

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-16-08

(UNIT CLARIFICATION)

LABORERS' INTERNATIONAL)	
UNION OF NORTH AMERICA,)	
LOCAL 483 LAW ENFORCEMENT)	
PROFESSIONAL ASSOCIATION,)	
)	
Petitioner,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
CITY OF GERVAIS,)	
)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on February 10, 2009, after a hearing held on October 14, 2008, in Gervais, Oregon. The record closed on December 8, 2008, with the submission of the parties' post-hearing briefs.

Barbara J. Diamond, Attorney at Law, Diamond Law, Portland, Oregon, represented Petitioner.

Frank Forbes, Labor Relations Consultant, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

On July 30, 2008, the Laborers' International Union of North America, Local 483 Law Enforcement Professional Association (Association) filed this petition for unit clarification. The Association seeks to clarify the existing bargaining unit to

include the position of police sergeant. The City of Gervais (City) filed timely objections on August 18, 2008.

The bargaining unit consists of “[a]ll strike-prohibited employees, *excluding* supervisory and confidential employees of the City of Gervais Police Department.” The issue is whether the bargaining unit under OAR 115-025-0005(2) includes sergeants, or whether sergeants are excluded because they are supervisors.

RULINGS

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

FINDINGS OF FACT

Parties

1. The City is a public employer. The Association is a labor organization and the exclusive representative of a bargaining unit of public employees who work in the City Police Department. That bargaining unit was certified by this Board on March 20, 2008, with the description of “[a]ll strike-prohibited employees, *excluding* supervisory and confidential employees of the City of Gervais Police Department.” (Certification of Representative pursuant to ORS 243.682(2)(a) (March 20, 2008) (italics in original)) The parties have no collective bargaining agreement.

2. At the time of hearing, the City Police Department consisted of Chief Paul E. Johnson Jr., Sergeant Joe Fast, and two full-time officers, Tom Courson Jr. and Jason Maddy. These individuals are all sworn, certified police officers. At times, the department also includes some reserve, or volunteer, police officers.¹ The two full-time officers and any reserve officers report to Sergeant Fast or Chief Johnson. The police sergeant reports to the police chief, who reports to the City Manager and City Council.

3. The chief of police is excluded from the bargaining unit. In 2005, Doug A Boedigheimer was the chief of police; he left the position in early 2007. Johnson began as chief in January 2008. Fast was appointed the acting chief for the period between Boedigheimer’s departure and Johnson’s arrival. At the time of hearing, Fast had been the City police sergeant for 7 years, and had been with the City Police Department for 11½ years.

¹We will refer to the two groups of police officers below the rank of sergeant as “full-time officers” and “reserve officers.”

4. The City Police Department usually operates 16 to 17 hours per day. Sergeant Fast works four, 10-hour shifts each week, overlapping only part of that time with Chief Johnson and the full-time officers.² Chief Johnson is scheduled to work weekdays from 8:00 a.m. to 5:00 p.m., but often works evenings and weekends.

Job Description and Duties

5. On or before 2003, the City adopted a job description for the police sergeant. That job description, one page in length, stated in part:

“GENERAL STATEMENT OF DUTIES: Under the direction of the Police Chief. Is responsible for the briefing and assigning of duties of patrolman on a shift; does related work as required.

“SUPERVISION RECEIVED: Works under the supervision of the Police Chief.

“SUPERVISION EXERCISED: Responsible for the supervision of officers on patrol.

“EXAMPLES OF WORK:

- “1. Briefs officers prior to tour of duty.
- “2. Assigns officers to districts and special duties.
- “3. Reviews reports of officers and reports to Police Chief.
- “4. Performs routine shift patrol duties when assigned.
- “5. Assists in the training.
- “6. Performs other duties as assigned.”

6. In late 2004 and early 2005, the City police officers sought to form a collective bargaining unit. The effort was put on hold when both of the full-time officers left City employment, leaving Sergeant Fast as the only potential bargaining unit member.

