

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-008-21

(UNIT CLARIFICATION)

OHSU POLICE ASSOCIATION,)	
)	
Petitioner,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
OREGON HEALTH & SCIENCE)	AND ORDER
UNIVERSITY (OHSU),)	
)	
Respondent.)	
_____)	

Daryl S. Garrettson, Attorney at Law, Fenrich & Gallagher, P.C., Lafayette, Oregon, represented the Petitioner.

Adam Collier, Attorney at Law, CDR Labor Law, Portland, Oregon, represented the Respondent.

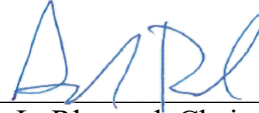
On December 28, 2021, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4).

In these circumstances, OAR 115-010-0090(5) allows the Board to limit the precedential value of the final order. The Board does so in this case. Accordingly, this order is binding on, and has precedential value for, only the named parties in this case.

ORDER

The petition is dismissed.

DATED: January 18, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

This Order may be appealed pursuant to ORS 183.482.

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Case No. UC-008-21

(UNIT CLARIFICATION PETITION)

OHSU POLICE ASSOCIATION,)	
)	
Petitioner,)	
)	
v.)	RECOMMENDED RULINGS,
)	FINDINGS OF FACT,
OREGON HEALTH AND SCIENCE)	CONCLUSIONS OF LAW, AND
UNIVERSITY,)	PROPOSED ORDER
)	
Respondent.)	
_____)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on July 27, 2021. The record closed on September 17, 2021, upon receipt of the parties' post-hearing briefs.

Daryl S. Garrettson, Attorney at Law, Fenrich & Gallagher, P.C., Lafayette, Oregon, represented the Petitioner, the OHSU Police Association.

Adam Collier, Attorney at Law, CDR Labor Law, Portland, Oregon, represented the Respondent, Oregon Health & Science University.

On April 29, 2021, the Petitioner, the OHSU Police Association (Association), filed a unit clarification petition with the Employment Relations Board (Board) under ORS 243.682(2) and OAR 115-025-0050(4). The petition seeks to add all the unrepresented Sergeants employed by the Respondent, Oregon Health and Science University (OHSU), in OHSU's Department of Public Safety (Department) to the Association's existing bargaining unit of Police Officers. The petition was supported by a sufficient showing of interest. On May 19, 2021, OHSU filed timely objections. The issue in this case is whether the petitioned-for Sergeants are "supervisory employees" as defined by ORS 243.650(23)(a). As set forth below, we conclude that the Sergeants are "supervisory employees" and thus cannot be added to the Association's unit. Therefore, we dismiss the petition.

RULINGS

All rulings by the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

1. OHSU is a “public employer” within the meaning of ORS 243.650(20).
2. OHSU has two campuses in Portland, Oregon. OHSU’s main campus is the Marquam Hill campus. The other, smaller campus is the South Waterfront campus. The two campuses are connected by a tram.
3. The Department is OHSU’s law enforcement agency, and is also known as OHSU Police and University Police. (Exh. R-2 at 1, Exh. R-5 at 1.)¹ It is responsible for both of OHSU’s campuses and is always in operation. It currently has about 40 or more employees, including 6 Sergeants, 19 (sworn) Police Officers, and 2 (non-sworn) Community Service Officers. (9:12-9:14 a.m., 9:22-9:23 a.m., Exh. R-10.)
4. The Association is a “labor organization” within the meaning of ORS 243.650(13).
5. Since 2014 or 2015, the Association has been “the sole and exclusive bargaining agent for all regular part-time and full-time employees in the classification of Police Officer within the Department of Public Safety, specifically excluding supervisors, managerial employees and confidential employees.” (9:26-9:27 a.m., Exh. R-1 at 4.) The Association’s bargaining unit has always excluded Sergeants.
6. OHSU and the Association are parties to a collective bargaining agreement (CBA) that runs from July 1, 2021 to June 30, 2024. (Exh. R-1 at 1.) The Sergeants work under separate annual contracts with OHSU. (1:40-1:40 p.m.)
7. The American Federation of State, County and Municipal Employees (AFSCME) represents a bargaining unit that includes most of OHSU’s other employees. (9:27 a.m.)
8. The Department follows a traditional chain of command. The head of the Department is Director of Public Safety Heath Kula. The Director of Public Safety is also known as the Chief of Police or the Chief Executive Officer. (10:29 p.m., Exh. R-8 at 7.) Administrative Lieutenant Maury Mudrick, Operations Lieutenant Sam Habibi, and Training Lieutenant Tom Forsyth report directly to Director Kula.
9. Five Operations Sergeants report directly to Operations Lieutenant Habibi: Kelly VanBlokland, Mychal Gresham, Zachary Gaylor, Jennifer Sullivan, and Troy Grundmeyer. (Exh. R-10.) Sergeants VanBlokland, Gresham, Gaylor, and Grundmeyer directly oversee a shift and

