

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-010-19

(REPRESENTATION)

SALEM POLICE EMPLOYEES UNION,)	
)	
Petitioner,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
CITY OF SALEM,)	CONCLUSIONS OF LAW,
)	AND ORDER
)	
Respondent.)	
_____)	

Mark J. Makler, Attorney at Law, Code 3 Law LLP, Portland, Oregon, represented Petitioner.



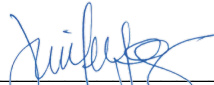
Jeffrey P. Chicoine, Attorney at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented Respondent.

On March 30, 2021, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in this matter. OAR 115-010-0090(4), (5).

ORDER

The petition is dismissed.

DATED: April 15, 2021.

	_____
Adam L. Rhynard, Chair	
	_____
Lisa M. Umscheid, Member	
	_____
Jennifer Sung, Member	

This Order may be appealed pursuant to ORS 183.482.

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(REPRESENTATION)

SALEM POLICE EMPLOYEES UNION,)	
)	
Petitioner,)	
)	
v.)	
)	
CITY OF SALEM,)	RECOMMENDED RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND PROPOSED ORDER
)	

A hearing in this case was held before Administrative Law Judge (ALJ) B. Carlton Grew on August 19, 20, and 27, and September 28 and 29, 2020, by Zoom teleconference hosted in Portland, Oregon. The record closed on December 1, 2020, following the submission of the parties' post-hearing briefs on November 25, and Respondent's motion to strike or dismiss a portion of Petitioner's post-hearing brief on December 1.

Mark J. Makler, Attorney at Law, Code 3 Law LLP, Portland, Oregon, represented Petitioner.

Jeffrey P. Chicoine, P.C., Attorney at Law, Portland, Oregon represented Respondent.

On October 24, 2019, Petitioner Salem Police Employees Union (Union) filed this representation petition with the Employment Relations Board (ERB or this Board). The petition seeks to create a new bargaining unit of "All employees of the City of Salem, Oregon, Salem Police Department in the classification of Police Sergeant." On November 13, 2019, the City of Salem Police Department (Department) filed timely objections to the Petition, stating that (1) the proposed unit employees are "supervisory employees" under ORS 243.650(23)(a) of the Public Employees Collective Bargaining Act (PECBA), and, as a result, cannot be included in a new bargaining unit, and (2) the proposed unit would unduly fragment the Department's workforce.

The issues presented for hearing¹ are:

1. Are the petitioned-for Police Sergeants supervisors under ORS 243.650(23)?
2. Does the proposed unit unduly fragment the Police Department, making it an inappropriate unit for bargaining?²

This Board concludes that the Department's sergeants are "supervisory employees" under the PECBA and therefore excluded from bargaining, and therefore dismiss the Petition.

RULINGS

On November 19, 2019, this Board issued a Notice of Hearing including a statement of the issues for hearing listed as above. On August 19, 2020, the ALJ repeated that issue statement at the start of the hearing in this matter. On November 25, 2020, the parties submitted their post-hearing briefs. In its post-hearing brief, Petitioner asserted, for the first time in this litigation, that ORS 243.650(23)(a), which defines the statutory term "supervisor," violates the First Amendment to the US Constitution as interpreted by *Janus v. AFSCME, Council 31*, 138 S Ct 2448, 201 L Ed 2d 924 (2018).³ Petitioner's *Janus* argument occupied 10 pages of an 29 page brief, appearing as the first argument. On December 1, 2020, Respondent Department objected to this newly raised issue, noting that the issue was not raised by the Union prior to the filing of its post-hearing brief, was not listed in the issue statement for the hearing issued by the ALJ, and was not raised before the evidentiary record was closed. The ALJ properly sustained Respondent's objection to the introduction of the Federal Constitutional challenge, for the reasons given in the Respondent's December 1 objections, and because Petitioner never sought leave to raise this issue at any time prior to doing so in its post-hearing brief. *Cf. Tri-County Metropolitan Transportation District Of Oregon v. Amalgamated Transit Union, Division 757; Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District Of Oregon*, Case No. UP-001-13,

¹In its post-hearing brief, Petitioner Union argues in response to the fragmentation issue that, in the alternative to a separate unit, the petitioned-for employees should be accreted to the police officer bargaining unit. Accretion of these employees to the officer bargaining unit has not been previously raised as an issue in this case, and no evidence addressed to that issue has been received, and therefore we would not consider it here. Moreover, because of our disposition of this case, the accretion issue is moot.

²Because we dismiss the Petition based on the supervisor issue, we do not reach the unit fragmentation issue.

³Briefly, the Union's arguments are that ORS 243.650(23)(a), the PECBA's definition of the term "supervisor," violates the First Amendment to the US Constitution as interpreted by *Janus*, because it interferes with the sergeants' rights to associate with each other, and that *Janus* requires that a public employer must collectively bargain with any group of employees who have chosen to associate for the purpose of collective bargaining. This is not the first challenge under *Janus* to a provision of the PECBA. *See Salem Police Employees' Union v. City Of Salem, and Oregon AFSCME Council 75, Local 2067*, Case No. UC-010-18, ___ PECBR ___ (November 2, 2018) (seeking to challenge this Board's rules concerning the contract bar and the open period based on *Janus*). While we do not reach the merits of Petitioner's argument, we note that ORS 243.650(23)(a) is merely the statutory definition of supervisor. That provision does not bar supervisors from becoming members of a bargaining unit.

n 16 at 22, 26 PECBR 322, 343 (2014), *aff'd without opinion*, 279 Or App 811, 381 P3d 1096 (2016). (“We agree with ATU that this issue is not before us, as the issue was not pleaded, agreed to in the issues statement, or briefed by the parties in their post-hearing briefs. Consequently, we decline to address it.”).