²At the time of hearing, Fast’s shift overlapped with full-time officer Courson six hours per week. Prior to his full-time position with the City, Courson had worked as a reserve officer for two other small communities for seven years, and had spent approximately one year as a deputy with the Marion County Sheriff’s Office. The other full-time officer, Maddy, was hired in August 2008. The record does not reveal the number of hours that Fast and Maddy are at work together.

7. In December 2006, with the assistance of the Local Government Personnel Institute (LGPI), the City revised the police sergeant's position description. The new version, three pages long, was in effect at the time of hearing Fast filled out paperwork and was briefly interviewed as part of creating the job description. That job description provides in part:

“GENERAL STATEMENT OF DUTIES/PURPOSE OF POSITION:

“Direct and perform law enforcement and crime prevention work including patrol and investigation. Process evidence and keep records. Interpret and enforce federal, state, and local laws. Carry out duties in conformance with Federal, State, County and City laws and ordinances. Lead and review the work of Police Officers and Reserve Officers. Attend related meetings and training.

“JOB SCOPE:

“Direct and perform law enforcement, field operations, and criminal investigations, with accountability for results in terms of methods and accuracy. Oversee, review work, and train Police personnel in the performance of their duties.

“SUPERVISION RECEIVED: Work is performed under the direction of the Police Chief, with work being reviewed primarily on the basis of results attained. Has latitude in performing regular activities related to law enforcement and criminal compliance within established procedure and policy. This position recommends policies and procedures. State and Federal rules/regulations, and organizational and departmental protocols, guidelines, and SOPs dictate actions.

“SUPERVISORY RESPONSIBILITIES: Responsible for the direction of two (2) Police Officer positions, and a varying number (up to 10) of Reserve Officers. Assign and review work, and evaluate performance. Recommend hiring, discipline, termination or other personnel actions.

“ESSENTIAL JOB FUNCTIONS/EXAMPLES OF DUTIES PERFORMED:

“* * * * *

“Oversee and direct assigned personnel, including training, assigning and reviewing work, evaluating performance, and effectively recommending other personnel actions, such as hiring, discipline, and termination. Review and maintain written records and reports submitted by Police Officers.

“* * * * *

“Provide suggestions and recommendations regarding policy and procedures, equipment, and facilities. Write proposals.

“Establish and maintain cooperative and effective working relationships with management, staff, outside agencies, and the general public to solve problems and create partnerships.

“* * * * *

“Follow all safety rules and procedures established for work areas. Ensure that all equipment used in [sic] maintained and operating properly. Maintain work areas in a clean and orderly manner.” (Emphasis in original.)³

8. Sergeant Fast received some special training for his position, including a supervisory class provided through the Department of Public Safety Standards and Training (DPSST) and a class in conducting background investigations of prospective police officers.

9. Sergeant Fast spends much of his workday responding to police calls and conducting investigations, performing background checks, checking officers’ reports, acquiring new equipment, setting up training, and seeking to expand the City’s roster of reserve officers. The chief, full-time officers, and reserve officers also perform patrol duties. Fast sometimes patrols with, and talks with, full-time and reserve officers for

³At the hearing, Sergeant Fast testified that this job description was accurate, and the City relies in part on that answer to argue in its post-hearing brief that Fast is a supervisor. Whatever Fast meant by that general answer, we conclude, based on the credible testimony of Fast and other witnesses, that Fast’s current job description does not provide an accurate basis to determine Fast’s supervisory status. We also note that an evaluation of the City’s Police Department policies and practices by its insurer in February 2008 noted that the job descriptions were inadequate and did not reflect the actual duties of the employees.

training purposes.⁴ In the past, Fast also shared maintenance of the department's evidence storage. Officer Courson was designated as the City's evidence custodian in the summer of 2008.

Hiring

10. The City uses the following process to hire new police officers. Chief Johnson receives applications submitted in response to a notice of a position. The chief reviews and culls the applications, and then directs Sergeant Fast to run background checks of the remaining applicants through Computerized Criminal History (CCH) and Law Enforcement Data System (LEDS). Whether an applicant passes a background check is usually an objective matter, determined by issues such as whether the applicant has a criminal record.

11. Applicants who pass the background check take the Police Officer Selection Test (POST), which is a standardized test prepared by DPSST. Fast proctors and grades the test using a DPSST answer key. The City has determined the percentage of correct answers required to pass the test. Fast also administers the Oregon Police Officer Agility Test (Or-PAT), a timed obstacle course test, to applicants.