¹All of OHSU’s exhibits were admitted without objection. The Association did not submit any exhibits of its own. (9:07-9:08 a.m.)

each has a “team” of four or five Police Officers specifically assigned to him or her. Sergeants Gaylor and Grundmeyer also have a Community Service Officer assigned to each of their teams. (9:17-9:19 a.m., 12:54 p.m., 1:44 p.m., Exh. R-10.)

10. Sergeant Sullivan used to be in charge of a shift and have Police Officers and, on certain days, a Community Service Officer assigned to her. However, Sullivan’s shift was taken over by Sergeant Grundmeyer, and currently Sullivan has no subordinates. (9:16-9:17 a.m., 9:22-9:23 a.m., 12:08-12:10 p.m., 1:29 p.m., 1:43 p.m., 2:11 p.m.) As of the hearing, Sullivan assists the other Sergeants as needed, and assists Lieutenants with investigations by assigning investigations to Police Officers and then overseeing those investigations. (12:09-12:11 p.m., 1:28-1:29 p.m., 1:42 p.m.) Sullivan is also in charge of the Department’s property room, which generally involves administrative or ministerial tasks. (9:20 a.m., 9:25 p.m., 12:09-12:10 p.m.) When needed, Sergeant Sullivan can temporarily oversee other Sergeants’ subordinates. (9:19-9:20 a.m.)

11. As of the hearing, a sixth Sergeant, Operations Sergeant Stephen Buchtel, reported directly to Director Kula and also had no subordinates. However, Sergeant Buchtel was expected to retire the week of the hearing, and there were no plans to replace him at that time. (9:16 a.m., 12:46 p.m., Exh. R-10.) As of the hearing, Buchtel was in charge of the Department’s fleet and vehicle maintenance, conducted background checks for OHSU (including for the hiring of positions outside of the Department), and performed other administrative and clerical tasks as assigned. (9:23-9:24 a.m., 12:07-12:08 p.m.)

12. The order of command authority in the absence or unavailability of the Director, in descending order, is Operations Lieutenant, then Training Lieutenant, then Administration Lieutenant, then Sergeant. (10:33 a.m., Exh. R-3 at 29.)

13. The Department also employs 10 Campus Dispatchers who work in the Department’s Dispatch Center (Dispatch), which operates 24 hours a day, 7 days a week. They are represented by AFSCME and do not report to Sergeants. (9:13 a.m., 9:35 a.m., Exh. R-10.)

14. The Department closely follows a detailed Policy Manual. (10:25-10:26 p.m., 2:47-2:48 p.m., Exh. R-3.) Within that Policy Manual, whenever the term “supervisor” is used, it can refer to a Sergeant. (10:26-10:27 a.m.) The definitions section of the Policy Manual also provides, in part, “When there is only one department member on-duty, that person may also be the supervisor, except when circumstances reasonably require the notification or involvement of the member’s off-duty supervisor or an on-call supervisor.” (Exh. R-3 at 12-13.)

