for general assistance and guidance to the patrol officers on Tuesday through Thursday.

All emergency calls to the Department are referred to a patrol officer, who responds to the call. Occasionally, the patrol officer conducts an initial investigation. The patrol officer prepares a report and submits the report to the shift sergeant. The shift sergeant may direct the patrol officer to add to or correct the case report. The shift sergeant may also direct the patrol officer to take additional action such as conducting further investigation.

Once the report is approved by the shift sergeant, it is transferred to the detective sergeant who may refer it back to a patrol officer for additional investigation, assign the case to a detective for further action, or send the report to another appropriate destination. When a detective completes his investigation, the detective gives the report

to the detective sergeant for approval. The detective sergeant may direct the detective to conduct additional investigation or add to or correct the report. The detective sergeant trains detectives and assigns cases to the detectives.

10. Shift sergeants establish the shift priorities, including staffing and assignment of cases and tasks. During a shift, the sergeant has authority to assign, move, and reassign patrol officers as warranted by circumstances or events. The Department has minimum staffing requirements, and sergeants may call in officers or approve overtime if necessary to maintain proper staffing levels.

11. Sergeants have authority to grant time off, and approve patrol officers' sick leave and vacation requests.

12. The Department requires patrol officers to complete a use of force report whenever the officer uses force. Sergeants responsible for review all these reports.

13. A sergeant heads the emergency response team which consists of two sergeants and six patrol officers. The sergeant maintains equipment for the team, trains team members, and develops tactics and procedures for incidents. Only the chief or captain can call out the emergency response team. Once that decision is made, the emergency response sergeant determines how the team is to be used and what tactics or procedures are to be employed by the team.

Evaluations

14. Shift sergeants prepare monthly written evaluations for each of the three or four officers on the sergeant's shift. There is no standard format for these evaluations, but the evaluations usually contain a review of the officer's activities, including the number of tickets, arrests, calls, cases, and days worked. The monthly evaluation typically notes any special accomplishments or deficiencies, and contains an overall assessment of the officer's performance. After the sergeant discusses the evaluation with the officer, both the sergeant and officer sign it. The final evaluation is then sent to the captain and placed in the officer's personnel file.

The detective sergeant regularly evaluates the detectives, but does so less frequently than the shift sergeants.

15. Sergeants participate in the annual evaluations of all patrol officers. The four sergeants and the captain meet as a group at the beginning of each year in order to complete the annual evaluation for each officer, which is based on the officers'

performance during the previous year. The sergeants and captain review the officer's personnel file, the officer's monthly evaluations, the officer's past annual evaluations, and documentation of any disciplinary action. The captain and sergeants reach consensus on their assessment of each officer and complete an annual evaluation form, which the sergeants and captain sign.

On one or two occasions, the captain changed the sergeants' comments about an officer on the evaluation form. However, these incidents involved changes in the tone rather than the substance of the sergeants' assessment.

16. When preparing an evaluation form for a probationary officer, sergeants recommend whether the officer should be granted permanent status. Probationary officers who have difficulty with job performance usually come to the attention of the sergeants and captain, and their problems are typically addressed during the probationary period. On one or two occasions, the Department extended an officer's probationary status so that the officer could demonstrate additional improvement in the officer's job performance.

17. An officer must receive a successful annual evaluation in order to receive a step pay increase on the salary schedule

Overtime

18. Sergeants approve overtime for the officers, both when an officer has already worked overtime or when an officer requests prior authorization to work overtime. After a sergeant approves an overtime request, the sergeant submits the request to the captain

Sergeants are required to report overtime abuse or violations of overtime policy to the captain or chief.

19. On May 19, 2005, the captain issued a memorandum to "All Supervisory Personnel" (sergeants) regarding "Proper Action to Correct Excessive Overtime Use."

"I have consulted with the Chief and here is how we are going to deal with the issue of officers taking too much time to complete reports, resulting in unnecessary overtime.

“When a Sergeant receives an overtime slip from any officer that seems excessive he will pull the associated documentation to see if the overtime is justified. Let’s say you have three hours overtime for one arrest report. You pull the case file and find a two and half page arrest report. You need to sit that officer down as soon as possible and discuss the situation with him. Did he get called out to cover graveyard twice while he was trying to complete the report or other unusual circumstance? If not you tell him he is taking to [sic] much time to complete reports. It is fair to tell an officer that other officers with less tenure than him complete reports on a timely basis and he does not.