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

FINDINGS OF FACT

The Parties

1. The Department is a division of the City of Salem, a public employer within the meaning of ORS 243.650(20).

2. The Union is a labor organization as defined in ORS 243.650(13), and is seeking to become the exclusive representative of the approximately 24 Department sergeants.

Structure of the Department

3. The Department has a hierarchical command structure for sworn police officers.⁴ In order of descending rank, the positions are chief, deputy chief, lieutenant, sergeant, corporal, and patrol officer or detective. The chief reports to the city manager.

4. The Department is organized into four divisions, three of which (Support, Investigations, and Patrol) employ sworn police officers and are headed by a Deputy Chief with the title division commander. The fourth division is the Communications Division, headed by a non-sworn Operations Manager.

5. The Support Division performs the Department’s administrative functions and has sergeants assigned to supervise and manage the Internal Affairs Unit, Administrative Unit, and Personnel and Training Unit.

6. The Investigations Division is divided into two sections, criminal investigations and special operations, each headed by a lieutenant.

7. The Criminal Investigations Section (CIS) is made up of two units, property crimes and persons’ crimes. Each unit is overseen by a sergeant and staffed by detectives. This section is headed by the Criminal Investigations lieutenant.

⁴Sworn law enforcement personnel in this case are individuals who are certified by the Oregon Department of Public Safety Standards & Training (DPSST) and work for a law enforcement entity pursuant to an oath of office to uphold the law. *See Taylor v. Multnomah County Deputy Sheriff’s Retirement Board*, 265 Or 445, 510 P2d 339 (1973).

8. The Special Operations section consists of three special units, the Drug Enforcement Unit, Street Crimes Unit, and Youth Services Unit (YSU). Each of these three units is overseen by a sergeant and staffed by detectives. Those sergeants report to the Special Operations lieutenant.

9. The Patrol Division contains the Patrol Operations section, which employs most of the Department's sworn personnel as patrol officers, and where new officers are first placed and undergo field training. There are 12 patrol sergeants in Patrol Operations, approximately half of the total number of sergeants.

10. The Patrol Division also includes four special units, each of which is staffed by patrol officers. These units are the Behavioral Health Team (BHT), Downtown Enforcement Team (DET), Problem Oriented Policing (POP) Unit, and the Traffic Control Unit (TCU). Each special unit is overseen by a sergeant, and that oversight is each sergeant's primary assignment. The four sergeants report to the Community Response lieutenant. There are also nonsworn employees in the Patrol Division in a bargaining unit represented by a local of the American Federation of State, County, and Municipal Employees (AFSCME).

11. The Communications Division is the regional dispatch center for the City and some nearby jurisdictions. It is overseen, and staffed by, nonsworn employees. The division director reports directly to the chief. A bargaining unit of Communications Division employees is represented by the Professional Communications Employees Association.

12. The primary assignment of the sergeant positions identified above is to work with the identified Department subdivision. Most sergeants also have a secondary assignment leading a special team or cadre. The special teams include the Special Weapons and Tactics Team (SWAT), Hazardous Device Team (HDT or Bomb Team), Mobile Response Team (MRT), Tactical Negotiation Team, and K-9 Team. The officers who serve on these teams do so as their secondary assignments.

13. The cadres on which sergeants may serve as cadre leaders include Emergency Vehicle Operations Certification (EVOC), Defensive Tactics (DT), Confrontation-Simulation (Con-sim), Emergency Trauma (ET), Domestic Violence (DV), and Firearms Training. Not all cadre leaders are sergeants.

Bargaining Unit of Department Police Officers

14. In addition to the petitioned-for sergeants, the Union represents a separate bargaining unit of Department employees, including all sworn officers below the rank of sergeant (corporals, patrol officers and detectives), nonsworn crime laboratory technicians, and sworn retired officers employed to transport criminals and as background investigators (officer's bargaining unit). At the time of hearing, the Union and City Department were parties to a collective bargaining agreement (Agreement) for the term of fiscal years 2020 to 2024.

15. The Agreement's recognition clause states:

"The City recognizes the Union as the sole and exclusive bargaining agent under ORS 243.650 et seq., for all career employees (INCLUDING PROBATIONARY EMPLOYEES), in these classifications: Police Officer, Corporal, Police Laboratory Technician, Community Service Officer, and Part Time non-career employees in the classifications: Community Service Officer, Custody Officer, and Special Investigator. The parties agree that the above constitutes an appropriate bargaining unit. Any seasonal, casual, or temporary employees in the listed classifications are excluded from representation." (Exh. P-13 at 1.)

16. The Agreement also states that a supervisor's approval is required for officer bargaining unit members seeking after-hours training, changing Youth Services school assignments, and requests for non-biddded vacations made with less than 24 hours' notice. The relevant supervisors are sergeants.

17. The Agreement includes a dispute resolution process ending in arbitration. The first step in the process is to file a grievance with the bargaining unit members' "immediate supervisor." (Exh. P-13 at 36.) Sergeants are the first step grievance filing immediate supervisor for patrol officers and detectives.

Sergeants' Class Specification (Job Description)

18. The Department calls its job description for sergeants a "class specification." (Exh. P-1 at 1.) The specification for sergeants states, in its "Job Summary" section, that "[t]he Police Sergeant role is to supervise, train, and participate in the work of a patrol squad or supervise the activities of a specialized unit or sub-unit." (Exh. P-1 at 1.)

19. The specification's "essential job functions" for sergeants include:

- Supervise the activity of a specialized unit or sub-unit.

- Plan, review, and direct the work of subordinate uniform and civilian personnel assigned to units such as: community services, personnel and training, traffic control, youth services unit, criminal investigations section, internal affairs, and other specialized units.

- Supervise major incidents, briefings and de-briefings.

- * * * Monitor and respond to calls for service to determine the needs of subordinates, community members, and the department.

- Review incident and activity reports submitted by subordinates. Prepare written reports and provide oral reports on emergency and non-emergency situations, employee performance, and other squad activities.