12. A hiring panel interviews applicants who pass the tests. The hiring panel typically includes Sergeant Fast and may include the chief, members of the City Council, the school superintendent, or other community leaders. The panel asks questions which have been written in advance of the interview. The chief writes many of these questions; Fast obtains some of the questions from other sources. Fast hosts the panel, but does not direct the panel discussion. After the interviews, the panel ranks the applicants by using a consensus process. Chief Johnson then interviews the candidates of his choice and makes a selection. The chief's choice must be ratified by the City Manager and/or City Council. Although Johnson may consider the panel's ranking or Fast's recommendation, he is not bound by them.

13. In September or October 2005, Fast learned during a background check that an applicant had failed to disclose an assault arrest on his application for full-time police officer. Fast sent the applicant a letter informing him that this disqualified him from consideration by the City for employment. Failure to disclose such an arrest automatically disqualified the applicant.

⁴The record contains little detail about Fast's interactions with the full-time officers. It appears that he provides advice and feedback about the officers' handling of specific situations, such as traffic stops, and general police work, by talking with officers and making comments on the officers' draft reports.

14. In December 2005, Fast learned during his background investigation that an applicant for full-time police officer had medical and psychological issues which might affect his performance as an officer. Fast discussed the matter with Chief Boedigheimer and, with Boedigheimer's approval, wrote the applicant to reject his application in January 2006.

15. In June 2006, during Chief Boedigheimer's tenure, Fast conducted a background check of a reserve officer applicant. Fast discovered that the applicant had a medical problem that might affect his performance as an officer. Fast presented the issue to Chief Boedigheimer and recommended that Boedigheimer require that the applicant take a medical exam at the applicant's own expense, or that Boedigheimer hire the applicant and address any issues as they arose.⁵ Boedigheimer decided to accept the applicant.

16. In late 2007, while he was acting chief, Fast recommended that the City hire Courson as a full-time officer, which it did.

17. In late May or early June 2008, Fast recommended that Chief Johnson immediately hire Jason Maddy for a vacant full-time officer position. Fast's recommendation was based on Maddy's three years of good work for the City and the City's urgent need. Johnson decided that the Department should follow normal hiring process, in part because Johnson wanted to see what the market had to offer. At the conclusion of that process, the Department hired Maddy in August 2008.

18. In July or August 2008, Fast recommended a City reserve officer for a full-time position. The reserve officer had already passed the background, POST, and physical agility tests. Chief Johnson did not hire the candidate Fast recommended and offered the job to another individual conditioned on his passing a background test. That officer ultimately declined the offer, allegedly because he had learned that Fast favored the internal candidate for the position and feared bias in the background investigation.⁶

19. Sergeant Fast performs a variety of duties regarding the volunteer reserve officers. In December 2005, a particular reserve officer told both Fast and the chief that he would contact another law enforcement entity, "the R.O.,"⁷ about a

⁵Currently, all applicants for Gervais police officer are subjected to a psychological examination. Fast has no role in this exam and does not see its results

⁶An investigation of Fast's role in this matter did not sustain any allegations of misconduct.

⁷The abbreviation "R.O." is not defined in the record.

recovered stolen vehicle. The officer did not contact the R.O. Fast wrote the reserve officer a letter explaining that he and the chief had discussed the matter, and that while the officer could continue in his reserve position, neither he nor Chief Boedigheimer would support the officer's application for a full-time officer position.

Evaluations and Trial Service Extensions⁸

20. According to City policies, the normal trial service period for a police officer is six months. However, the City generally requires a 12 month trial service period which may be extended for even longer periods of time. Under Chief Boedigheimer, the decision to extend an officer's trial service period was based on Sergeant Fast's evaluation of the employee. Those evaluations typically included Fast's recommendation as to whether the trial service period should be extended.