“You then tell the officer you are going to mention on his monthly evaluation that he needs to complete reports more quickly and failure to do so is ‘*Unsatisfactory Performance*’ which is a procedural violation. Attach a copy of the OT slip and the report and forward it to me. The monthly evaluation entry should read something like ‘I spoke to Officer Smith about an overtime request for three hours dated 05/20/05 he submitted in connection with case #05-0000. I informed Officer Smith that three hours overtime was excessive for a two page report of this level of complexity. I encouraged Officer Smith to complete his reports on a timely basis. I told him that he needed to improve and that failure to do so could be considered *unsatisfactory performance*.’

“The key words to use verbally and in the comment on the monthly evaluation is *unsatisfactory performance*.

“So the bottom line is: be watchful of overtime you approve that seem excessive and document the needed correction action.

“These notices would be considered written warnings and if a pattern of unsatisfactory work performance continues action could ultimately be taken against the officer who fails to improve.

“If you need further direction see me or the Chief.”
(Emphasis in original.)

Discipline

20. Article 8, Section A.6 of the collective bargaining agreement specifies disciplinary steps as: “written reprimand, suspension without pay, demotion to a lower-paying classification and discharge.”

21. The Department policy and procedure manual specifies that sergeants have authority to take corrective action short of a written reprimand. Sergeants regularly counsel employees and have issued verbal and written warnings. The chief is responsible for imposing more serious forms of discipline.

22. Sergeants are authorized to suspend and have suspended an officer pending an investigation, when the sergeant believes that the officer may have violated Department “rules, standards, policies, duties, or [the] law.” Among the reasons for which a sergeant might suspend an officer are:

“Tardiness in reporting for duty; failure to comply with uniform and equipment regulations; being intoxicated or having alcohol on his breath; inattention to official business; insubordination; and serious abuse of Police Department equipment. Other actions could be when an officer is involved in a critical incident such as an officer involved shooting or other traumatic incident.”

When a sergeant suspends an officer, the sergeant must notify the captain or chief as soon as possible and file a complaint against the officer. On those infrequent occasions when both the captain and chief are unavailable, the chief designates a particular shift sergeant or detective sergeant to handle such events.

23. On February 11, 1997, the chief directed a sergeant to investigate an incident involving intoxicated officers JC and ST. The sergeant completed the investigation and recommended that the chief reprimand the officers in writing. The chief followed this recommendation.

On October 25, 2007, a sergeant reported to the chief that officer JR had improperly “run” a license plate, *i.e.*, checked on the status of a vehicle license through the police computer system, that belonged to a vehicle parked outside the home of JR’s

ex-wife. The sergeant made no recommendation concerning discipline in his report. Based on the sergeant's report, the chief reprimanded JR in writing.

24. Citizens regularly complain to the Department about patrol officers' conduct. These complaints are directed to the captain, who then decides whether to investigate the complaint himself or to assign the complaint to a sergeant for investigation. If assigned to do so, the sergeant investigates the complaint and prepares a report for the captain and chief. As part of the report, the sergeant concludes whether the complaint is unfounded or whether the officer violated a Department rule, policy or procedure. The chief has consulted with the captain, the sergeant, and occasionally the officer who was the subject of the complaint, before acting on the complaint. On numerous occasions during the past several years, superior officers have followed a sergeant's recommendation that no action be taken against an officer because the sergeant concluded the complaint to be unfounded.

Grievances

25. Article 19 of the collective bargaining agreement provides for a four step grievance procedure. At Step One of the grievance procedure, the grievant must present the grievance to his or her immediate supervisor. A grievance unresolved at Step One may be presented to the chief at Step Two, and the City Manager at Step Three. The Association may demand arbitration for a grievance that is unresolved at Step Three.

26. The City considers the immediate supervisor specified in Step 1 to be the sergeants. There have been only two grievances filed since 1975.²

The most recent grievance occurred in June 2006. On June 29, 2006, the Association submitted a Step 1 grievance (over a denial of vacation) to the chief. The chief refused to accept the grievance and forwarded it to Sergeant Portwood. On July 3, 2006, Sergeant Portwood wrote to Officer BL:

"Re: Step 1 Grievance/Priority Vacation Denial 6/27/06

"* * * * *

"I received a copy of your grievance written by the Associations [sic] attorneys from Chief Waterbury on

²The record contains no information regarding the second grievance filed during the period from 1975 through 2008.