“• Prepare and conduct employee performance appraisals * * *.

* * *

“• Investigate internal affairs complaints and make effective recommendations on disciplinary matters involving employees.

* * *

“• Maintain, approve, monitor, and schedule caseloads, attendance, and leave requests for assigned staff.” (Exh. P-1 at 1.)

20. Most of these same responsibilities and duties are also listed in a job bulletin used for recruiting and hiring for sergeant vacancies.

Sergeants' General Authority and Responsibilities

21. Sergeants evaluate each of their subordinates. Any merit or step increases for their subordinates are contingent on these annual evaluations, which must include an explicit recommendation for a one-step merit increase, two-step merit increase, or no merit increase. If a sergeant recommends no merit increase, and the recommendation is approved, then the employee must be put on a performance improvement plan. Recommendations for no-merit increases are unusual, but have been made. Sergeants' evaluations and recommendations regarding merit increases are routinely approved, although sometimes minor adjustments in the individual ratings are made by lieutenants.

22. Sergeants also evaluate subordinates when these employees apply for a special assignment, such as to a detective position or to a position on a specialty unit or team, whether the special assignment is a primary or ancillary assignment. Appointment to special assignments are handled in accordance with City Directives, and are managed and overseen by the sergeant in charge of each specialty assignment, team or unit. Evaluations count as 30 percent of an applicant's score.

23. Step one grievances are submitted to the sergeants and the sergeants are responsible for providing a timely response. Sergeants generally respond to first step grievances after providing them to their supervisor and being given directions for a response. In theory, sergeants could independently respond to grievances, but do not do so in practice.

24. Sergeants have authority to send an officer home for personal or health reasons. Supervising sergeants are authorized by City Directives to put an employee on temporary administrative leave with after-the-fact notice to superiors. For example, one sergeant sent a patrol officer home on light duty in the office after the officer accidentally fired a gun while at a desk. The sergeant sent the officer home immediately and then notified the sergeant's superiors, and later there was a decision made to reprimand the officer.

25. Sergeants as supervisors have authority to issue an oral reprimand and have done so. Examples of such reprimand are found in Exhibits R-43, 44, 46, 47, and 48. A Patrol Lieutenant issued an oral reprimand and written reprimand as a sergeant with approval from his supervisor on his recommendation. Currently, written reprimands and above require a due process hearing. Supervising sergeants may be tasked with investigating a matter with an officer or detective on their team or squad through the internal affairs process, as discussed below.

Sergeants' Accountability for the Work of Their Unit, Squad or Team

26. Sergeants are viewed as supervisors by their superiors, and are held accountable for their supervisory work and the work of their subordinates. That accountability includes counseling, reassignment, and their supervisor's specific sections of their annual performance evaluation forms. Sergeants' special assignments are generally for multiple years, but can be shortened, ended, or lengthened depending on the operational needs of the Department and performance of individual departments.

27. The forms used to evaluate the work of sergeants have specific sections devoted to the sergeants' work in the areas of "leadership", "supervisor", and the performance of their specialty team or unit.

Sergeants' Duties Regarding Regular Patrol Operations

28. Patrol sergeants lead a squad, which is generally comprised of six patrol officers and a corporal, assigned to a patrol district. There are 11 patrol districts within the Department. There are four squads on each shift. The shifts are day, swing, and graveyard.

29. Sergeants are responsible for making sure that the squad's work gets done, gets done correctly, and that patrol officers have what they need to do their work in terms of equipment and support.

30. Sergeants assign Patrol officers to Districts, a fact that is one of 12 items in the Patrol Shift Bidding Guidelines. There are several factors a sergeant may consider in assigning patrol officers to a patrol district, including: officer preference; continuing an ongoing project; the need for a particular officer's skill and experience in a district; the need to give an officer experience with different issues arising in different districts; and giving an officer experience with a busier workload.

31. Sergeants can and do hold patrol officers over into the next scheduled shift if there is inadequate staffing due to unexpected absences or a sergeant determines that there is a need, based on their judgment, for additional staffing. Sergeants may consult with their lieutenants about holding staff over, but are not required to, and it may not be possible to do so. There are only four patrol lieutenants, not every shift is staffed with a lieutenant, and there are other times when lieutenants are not on duty or available. Most of the shifts Friday through Sunday have no lieutenants assigned. There are additional shifts without lieutenants when a lieutenant is absent, such as on vacation or other leave.

32. Sergeants can and do recommend to lieutenants that a particular patrol shift run below the defined minimal staffing level, or decide to run short when no lieutenant is on duty based on the sergeants own assessment of the needs and risks. These situations typically arise during graveyard shifts on quiet nights.

33. During a shift, patrol sergeants routinely direct the work of squad members as a result of monitoring the dispatch traffic. A sergeant may override a dispatcher and redirect a call to another officer for a variety of reasons, including: the officer in question is already engaged or overloaded; an officer with special training is more appropriate (often for a behavioral health or a domestic violence call); or after deciding to require a second officer for backup. Also, dispatchers often decide not to assign particular calls, usually those involving non-criminal calls such as a welfare check or to provide support in the reclaiming of property. Sergeants' review these unassigned calls and decide whether and how to respond, and who should respond.

34. Sergeants are usually the first supervisor to arrive at a crime scene. When that happens, the sergeant will take charge of the crime scene, directing patrol officers in their efforts to control the crime scene. Sergeants remain in charge of the crime scene unless a lieutenant arrives and assumes supervision.

35. Patrol sergeants also supervise, monitor and correct patrol officers' work by reviewing the large number of incident reports filed by patrol officers. Sergeants review incident reports to insure that all necessary investigative steps were taken and documented and that the reports are adequate for the district attorney's use. Although reviewing these reports may be delegated to corporals, the delegating sergeants remain responsible for such reviews. These reviews and related comments take up a substantial amount of patrol sergeants' work time.