21. In April 2007, the City Manager asked Sergeant Fast to ask a full-time officer at the end of his six-month trial service period to agree to extend the officer's trial service period for another six months, from 6 to 12 months.⁹

22. In April 2008, Sergeant Fast evaluated a full-time officer at the end of his six-month trial service period. Fast concluded that the officer's trial service period should be extended six months. Chief Johnson immediately rescinded the evaluation and suspended the entire evaluation process pending his revision of it. In May 2008, the prospective officer wrote Johnson that no action had been taken to disallow his change to permanent status, making him a full-time employee by default. Johnson then formally placed the officer on permanent full-time status.

23. At the time of hearing, Johnson had drafted, but not implemented, procedures and forms for a new evaluation process. The new procedures expanded the chief's role in the evaluation process, adding a requirement that the chief's comments be included in the final evaluation report. The procedures and forms also included references to evaluators who were neither the chief nor the sergeant, suggesting that, in the future, evaluations could be performed by full-time officers.

⁸It does not appear that the City Police Department has a practice of evaluating permanent employees.

⁹The record does not reveal whether Fast was acting chief at this time

Transfer, Layoff, Recall, Promotion, Reward

24. The City's layoff and recall policy is set out in the City's general "Personnel Rules, Policies and Procedures" manual. The policies give the sergeant no role in those decisions, and the record contains no evidence that the City ever laid off or recalled any Police Department employees.

25. The only promotion relevant to the bargaining unit is promotion from full-time officer to sergeant, an event which has not occurred since Fast became sergeant seven years ago. There is no evidence that a current sergeant would name his or her replacement. Volunteer reserve officers who become full-time officers go through a hiring process, not a promotion process. Chief Johnson rewards good performance through special written orders, commendations, certificates of achievement, allocation of training opportunities, and providing opportunities for overtime.

Discipline, Discharge, Adjustment of Grievances

26. There is no evidence in the record that the City ever imposed formal discipline on a Police Department employee. The Police Department policies provide that the chief cannot impose discipline above an oral or written reprimand without the approval of the City Manager or City Council.

27. The procedure to be followed in a case of alleged misconduct by an officer is set out in the City "Police Department Policy Manual." It includes the following paragraph:

"INVESTIGATION OF ALLEGED MISCONDUCT:

"A member assigned to the investigation of alleged misconduct on the part of another member of this Department shall conduct a thorough and accurate investigation. The investigation shall include statements from all parties concerned, and when necessary and pertinent [*sic*], the gathering and preservation of any physical evidence pertaining to the case as well as all other information having a bearing on the matter."

28. According to the City Police Department Policy Manual, an emergency suspension may be imposed by "[a] senior officer" or a "[s]upervisory officer of reserves."

29. City policies provide for a grievance process. Step one of that process is a meeting “between the supervisor, department head and the employee to be resolved if possible at this level.” The policy does not identify the sergeant as a supervisor for this purpose, and the witnesses at hearing could not recall any grievances handled under this procedure.

30. In August 2005, Sergeant Fast, through his review of police officer reports and conversations with officers, discovered what appeared to be a misleading omission in an officer’s report of a breath test he administered to a motorist. Fast informed Chief Boedigheimer of his discovery, and Boedigheimer directed Fast to investigate the matter and provide Boedigheimer with the results of that investigation. On August 18, 2005, Fast then wrote a memo to Boedigheimer summarizing the information he had learned. Fast concluded his memo,

“I would ask that you take this information and conduct your own investigation and conclude what you will. The problem I have at this time (and into the future) is that I no longer feel that I can trust this officer. I do not know what to do at this point and look to you for direction.”

Boedigheimer did not ask Fast to recommend any disposition of the matter and Fast did not do so. After receiving Fast’s report, the chief decided to pursue termination of the officer, who then resigned.

Assignments, Direction, Schedule, Reports, Timesheets, Training, Equipment

Scheduling

31. Sergeant Fast initially assigns officers to the monthly schedule based on call frequency and special community events, and then submits the proposed schedule to Chief Johnson for his approval. Fast must obtain Johnson’s approval to make any changes in the monthly schedule. On one occasion, an officer asked Fast to change the start and stop times of his shift. Fast denied the request, and the officer went to Johnson, who overruled Fast. On another occasion, Fast called another officer to work three hours early because Fast was too ill to work himself. The chief counseled Fast that he was not permitted to make such schedule changes on his own.