June 30, 2006. Although I never saw your vacation request, I was your immediate supervisor on the date it was submitted.

“As you are aware, the decision to deny your request for priority vacation was made at a higher level than [sic] that of shift supervisor. Therefore, there is nothing I can do to resolve this issue. The grievance in its entirety remains unresolved at this level.”

27. Some sergeants testified they considered themselves to be a supervisor and some testified they considered themselves to be a leader.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Department sergeants are supervisors and the proposed bargaining unit is not appropriate.

DISCUSSION

The fundamental question in this case is whether the sergeants are supervisors under the Public Employee Collective Bargaining Act (PECBA)³ If the sergeants are supervisors, they must be excluded from the bargaining unit under ORS 243.650(19).

³In its objections, the City also asserts that the sergeants are confidential employees. ORS 243.650(6) defines a confidential employee as “one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining.” The issue of confidential status was not presented at the hearing and the City does not make any arguments regarding this issue in its post-hearing brief. Since there was no evidence that demonstrates the sergeants have any role in formulating, determining, or effectuating collective bargaining policies, we cannot conclude that the sergeants are confidential employees.

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.”

Under this definition, 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. In addition, we decide whether the employees’ exercise of authority requires the use of independent judgment.

We begin our analysis here by examining the sergeants’ authority to hire, fire, transfer, promote and reward employees.⁴

Hiring

The only role Department sergeants have in the hiring process is to serve as a member of a panel that interviews and scores applicants. We have found that service on interview panels is insufficient to establish hiring authority. See *Washington County Police Officers Association v. Washington County Sheriff’s Department*, Case No. C-49-84, 8 PECBR 7973, 7986 (1985) (a sergeant’s voice as a single member of a panel is “far too diluted and removed from the actual decision to be considered an effective exercise of independent judgment”(emphasis in the original)), and *Tualatin Police Officers Association v. City of Tualatin*, Case No. UC-61-89, 12 PECBR 413 (1990) (it is difficult

⁴Under the current definition of a supervisor, adopted by the legislature in 1995, we consider an employee’s exercise of authority in all 12 areas listed in the statute, along with the employee’s ability to use independent judgment in that exercise of authority. However, we have adopted private sector precedent under the National Labor Relations Act (NLRA). We utilize the approach taken by the National Labor Relations Board (NLRB), where “the various indicia [of supervisory authority] often are regarded more like the denizens of Orwell’s Animal Farm in that some indicia are ‘more equal’ than others.” *Deschutes County Sheriff’s Association v. Deschutes County*, Case No. UC-62-94, 16 PECBR 328, 339, *on reconsideration from* 15 PECBR 796 (1995). Consequently, we typically begin our consideration of supervisory authority by considering the major statutory areas—the ability to hire, fire, transfer, reward, promote, and discipline employees.

to determine a sergeant's influence in a hiring decision when the sergeant is part of panel in which other, superior officers participate).

Based on this record, we conclude that Department sergeants have no authority to hire or effectively recommend the hiring of officers.

Transfer, Lay Off, Recall, Promote, and Reward

Sergeants have no authority to transfer, lay off, recall, discharge, or promote City employees. Sergeants annually evaluate officers, and a favorable evaluation is needed for an officer to advance on the salary schedule. However, the assessment of an employee's performance in the annual evaluation is based on agreement among the sergeants and the captain. As with the hiring panel, we conclude that the sergeants' voice in the group evaluation process is too diluted to constitute an exercise of independent judgment. We hold that the sergeants do not have authority to reward employees.

Grievances

Bargaining unit members have filed few grievances.

In the last 33 years, there have been only two grievances filed and only one about which evidence was presented at the hearing. In June 2006, the Association filed a grievance with the chief over his denial of vacation. The chief rejected the grievance and referred it to a sergeant for step one disposition, since the City considers a sergeant to be the "immediate supervisor" at Step One of the contract grievance procedure. In responding to the grievance, the supervising sergeant wrote that since the "decision to deny" the employee's request "was made at a higher level then [sic] that of shift supervisor * * * there is nothing I can do to resolve this issue. The grievance in its entirety remains unresolved at this level."