36. When sergeants reject reports, they write comments which require that the report author provide additional details or do other follow-up work. The sergeants' direction must be followed, and the sergeants' supervisors consider the rejection comments to be an exercise of the sergeants' judgment based on their skills and experience.

Sergeants' Duties in Patrol Division Special Units or Teams

37. Like regular patrol sergeants, the supervising sergeants for special units or teams monitor calls from dispatch and decide which ones to respond to. The sergeant also schedules the work, authorizes overtime, calls in officers early or holds staff over, and makes sure that there is adequate coverage when granting time off. The sergeants are responsible for monitoring and correcting the work of officers by reviewing and approving or rejecting incident or investigation reports.

38. The Traffic Control Unit is a primary assignment for a sergeant. This sergeant oversees one corporal and six officers. (At the time of hearing, one officer position was vacant.) This unit's main task is motorcycle-based traffic enforcement. The unit also handles major crash investigations and crash reconstruction; operates drones; and runs special grant-funded projects regarding pedestrian safety and speed control. The sergeant is responsible for assigning duties among these responsibilities and overseeing the work. The sergeant handles all scheduling and

time off requests. There is no defined staffing minimum for this unit, but the sergeant is required to ensure that there is adequate coverage to accomplish the unit's current work. The sergeant also develops operation plans (either directly drafting or delegating such work) for parades, races, festivals, demonstrations, and other public events, and oversees the implementation of those plans. Those plans generally include selection of the number of personnel, and their assignments to planned tasks, and provisions for assistance from outside the unit if needed.

39. The Downtown Enforcement Team (DET) sergeant leads a corporal and five officers. The team focuses on downtown Salem, adjacent park areas, and mass transit. It is funded, in part, by a contract with the Salem Area Mass Transit District, which requires police staff from Monday to Friday, 12:00 p.m. to 9:00 p.m. Team personnel also work closely with Salem parks, downtown businesses, and at-risk youth programs. The sergeant assigns duties and posting, including serving as liaisons with transit, parks, businesses, and the youth program. Officers may be held over on overtime authorized by the sergeant to handle special events. The sergeant also schedules the work, authorizes overtime, calls in officers early or holds over staff, and makes sure that there is adequate coverage when granting time off. The sergeants are responsible for monitoring and correcting the work of officers by reviewing and approving incident or investigation reports.

40. The Problem Oriented Policing Unit sergeant leads two officers working on long-term problems that cannot be effectively dealt with by patrol officers. These problems arise from businesses, residences, or individual repeat offenders that require ongoing attention and more focused police work. The sergeant decides which projects to pursue, assigns officers to those projects, and decides on and directs officers in the tactics utilized in addressing such problems. The sergeant also schedules the work, authorizes overtime, calls in officers early or holdover staff, and makes sure that there is adequate coverage when granting time off. The sergeants are responsible for monitoring and correcting the work of officers by reviewing and approving incident or investigation reports.

41. The Behavioral Health Unit sergeant leads three officers. Two officers work with Marion County nonsworn personnel. The third officer is stationed in Polk County to work with that County's nonsworn health department personnel. The officers in this unit assist, support, and accompany county nonsworn personnel in calls related to behavioral health problems. Such calls are usually routed to these officers. The sergeant monitors those calls and may redirect, prioritize, or choose that officers not respond. The sergeant also schedules the work, authorizes overtime, calls in officers early or holdover staff, and makes sure that there is adequate coverage when granting time off. The sergeants monitor and correct the work of officers through their review and approval of incident or investigation reports.

Sergeants' Duties in Investigations Division: Criminal Investigations Section (CIS)

42. The CIS includes most Department detectives, who are selected for that position through a process highly regulated by the Agreement. The section is divided into a persons' crime unit and a property crimes unit, each supervised by a CIS sergeant. The CIS sergeants review incident reports that the Patrol officers have provided them for investigation, and other reports of crime. The CIS sergeants decide whether to investigate and assign the matter to a detective for

investigation. However, there are a number of specialized detectives who are routinely assigned cases in their specialty, such as auto theft, fraud, and homicides.

43. Some crimes are more complicated, and the sergeants may decide to assign the case to a detective with more experience. Some crimes involve more than one specialty, and then the sergeant must decide which specialized investigator should handle the case.

44. Initially, a CIS sergeant must decide whether a case is worthy of investigating, and then triage or prioritize the assignment of those cases. The Department does not have the resources to investigate all cases that are initially determined to justify an investigation. In 2019 approximately 1,500 cases were determined to not meet the criteria for starting an investigation, while 500 did meet the criteria and were assigned to detectives.

45. The criteria used by the property crimes sergeant in selecting cases to be investigated are not fixed, but are guidelines that the sergeant can choose not to follow. For example, while there is generally a baseline amount of damages below which a fraud investigation will not take place, in special circumstances a sergeant may direct an investigation where the amount is below the baseline. All such guidelines are subject to change by sergeants due to environmental and staffing issues, such as those presented by the COVID-19 pandemic, mass protests, and wildfires.

46. Once a case is assigned, the CIS sergeant supervises the investigation to ensure that the assigned detective has an appropriate plan for the investigation and that the investigation progresses to a conclusion. The supervising CIS sergeant may reassign cases for a variety of reasons, including redistributing caseload, releasing a detective to handle other cases, or to add resources to an investigation.

47. Child abuse reports come to the Department on “307” forms. The Department does not have the resources to investigate every such report of child abuse. A sergeant in the persons’ crime unit has delegated the review of “307” reports to a detective to determine which cases should be investigated.

48. Criminal investigation sergeants review detectives’ investigation reports to ensure that the investigations are adequate and that enough detail is concluded to aid a prosecution.