32. The City has limited funds for overtime for officers. Officers may work some overtime when their shift ends in the midst of a law enforcement activity,

such as an arrest or a stop of a possibly intoxicated driver.¹⁰ However, most officer overtime is paid by grants for special projects. In the past, when special project overtime was available, the available overtime was shared equally by all officers. At the time of hearing, Chief Johnson decided how special project overtime should be allocated.

33. When Chief Johnson is not working, he keeps his police radio on and will respond as back-up to an officer if he believes it is appropriate. Johnson appears as back up an average of once a week. Johnson also calls the City Police office twice per shift to get information about how the shift is going.

34. During the summer of 2008, Chief Johnson became concerned about the Gervais Police evidence locker. Johnson issued a written special order directing Fast and the officers to review the stored material, organize it, and dispose of what was no longer needed. The special order also restricted training and other activities. During this period, Fast and a full-time officer had a dispute about their respective responsibilities for the cleanup. Fast responded to the officer in an e-mail, with a copy to the chief, stating in part:

“[A]ll I asked of you was to go through the boxes that you put together and pull out all misc., undocumented evidence, inventory said evidence then store it until we can get competent help. You said yourself that there was not much there as most of the items were taken as safekeeping and/or found property.

“This said, I am not sure why my working here the past 10 plus years has any relevance on performing the above task. I too am busy with backgrounds, checking reports, acquiring new equipment, setting up training, building our Reserve complement ect [*sic*]. The fact is, that until someone who is specifically trained in property room management goes through ALL of the evidence it will never be satisfactory. My ability to match evidence with past cases based on my tenure here is not a good enough reason for me to take up this job alone, as I only was responsible for MY cases, and I was diligent in documenting those, where as I can not speak for everyone else.

¹⁰There is no evidence that the officers must contact Fast before working overtime under these circumstances.

“* * * * *

“I, just like you, do not have any formal evidence room training. I have told this to the Chief and he understands. All we need done, in my opinion, is to do what I asked initially, which again, should not take long. If you are burned out it’s understandable. Take a week off from the evidence, as long as the Chief allows, then pick up where you left off. I am a team player, I will be willing to take half of the boxes as long as you do the other half, fare [sic] enough? Joe”

Reports

35. Sergeant Fast reviews the draft police reports and forms submitted by the full-time officers and returns them with comments and questions. During the summer of 2008, Chief Johnson wanted more information about the daily activities of the staff and directed Fast and the other officers to file daily activity reports with him, which they did. The reports addressed items such as police investigations as well as matters such as washing patrol cars, sweeping garage floors, and cleaning the office microwave.

36. On August 9, 2008, Chief Johnson issued Special Order No. 08-005 covering a wide variety of tasks for Sergeant Fast and the two officers. The order stated, in part,

“2. Outside Sanctioned Overtime. On August 4, 2008, I verbally rescinded the order of suspending all Department outside sanctioned overtime (e.g., Mt. Angel October Fest, [Multi-Agency Traffic Team] M.A.T.T., etc.) and Field Training. Therefore, effective on August 4, 2008, officers may engage all Department outside sanctioned overtime opportunities and Field Training as provided by Department policies and practices.

“3. Concurrent Assignments:

“a. In addition to regular duties, before the end of each shift every member working that shift will

clean our office spaces; and at a minimum this assignment includes:

- “1) General cleaning of any messes located within any of the office spaces.
- “2) Clean your desk area and/or other areas that you worked in.
- “3) Sweep the office, ready room, and restroom floors.
- “4) Remove trash and dump it in the outside dumpster and, as needed, replace the trash bags with new ones. Do not remove trash from one place and deposit it into the large trash receptacle located in the main garage.
- “5) Remove your dirty clothing and/or personal equipment, storing soiled clothing and personal equipment in department spaces and vehicles is prohibited.
- “6) Place all plastic bottles into the provided receptacle. (The receptacle is ordered and is expected onsite between August 11-12, 2008.) Moreover, be sure to empty the bottle's contents and, if necessary, rinse it out before depositing into the designed [*sic*] container. Should any member elect to use tobacco products, their waste materials are not to be deposited in any of the department trash containers.
- “7) When necessary, submit a written, dated, and signed memo to the Chief of Police of cleanliness issues and/or about

office equipment, fixture, plumbing, electrical discovered during your tour of duty.