Here, the evidence contains a limited history of processing grievances and nothing more than a collective bargaining agreement that specifies that a sergeant is the "immediate supervisor" at Step One of the grievance procedure. In *Department of Administrative Services v. Oregon State Police Officers Association*, Case No. UC-35-95, 16 PECBR 846 (1996), we held that "[a]bsent evidence that a sergeant has the authority to affirmatively adjust a grievance, we are not prepared to conclude that their role in the grievance process is anything other than routine paperwork not requiring the use of independent judgment." *Id.* We have no evidence that Department sergeants have any actual authority to adjust a grievance. We conclude that sergeants exercise no independent judgment in the area of grievances.

Discipline

Sergeants are authorized by Department policy to counsel and correct employees, and to issue oral reprimands and written warnings. Sergeants understand they have the authority to discipline officers. Sergeants are also authorized to suspend an officer pending an investigation of that officer's conduct, if the sergeant determines that the conduct violates Department rules, standards, policies, or the law. The chief or captain directs sergeants to investigate citizen complaints about officers. In reporting about an investigation to the chief, a sergeant includes a recommendation as to whether the complaint is founded or unfounded. The record indicates that the sergeant's recommendations are often followed. The record regarding sergeants' recommendations for discipline more serious than an oral reprimand is inconclusive. At the hearing, evidence was presented regarding two disciplinary matters. In 2007, the sergeant reported to the chief that officer JT improperly ran a license check on a vehicle; the sergeant made no recommendation regarding discipline in his report. The chief subsequently reprimanded the officer in writing. In 1997, the chief directed a sergeant to investigate an incident involving two officers. The sergeant did so, and recommended that the chief reprimand the two officers in writing. The chief followed the sergeant's recommendation. In *Deschutes County Sheriff's Association v. Deschutes County*, 16 PECBR at 328, we found that sergeants had limited authority to suspend deputies—for one day, with pay—if the sergeant found the deputy unfit for duty. We also found that the sergeants had authority to orally reprimand deputies. We concluded:

“It is significant * * * that sergeants are expected to, and do, exercise independent judgment in deciding whether to suspend deputies. The grant of that degree of authority in one aspect of discipline tends to imply that the Department allows and expects sergeants to exercise similar discretion in deciding whether a situation should be rectified with an oral reprimand or whether more severe discipline to be imposed by a superior officer is necessary. Under circumstances presented by this case, we conclude that the sergeants' role in the discipline of other employees is not merely routine or reportorial. Although it is a close question, we find that the Department's sergeants exercise sufficient disciplinary authority to be supervisors under the statute.” *Id.* at 341.

The disciplinary authority sergeants exercise here is comparable to the authority exercised by the sergeants in *Deschutes County*. Department sergeants can decide when to suspend officers, when to orally reprimand them or issue them a written

warning, and when to refer a matter to a superior officer for more severe discipline. We conclude that the sergeants have enough independent power to discipline employees to qualify as supervisors.

Assign and Responsibly Direct Employees

Our conclusion that sergeants are supervisors because of their disciplinary authority is strengthened (as it was in *Deschutes County*) by evidence of sergeants' extensive role in assigning and directing employees. Sergeants almost single-handedly manage the day-to-day operation and administration of the Department. Sergeants assign work to deputies, establish shift priorities, and maintain minimum staffing levels by authorizing overtime or calling in additional deputies. Sergeants also approve officers' vacation and leave requests, and regularly evaluate officers.

In *Teamsters Local 206 v. City of Reedsport*, Case No. UC-46-98, 18 PECBR 189 (1999), we concluded:

“While shift scheduling is done by the management team, as the highest ranking officers on shift, sergeants have the authority to assign and direct the day-to-day activities of members of the bargaining unit. They exercise independent judgment in so doing. They may independently authorize overtime on a given shift, and occasionally they may authorize leaves of absences. * * * These facts show that sergeants exercise supervisory authority in the areas of directing and assigning employees.” *Id.* at 197.

No other Department supervisor routinely directs officers in carrying out assignments and executing tasks. This is the principal function and responsibility of the sergeants.

Here, we find that sergeants have independent authority to assign and direct officers comparable to the authority sergeants exercised in *Reedsport*. Accordingly, we conclude that they have supervisory authority in this area

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In sum, we conclude that Department sergeants are supervisors, based on their effective authority to discipline and assign and direct employees, and their ability to exercise independent judgment in these areas. We will dismiss the petition.

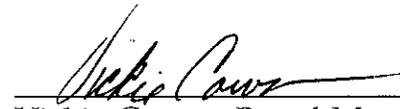
ORDER

The petition is dismissed.

Dated this 9th day of February 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.