49. CIS detectives’ regular hours of work are between Monday and Friday. CIS sergeants are responsible for authorizing time off and schedule adjustments and requests for time off by detectives, and can deny such requests based on Department needs. Sergeants are responsible for deciding whether and who to call in from off duty to address pressing investigatory needs and to ensure that detectives who are called in report to duty.⁵

⁵The Department requires Detectives to carry phones and answer calls when off duty, and provides them premium pay for doing so.

Sergeants' Duties Regarding Investigation Division Special Units/Teams

50. The Street Crimes Unit is comprised of a sergeant, a corporal, six detectives, and one administrative assistant. The sergeant does not have a caseload and is not lead investigator for any cases. The sergeant determines whether an investigation is appropriate for the unit, and whether it is substantial enough to refer to the Drug Enforcement Unit. The sergeant oversees what tactics will be used, ensures that detectives are making progress with their investigations, and ensures that the detectives have a planned conclusion to the investigation and a route to that conclusion planned out.

51. Cases assigned to individual detectives in the unit are usually self-generated by the detective, but may also be assigned as arising from public reports or complaints, or from information provided by patrol officers. An example of the latter is the identification of possible drug houses that warrant special attention. Regarding non-self-generated cases, the sergeant decides which personnel should work on that case and what tactics should be utilized, such as surveillance, or stopping and questioning visitors. Generally, Street Crimes staff works 10:00 a.m. to 6:00 p.m., Monday through Friday, but schedules are often adjusted to address specific needs of particular investigations. Detectives submit these adjustments to the sergeant and are subject to his approval. Overtime needs or other scheduling requests are authorized by the sergeant.

52. The Drug Enforcement Unit (DEU) consists of a sergeant and two detectives, and is assigned to work with federal agents. This unit is housed in the local offices of the Federal Drug Enforcement Agency. The sergeant reports to the Special Operations lieutenant, but is generally directed by the Federal DEA agent in charge. The sergeant does not handle a caseload and is not lead investigator on any cases. The unit's detectives carry a caseload and are lead investigators on cases. However, the Drug Enforcement sergeant approves overtime and authorizes time off; can call in detectives and authorize their overtime work; oversees and directs the work of detectives in the unit and ensures compliance with Department directives and collective bargaining obligations. The sergeant also reviews the reports of his detectives and approves them and orders corrections needed, and writes the annual evaluations, which can be used for promotions or special assignments.

53. The Youth Services Unit consists of a sergeant, one corporal, and seven officers. The officers in this unit are assigned to at least two schools in the Salem-Keizer School District. The Unit's work is funded by a contract with the school district, which requires that an officer be physically present in each school during each school day. The Youth Services sergeant decides on overtime authorizations, time off requests, and training for the unit's officers without involving the Special Operations lieutenant.

54. Youth Services Officers generally remain in the same assigned schools, benefitting from their long-term relationships with faculty, staff and students at individual schools. However, there have been reassignments, and the Special Operations lieutenant has sought and accepted the Youth Services sergeant's judgment and recommendation. The sergeant assigns himself or officers to temporary assignments to fill in for officers' absences to insure that the assigned schools are covered. The sergeant may cover the school themselves or add the assignment that of another officer. The sergeant's decisions on such reassignment or temporary assignment depend on "fit"

between the officer and the school. Officers' duties include making threat assessments of students, investigating crime within the school, and investigating child abuse. The sergeant may reassign cases to other officers depending on skill or an officer's absence.

Sergeants' Duties Regarding Other Specialty Units, Teams and Cadres

55. In addition to their primary assignments, some sergeants, officers, and detectives are given secondary assignments on some specialized teams. Regardless of the unit, team, or cadre, sergeants must authorize cadre work to be performed either outside of regular hours, which entails approving overtime, or during regular hours which entails temporarily removing the cadre member from their principal assignment.

56. The Hazardous Device Team is currently supervised by a sergeant who reports to a patrol operations lieutenant. The Team is a secondary assignment for both the sergeant and lower ranking team members. Hazard Device calls to the Department go directly to a sergeant and their assistant team leader. The Hazardous Device sergeant or their assistant then decide whether the Team will respond, how many staff will respond, and who the responders will be. The Hazardous Device sergeant informs their superiors about the plans, informing lieutenants or other higher ranking officers up the chain of command. The relevant Patrol lieutenant defers to the Hazardous sergeant regarding these decisions. The sergeant has expertise regarding hazardous devices and is familiar with the individual capabilities and expertise of his team members. However, the sergeant is not a bomb technician, so the sergeant in turn defers to other team members on technical issues. For example, the sergeant defers to his assistant team leader for technical judgments, which in this field can include judgments about how many and which team members to call in. However, in his own capacity as supervisor, the sergeant is responsible for making sure that calls were properly staffed.

57. The Tactical Negotiations Team is overseen by two sergeants (a team leader and an assistant team leader) who report to a Patrol Operations lieutenant. It is generally called out when SWAT is activated, but decisions such as whether to deploy the entire team or not and, if not, which team members are deployed, are left to the team's sergeants.

58. The K-9 team is overseen by a sergeant, and includes six officer-dog teams. The sergeant reviews requests for K-9 units at special events or demonstrations, and decides which to respond to and assign an officer-dog team to attend. The K-9 sergeant is also responsible for assigning teams to training academy or on-duty training, and to handle requests from other agencies (which could be approved by any sergeant but goes to the K-9 sergeant when on-duty). The K-9 sergeant is responsible for reviewing all incident reports involving dog bites to ensure that K-9 staff followed appropriate practices, including documenting noteworthy events within the report for future liability concerns.

59. The Peer Support cadre is led by a sergeant, with another sergeant functioning as the assistant team leader. The cadre uses trained Department members to provide support to sworn and nonsworn Department staff in dealing with on-the-job or personal problems that may impair their work performance. The sergeants in peer support can assign a team member to assist or permit the officer to select someone from a list.