“8) Overtime is not authorized to complete the above assignments.

“b. Sergeant Fast will continue to fulfill his regular assigned duties and:

“1) As approved by Chief Johnson, conduct Field Training of our officers.

“2) Whenever not needed in the field/ writing reports, or fulfilling other assignments directed by Chief Johnson, will invest his on-duty time to:

“a) As approved by Chief Johnson, conduct and complete background investigations on individual reserve and fulltime police applicants; and

“b) Provide supervision and direct support to Officer Courson’s Evidence Custodian responsibilities as noted in paragraph 3.c. (below).

“3) Overtime is not authorized to complete the above assignments.

“c. Officer Courson will continue to fulfill his regular assigned duties and:

“1) From August 9 through August 15, 2008, Officer Courson is relieved from his duties of updating and upgrading our Department’s evidence administration. Beginning on August 16, 2008, Officer

Courson will resume all his duties as our Department's Evidence Custodian.

- "2) Except as ordered in paragraph 3 c.1. (above), whenever not needed in the field, writing reports, or fulfilling other assignments directed by the [sic] Chief Johnson or Sergeant Fast, Officer Courson will invest 25% of his duty time toward completing the Department's evidence/property administration and management program.
- "3) During our next Staff Meeting (that will be scheduled between late August and mid September 2008), Officer Courson will [sic] the staff on his Evidence Custodian duties as well as provide training on the handling of evidence.
- "4) Immediately notify the [sic] Chief Johnson and Sergeant Fast whenever the Department's ability to maintain, secure, and control its evidence (property) is compromised or could be compromised.
- "5) Overtime is not authorized to complete the above assignments.

"d. Personal and Patrol Vehicle Appearance:

- "1) Personal Appearance. Of course good grooming and personal hygiene is a must. Furthermore, every member of the Department is required to start their shifts wearing a clean, pressed uniform (which includes the appropriately cleaned and placed accoutrements; shoes shined (but not necessarily 'spit-shined'); utility belt, gear, firearms,

and protective vest must be clean and serviceable.

- “2) Patrol Vehicles. Keep them clean and ready for duty; do not allow the vehicle’s gas level to get below one-half tank and always leave your shift with a full tank; check all fluids at the beginning of your shift and, when appropriate, replenish them.
- “3) Should there be any damage or equipment failure to a Department vehicle that can cause a risk to the officer and/or public, that vehicle will be immediately “Redlined” and, if able, properly stored and [sic] submit detailed, dated, and signed memo to Chief Johnson, copied to Sergeant Fast, of any vehicle discrepancies. Once any vehicle is “Redlined” it shall not be used as a patrol vehicle until it has been determined to be mechanically/electronically sound and ready for duty
- “4) Overtime is not authorized to complete the above assignments.

“4. Notifications of Depleted Operational Capabilities. Whenever any member becomes aware of any condition or circumstance that may impact our Department’s ability to perform its patrol and enforcement responsibilities, as soon as practical, notify Chief Johnson and Sergeant Fast. Clearly, it would be impossible to list all the prospects that could trigger such notification, common sense should prevail. In addition to those circumstances referred to earlier, others could include, but not limited to: injury or illness of a Department member, officer involved

accident, a member is unable to work due to a family concern, lack of transportation to get to work, etc.

“Anytime there is a HAZMAT or other hazardous circumstance that threatens the health, welfare, and safety of our citizens and staff, as soon as practical, notify Chief Johnson and Sergeant Fast ”

Timesheets

37. At the time of hearing, Chief Johnson reviewed and approved the timesheets for all officers.

Training

38. Sergeant Fast often gives Chief Johnson information about particular training opportunities and his recommendation about attending that training. Johnson decides whether a particular officer should go to a particular paid training event. Fast provides substantial on-the-job training to full-time and reserve officers through “ride-alongs,” conversations, and comments and questions on officer reports.

Equipment

39. Chief Johnson keeps track of each item of equipment issued to officers (ranging from weapons to ties and tool belts) through a sign in and out sheet. The chief initials each item signed in or out.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The sergeant is not a supervisory employee.

Standards for Decision

At issue here is the question of whether Sergeant Fast is a supervisor. If he is, he must be excluded from the Association 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.”

An 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. *IAFF Local 851 v. Lane Rural Fire/Rescue District*, Case No. RC-7-03, 20 PECBR 512, 529 (2003).

We begin our analysis by considering Sergeant Fast’s authority to hire, fire, transfer, reward, promote, and discipline employees.

Hiring

Sergeant Fast participated in several hiring panels. He hosted the panels, provided technical expertise and some questions for the panels, but his role was as an equal to the other panelists. The panel only ranks the candidates, and the chief is not bound by the panel’s ranking. Some of Fast’s recommended candidates have been hired, some have not. Participation on a hiring panel is not determinative of supervisory status because the “voice of a single panel member is far too diluted and removed from the actual decision to be considered an *effective* exercise of *independent* judgment.” *City of Union v. Laborers’ International Union of North America, Local 121*, Case No. UC-9-08, 22 PECBR 872, 887 (2008), *citing Washington County Police Officers Association v. Washington County Sheriff’s Department*, Case No. C-49-84, 8 PECBR 7973, 7986 (1985) (emphasis in original). In *Tualatin Police Officers Association v. City of Tualatin*, Case No. UC-61-89, 12 PECBR 413, 422 (1990), we stated that “the direct and substantial involvement of higher authority [in the hiring process] * * * reflects, in many cases, the retention of authority by management, rather than its delegation to a lower level.”

The City contends that Officer Maddy’s hiring demonstrates Fast’s authority to effectively recommend the hiring of officers, since Fast recommended that Maddy be hired and the City hired him. However, Fast recommended that Maddy, who had extensive experience with the City as a reserve officer, be hired without going through the full hiring process. The chief rejected Fast’s recommendation. He chose to go through the full hiring process detailed above to see what the market had to offer.

This scenario does not establish that Fast effectively recommends the hiring of full-time officers.

Fast was appointed acting chief for the period between Boedigheimer's departure and Johnson's arrival. While he was acting chief, Fast recommended that Courson be hired as a full-time officer, and that recommendation was followed. Fast's actions as temporary acting chief are of little relevance to his supervisory status as a sergeant. This Board has previously held that an employee who acts "as a temporary supervisor and exercises supervisory duties 'only to an extent consistent with * * * temporary status does not thereby become a supervisory employe[e] * * *.'" *International Brotherhood of Electrical Workers, Local Union 932 v. City of Siletz*, Case No. RC-12-00, 19 PECBR 178, 189 (2001), quoting *Sisters Police Association v. City of Sisters*, Case No. RC-46-96, 17 PECBR 212, 221 (1997) and *Coos Bay-North Bend Water Board v. Oregon State Employees Association*, Case No. C-175-80, 5 PECBR 4334, 4337 (1981).

We conclude that Sergeant Fast lacks the authority to effectively recommend the hiring of an employee.

Evaluations and Trial Service Extensions

An employee's role in evaluating other employees is not one of the criteria listed in ORS 243.650(23). However, an employee's power to evaluate other employees may directly affect the hiring and disciplinary process, and "we consider it to the extent it constitutes evidence that [the employee] effectively recommends personnel action." *City of Union*, 22 PECBR at 886, citing *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94, 16 PECBR 328, 341 (1996).

Much of Sergeant Fast's evaluation work concerns volunteer reserve officers. Volunteers are not, however, employees under the Public Employee Collective Bargaining Act (PECBA) and we will examine only the authority of a putative manager regarding paid employees. *Teamsters Local 223 v. City of Gold Hill*, Case No. UP-63-97, 17 PECBR 892, 901 (1999), citing *International Association of Fire Fighters v. Lapine Rural Fire Protection District*, Case No. UC-38-91, 13 PECBR 403, 408 (1992).