60. The Taser cadre is led by a sergeant who oversees a team of eight instructors. The sergeant is responsible for assigning instructors to training or other tasks such as purchasing, budgeting, and maintaining and inspecting equipment, depending on individual experience and skill. The sergeant also assigns instructors to quarterly training events, new officer training, and a citizens' police academy that the sergeant would assign instructors.

Department Special Teams, Operational Plans and Special Events

61. Operations plans regarding specific parades or other civic events are generally created in the Traffic Control Unit. Plans regarding demonstrations or protests, or for special operations such as executing a search warrant by the SWAT team, are created in the Mobile Response Team. The sergeants on those teams are responsible for the preparation, creation, and presentation of such plans, although the sergeant may delegate the writing to a subordinate. Operations plans prepared by these sergeants are subject to approval by a Patrol lieutenant or higher level officials.

62. The SWAT Team supervising sergeant provides a Patrol lieutenant with operation recommendations that the lieutenant routinely approves with minor revisions.

63. Operations plans are tailored for a specific incident or event. The relevant sergeant is generally in charge of having a team execute a plan by his or her team and directing what occurs on the ground. In the SWAT Team, one sergeant is responsible for deploying and directing the sniper or perimeter team, and another sergeant for directing the entry team, executing that portion of the plan, as well as in overall charge of the deployment of personnel and equipment at the scene. Some tactics, such as using gas or dynamic entry (door breaching) require specific authority from a Patrol Operations lieutenant. When the SWAT Team is called out on short notice, plans are created through discussions directed by the relevant sergeants.

64. Search warrants are also executed by detectives in the criminal investigation units (persons' crimes and property crimes) and the Street Crimes Unit. The sergeant supervising street crimes developed plans, submitted them to superiors for review and approval, and supervised the execution of such plans. The supervising sergeant may have a subordinate draft all or part of the plan, but it is the sergeant who is responsible for the plan. Operational plans generated by the Street Crimes Unit may advocate for the involvement of additional personnel, frequently SWAT team members or former members of the Street Crimes Unit because they have the skill and experience necessary for executing search warrants. The Department requires that there be a sergeant on scene to oversee the personnel executing search warrants.

Sergeant Duties in the Department Support Division: Sergeant Duties in Internal Affairs

65. Internal Affairs procedures are contained in a Department Directive. The internal affairs sergeant manages complaints and other inquiries about Department staff. Not all inquiries rise to the level of a complaint, but the Internal Affairs sergeant or his designee logs, responds to, and tracks all of them. The sergeant reviews each inquiry and determines whether the inquiry meets the level of a formal complaint, should be handled through a disciplinary process, or whether it

appears that it can be resolved informally. Informal resolutions of inquiries may be through a direct response from the employee, sergeant, or their supervisor.

66. For each inquiry that the sergeant determines should be handled as a complaint, the sergeant consults with the division commander of the relevant employee who is the subject of the complaint to determine if the investigation will be conducted by the internal affairs sergeant or the employee's supervisor, who is generally another sergeant.

67. Internal Affairs investigations are formal. They result in a report containing a finding of unfounded, exonerated, not sustained, or sustained. A finding of unfounded, exonerated, or not sustained is also a determination that the employee will not be disciplined. While sergeant's findings are sometimes challenged by a division commander or the chief, nearly all are routinely accepted. However, if the investigating sergeant determines that the allegations are sustained, the sergeant does not recommend, determine, or issue the discipline.

Support Division: Sergeant Role in Hiring and Training Recruits

68. The Personnel and Training ("P&T") sergeant oversees Department recruitment and hiring. During the hiring process, the P&T sergeant decides whether to advance or disqualify candidates after the integrity interview, the background investigation, and the psychological examination. At the conclusion of the process, the P&T sergeant makes recommendations as to who should be hired, and those recommendations are generally followed.

69. The P&T sergeant initiates the recruitment and hiring process using a web-based workforce recruitment and testing platform. Applicants complete and submit an online application and the results of their test from the National Testing Network. They also take the Oregon Physical Abilities Test (ORPAT) physical fitness examination. Applicants who meet the Department's minimum qualifications and scoring cutoff move to the next step in the hiring process.

70. The P&T sergeant then decides on the number of applicants to interview and organizes a structured, scored, oral interview with a three-member board. The board includes Department and outside members. In recent entry level recruitments, a board interviewed the top 64 applicants.

71. Applicants who receive a passing score in the oral interview are immediately given an "integrity interview" by a background investigator made up of 120 standard questions. The questions are based on the criteria for mandatory and permissive disqualification for police certification found in the Oregon Administrative Rules and City Directives. Applicants whose answers do not include mandatory or permissive qualification issues move to the next level in the hiring process. Applicants whose answers trigger mandatory disqualification are rejected.

72. The P&T sergeant evaluates applicants whose answers trigger permissive disqualification. The sergeant weighs this information in making a hiring recommendation to the lieutenant.

73. Applicants who pass the oral interview, integrity interview, and qualification standards are given a conditional offer of employment. A background investigator then conducts a full background investigation.

74. Applicants who pass the background investigation are then given a psychological evaluation. The evaluating psychologist will sometimes issue a marginal pass or otherwise report issues revealed during the evaluation. Under those circumstances, the P&T sergeant confers with the evaluating psychologist and weighs this information in making a hiring recommendation to the lieutenant.

75. After the steps above, the P&T sergeant submits a list of the hires they recommend to the administrative lieutenant. These recommendations are routinely accepted by the lieutenant and passed on to the chief and deputy chiefs, who also generally accept the recommendations. There is no additional “hiring board” process involving the chief and deputy chiefs.

76. The P&T sergeant is the City-designated supervisor of police recruits after they are hired, as the recruits take an eight-week officer training course, ride in squad cars, or attend the state police academy (the Oregon Department of Public Safety Standards and Training (DPSST)). The sergeant assigns and schedules the recruits for coursework, sets classroom and training sessions, and oversees the training coordinator, who directs the recruits when and where to report.