In prior years, it appears that Fast evaluated full-time officers during their trial service period.¹¹ However, since 2008, Fast's authority has been substantially

¹¹There is no evidence that the sergeant has performed evaluations of permanent employees.

decreased in this area.¹² Sergeant Fast's recent evaluations have been subject to Chief Johnson's strong review, and in one case Fast's evaluation was promptly and completely rejected, along with the process itself. As a result of Chief Johnson's action, a trial service employee gained permanent status by default. At the time of hearing, the Police Department had no actual evaluation process in place. Based on the City's recent practice and the lack of an evaluation process at the time of the hearing, we conclude that Fast has no independent authority to evaluate full-time officers or effectively recommend any particular evaluation grade for an officer.

Discipline

The record shows that the City Police Department has had few occasions to consider discipline. Evidence was presented about only one incident in which Fast was involved in the discipline of a full-time officer. At Chief Boedigheimer's request, Fast investigated an officer's misleading omission in a report. Boedigheimer did not ask Fast for any recommendation regarding appropriate discipline, and Fast made none. An employee who acts as a mere conduit of information to the decision maker does not have authority to discipline or effectively recommend discipline. *City of Union*, 22 PECBR at 887.

We conclude that Sergeant Fast lacks the authority to effectively recommend discipline of full-time employees.

Transfer, Layoff, Recall, and Grievances

There is no evidence in the record of Sergeant Fast's involvement in any transfers, layoffs, or recalls. There is no collective bargaining agreement, and therefore no grievances have been handled under such an agreement. City policies provide for a grievance process. Step one of that process is a meeting "between the supervisor, department head and the employee to be resolved if possible at this level." The policy does not identify the sergeant as a supervisor for this purpose. In any event, the witnesses at hearing could not recall any grievances handled under this procedure.

¹²There is evidence that Fast had substantially more authority under prior Chief Boedigheimer than current Chief Johnson. In a very small workplace like this one, the style and preferences of individual managers and the ability and experience of subordinates may be more significant than their formal roles. Under those circumstances, a change in managers could result in substantial changes in the roles, duties, and even supervisory status of subordinate employees. Whether or not that is the case here, we are concerned only with Fast's status in the workplace as it was organized and functioning at the time the petition was filed and at hearing.

We conclude that Sergeant Fast is not involved in transfers, layoffs, and recalls, and lacks the authority to hear or adjust grievances.

Assign and Direct Work

The record reveals that Sergeant Fast has little authority to assign and direct the work of the full-time officers. Chief Johnson has issued specific, detailed orders that provide direction for most of the tasks an officer might perform on a daily or weekly basis, from office cleaning and trash removal to providing notice that a police car has become unsafe to operate. When the chief assigned Fast and another officer the job of cleaning up the Police Department's evidence storage, Sergeant Fast participated in the work rather than simply directing the officer's work.

Although Fast creates the monthly shift schedule for himself, the chief, and the officers, he can make no changes in it without the chief's explicit approval. Fast cannot assign overtime without the chief's approval, and it is not clear from the record whether officers taking overtime to finish police work (such as an arrest) even report that fact to Fast as it occurs.

Fast reviews full-time officers' reports, and often patrols with them and talks with the officers about their work. In performing these tasks, however, Fast "does not exercise independent judgment in assigning or directing employees but rather uses his experience and knowledge of the work." *City of Union*, 22 PECBR at 885. In this regard, Fast is a lead worker rather than a supervisor.

In sum, any responsibilities Sergeant Fast has for directing and assigning officers' work "do not indicate supervisory status because they are 'routine or clerical in nature, or are subject to review by other management officials.'" *City of Union*, 22 PECBR at 885, quoting *Oregon State Employees Association v. Department of Human Resources, Health Division*, Case No. C-286-79, 5 PECBR 2707, 2715 (1980). See also *City of Siletz*, 19 PECBR at 188-89. We conclude that Fast does not have the authority to assign and direct work.

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Summary

Sergeant Fast does not exercise significant supervisory authority in any of the areas listed in ORS 243.650(23). He is not a supervisory employee and is included in the bargaining unit.

ORDER

1. The petition is granted.
2. The sergeant is not a supervisor and is included in the bargaining unit.

DATED this 15TH day of May 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.