77. P & T sergeant also oversees a human resources coordinator who manages payroll, pay increases, certification and training requirements, and other human resource functions.

Support Division: Administrative Sergeant

78. At the time of hearing, the administrative sergeant was also the SWAT leader; supervises four units of both sworn and nonsworn personnel; and oversees the Department’s crime analysis, public relations, transport, and fleet and accreditation functions. The administrative sergeant ensures that this work is accomplished in a satisfactory manner that satisfies the Department’s needs by routine oversight, prepares annual evaluations, reviews timecards, authorizes or denies overtime and time off, and insures adequate staffing.

79. The transport unit transports prisoners from jail to court, and is staffed by part-time, retired officers. The administrative sergeant monitors this unit and has intervened when court personnel report behavioral or performance concerns.

80. The Fleet and Accreditation Unit is comprised of one full-time officer and a half-time nonsworn, administrative staffer. It manages the Department fleet and coordinates the Department’s ongoing accreditation efforts. The sergeant reviews major financial decisions involving repair or replacement of damaged vehicles. The sergeant also decides when special events may require more than the usual number of fleet cars be available. This requires the sergeant to ensure that enough vehicles are not in maintenance status. The fleet sergeant also oversees work done by staff to maintain the Department’s accreditation.

81. The Crime Analysis Unit consists of one sworn and one nonsworn employee. Work routinely comes from various sources in the Department. However, the sergeant assigns and directs work on major projects, most recently a video analysis project.

82. For several months prior to hearing, the Administrative sergeant's primary duty was to supervise and direct the implementation of new software for the Department's record management system, a very large and complex task.

CONCLUSIONS OF LAW

The Union filed a representation petition seeking to create a bargaining unit of approximately 24 sergeants. The City objected, contending that the sergeants are supervisory employees within the meaning of ORS 243.650(23). Supervisory status under the statute depends on whether the sergeants assign, responsibly direct, discipline, adjust grievances, or hire other employees, as those job functions are defined under the Public Employee Collective Bargaining Act (PECBA). We conclude that the sergeants are supervisory employees because they assign work to other employees, use independent judgment in doing so, and hold that authority in the interests of City management.

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The petitioned-for sergeants are supervisory employees within the meaning of ORS 243.650(23) and are not appropriately included in the Union's bargaining unit.

Standards of Decision⁶

Under the PECBA, "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. Supervisory employees, however, are not "public employees" and cannot appropriately be included in a bargaining unit. ORS 243.650(19); *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22, 25 PECBR 996, 1017 (2014).

This matter is investigatory, and neither party bears the burden of proof. OAR 115-010-0070(5)(a). Before we will conclude that an otherwise "public employee" is a "supervisory employee," however, there must be sufficient evidence establishing that the statutory exclusion of ORS 243.650(23) applies.⁷ *Portland Police Commanding Officers Association*, UC-017-13 at 23, 25 PECBR at 1018. Mere inferences and conclusory statements are insufficient. *Id.* Accordingly, in the absence of detailed, specific evidence establishing that a petitioned-for employee has authority under ORS 243.650(23), we will conclude that the employee is not a

⁶This summary of the analysis of a claim under ORS 243.672(1)(a) tracks this Board's 2019 decision in *Keizer Police Association v. City of Keizer*, Case No. UC-004-18, May 28, 2019.

⁷This standard is now part of OAR 115-010-0070(5)(a). ERB 1-2021, effective 1-7-21.

supervisory employee. *SEIU Local 503, OPEU v. Portland State University*, Case No. UC-002-17 at 13, 27 PECBR 222, 234 (2018).

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.” ORS 243.650(23)(a).

When we apply this definition, we consider three questions⁸, “each of which must be answered in the affirmative for an employee to be deemed a supervisory employee: (1) does the employee have the authority to take action (or to effectively recommend action be taken) in any of the 12 listed activities; (2) does the exercise of that authority require ‘the use of independent judgment’; and (3) does the employee hold the authority in the interest of management?” *Portland Police Commanding Officers Association*, UC-017-13 at 22, 25 PECBR at 1017 (citing *Deschutes County Sheriff’s Association v. Deschutes County*, Case No. UC-62-94 at 12, 16 PECBR 328, 339 (1996)). Significantly, the enumerated supervisory functions in ORS 243.650(23)(a) are read in the disjunctive, such that an employee is a “supervisory employee” if the employee has authority under one of the 12 statutory criteria. *Portland Police Commanding Officers Association*, UC-017-13 at 22, 25 PECBR at 1017.

For an employee to effectively recommend actions, their position must be given “substantial credence” “more often than not.” *Oregon AFSCME, Council 75 v. Benton County*, Case No. C-210-82 at 14, 7 PECBR 5973, 5986 (1983). Evidence of an effective recommendation can be found by the lack of any independent review or investigation of the recommendation by a higher-level supervisor. *American Federation of State, County and Municipal Employees, Council 75 v. Lane County Sheriff’s Office*, Case No. C-281-79 at 11, 5 PECBR 4507, 4517 (1981).

In determining whether an employee exercises independent judgment, this Board considers “factors such as whether superiors reinvestigate matters handled by the individual, and whether the individual merely follows a recipe provided in a management cookbook[.]” *Department of Administrative Services v. Oregon State Police Officers Association*, Case No. UC-35-95 at 15, 16 PECBR 846, 860 (1996) (internal citations omitted). The exercise of authority must be not of a “merely routine or clerical nature.” ORS 243.650(23)(a).

Here, we analyze only one of the statutory factors--whether the petitioned-for sergeants have the authority to assign other employees – because that factor resolves this case. This Board has defined the statutory term “assign” to mean “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or

⁸More simply, there are three criteria for a supervisor under the PECBA: (1) the employee has the authority to take action (or to effectively recommend action be taken) in any of the 12 listed activities; (2) the exercise of that authority requires the use of independent judgment; and (3) the employee holds the authority in the interest of management.

overtime period), or giving significant overall duties, *i.e.*, tasks, to an employee.” *City of Portland*, 25 PECBR at 1021 (quoting *Oakwood Healthcare, Inc., and International Union, United Automobile Aerospace and Agriculture Implement Workers of America, AFL-CIO*, 348 NLRB 686, 689 (2006)). Assignment of an employee to a certain department, to a certain shift, or to certain overall tasks all “generally qualify as ‘assign’ within our construction.” *Id.* Setting or adjusting the schedule and deciding staffing issues on a routine basis are examples of assignment of duties. See *Hillsboro Sergeant's Association v. City Of Hillsboro, Oregon*, Case No. CC-009-14, at 5, 26 PECBR 491, 495 (2015); *Teamsters Local 206 v. City of Reedsport*, No. UC-46-98, at 8, 18 PECBR at 189, 197 (1999) (as an indicator of supervisory responsibility, the Board found that sergeants “may independently authorize overtime on a given shift”).

Here, the record shows that sergeants have the authority to: (1) decide, on a daily basis, which tasks should be assigned to their officers; (2) decide how many officers are necessary for assignments and the combination of skills, specialization, and experience necessary to complete those tasks; (3) call in, retain, or send home officers for a shift depending on their assessment of the work facing that shift; and (4), in connection with the previous areas of decision, assign officers overtime and approve or deny officers’ overtime requests.

Assigning Tasks

The sergeants at issue overseeing the various subdivisions of the Department routinely make a variety of assignments. Most of the sergeants are in the Patrol Operations division. Those sergeants assign patrol officers by designating the district each officer will patrol on a routine basis. They make these assignments while considering factors ranging from an officer’s personal preference, training needs, or the officer’s particular experience and skills regarding a district. They monitor dispatch traffic and can overrule particular dispatches and assign other officers, as well as evaluate and decide whether and how to act on unassigned calls, and who should take those calls. They send home, hold over, or call in officers, and these decisions are not dictated by staffing minimums, but by sergeants’ evaluation of Department needs under the circumstances of a particular shift.

Patrol sergeants in particular make adjustments to assignments and staffing in response to unplanned vacancies. The sergeants must exercise their judgment in deciding whether to fill the shift vacancy and, if so, how to do it. The sergeant can then decide whether to call in a replacement, call another officer to report early, or hold over an officer at the end of his or her shift. Factors considered are time of day, activity level, whether significant events are scheduled, and length of vacancy. For example, patrol sergeants may authorize time off below minimum staffing standards on low-activity nights or denied time off above minimums during special events. Sergeants often inform their lieutenant of these adjustments, but there is no evidence that lieutenants have overruled sergeants’ judgments regarding those adjustments. In fact, there is no relevant lieutenant on duty for several shifts each week.

Other sergeants have the authority to use their judgment regarding whether to call in officers and who to call in. The Traffic Control sergeant decides if they need to call in an officer for a crash investigation and who that will be. The sergeant makes these judgments by evaluating the situation, mindful of facts such as the apparent complexity of the crash and the experience of

the officers on the scene. Criminal Investigation sergeants may direct a detective to stay over to support the execution of a search warrant. The Youth Services sergeant assigns officers to cover schools outside their regular assignment when a relevant officer is absent. The Problem-Oriented Policing sergeant decides which problems to devote Department resources to, and assigns officers to work those problems. The Downtown Enforcement sergeant assigns officers to serve as liaisons to transit, parks, businesses, and the youth program, also choosing which officers get which posting. The Hazardous Device sergeant decides which officers to call in to deal with a potential device if no one is on duty. The K-9 sergeant decides which events a dog and handler will attend and which officers will go to that particular event. A sergeant serving as a cadre leader decides what and when training will occur and assigns a team member to undertake such training.

These staffing adjustments often require employees to work overtime or change their schedules, both of which can be approved by sergeants. Sergeants throughout the Department are also responsible for authorizing or granting requests for overtime or schedule adjustments, and authorizing time off requests outside the normal vacation schedule.

We conclude that the sergeants assign work as that term is used under the PECBA.

Independent Judgment in the Interests of Management

We turn to whether the sergeants exercise independent judgment through their authority to assign. The record here establishes that daily workload assignments require the use of independent judgment by the sergeants, including an individualized assessment of the availability, experience, preferences, seniority, skills, specializations, and workload of each subordinate officer as well as independent judgment regarding the difficulty of the work required by each assignment.

The Union argues that the sergeants are micromanaged and that their decisions are regularly overturned by lieutenants and other command staff. Viewing the record as a whole, however, the record does not establish that the sergeants' superiors micromanage or regularly overturn sergeants' assignments of work.

Finally, this Board concludes that the sergeants hold the authority to assign in the interest of management. Sergeants directly oversee and are in charge of their subordinate officers, and it is in this role that they hold the authority to assign in the interest of the Department's functions. The sergeants are supervisory representatives of the Department regarding the officers, and not part of a peer-to-peer relationship.

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Having concluded that the sergeants have the authority to assign within the meaning of ORS 243.650(23), we hold that the sergeants are therefore “supervisory employees” under the PECBA and therefore the proposed Union bargaining unit is inappropriate. We will dismiss the petition.

PROPOSED ORDER

The Petition is dismissed.

SIGNED AND ISSUED 30 March 2021.



B. Carlton Grew
Administrative Law Judge

NOTE: The Employment Relations Board’s rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The “date of filing objections” means the date that objections are received by the Board; “the date of service” of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency’s Case Management System (preferred), which may be accessed at <https://apps.oregon.gov/erb/cms/auth>. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (See Board Rules 115-010-0010(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)