15. Policy 102.1 defines a “First Level Supervisor” as:

“Occupying a position between the operational level and the middle manager position who is primarily responsible for the direct supervision of subordinates. A first level supervisor position does not include a position with limited or acting supervisory responsibilities. Sergeants are considered First Level Supervisors.”

(3:01 p.m., Exh. R-13 at 16.)

Within the Policy Manual, the term “middle manager” refers to a Lieutenant. (10:29 p.m.)

16. When someone becomes a Sergeant, that person must attend 80 hours of supervisory training at either (1) the Oregon Department of Public Safety Standards and Training’s (DPSST’s) police academy or (2) the regional sergeants academy that occurs in the Portland metro area. In addition, every year, the Department conducts a one-day “supervisory in-service” training. (10:12-10:13 a.m., 2:53 p.m.) Policy 102.3 provides, in part, “First Level Supervisors are required to attend the DPSST Supervisors School, or its equivalent, within one year of appointment or as required by DPSST.” (Exh. R-3 at 16.) It also provides, “In addition to basic certification, First Level Supervisors * * * are expected to meet the qualifications for supervisory * * * level certification * * * within five years of each appointment or as required by DPSST.” (Exh. R-3 at 16.)

17. On April 12, 2021 Lieutenant Habibi sent an email to the Sergeants (except for Sergeant Buchtel). The email’s subject line is “Operation Changes.” (9:58-10:01 a.m., Exh. R-4.) The email states, in relevant part,

“Now that we are fully staffed, I am going to take a step back and have you be in charge of daily operations. My expectations are that you work closely together, to help each other and communicate effectively with one another. I expect you to make decisions on things that normally you would defer to me. At the same time, I will also be pushing things down to you to handle/resolve.”

(Exh. R-4.)

The email subsequently states, “I am very excited to watch your leadership grow in the department and I am here to support you. I will still be available to answer questions and provide guidance if needed.” (Exh. R-4.)

18. Lieutenant Habibi sent the foregoing email before the Association filed its April 29, 2021 unit clarification petition. When Habibi sent the email, he was unaware that the Sergeants had been speaking with the Association about petitioning for inclusion in its bargaining unit. (9:59 a.m., 12:20-12:23 p.m., 3:02 p.m.)

Scheduling

19. The Operations Lieutenant initially determines how many Police Officers are assigned to each shift and determines the start and stop times for the shifts. (3:04 p.m.) Typically, Police Officers work one of the Department’s two 12-hour shifts (day or night) and are assigned to one of two teams affiliated with each of those shifts (for a total of four teams). (9:17 a.m., 3:05 p.m.) Police Officers’ basic schedules have not changed during the COVID-19 pandemic. Further, unlike their superiors, Police Officers never work from home. (9:22 a.m.)

20. The day shift runs from 6 a.m. to 6 p.m., while the night shift runs from 6 p.m. to 6 a.m. (9:17 a.m.) For the day shift, one team works every Sunday, Monday, and Tuesday, and every other Wednesday. The other day shift team works every Thursday, Friday, and Saturday, and every other Wednesday. One night shift team works every Sunday, Monday, and Tuesday, and every other Saturday. The other night shift team works every Wednesday, Thursday, and Friday, and every other Saturday. (9:18 a.m.)

21. Each of the Sergeants who oversees a shift works the same hours as the Police Officers assigned to them. (9:19 a.m.) Despite a Sergeant being assigned to every shift, “[t]he Department is routinely required to operate without a [S]ergeant on duty.” (Exh. R-3 at 32.) Sergeant Sullivan (who, as noted, has no subordinates) generally works day shift hours every Wednesday through Friday and every other Saturday. (9:19-9:20 a.m.)

22. The three Lieutenants currently work every Monday through Friday during the day shift. (9:21 a.m., 10:33 a.m.) Due to the COVID-19 pandemic, the Lieutenants currently primarily work from home, and work in person just once or twice a week. (9:21-9:22 a.m., 12:41 p.m., 1:55 p.m.) Before the pandemic, the Lieutenants worked 10-hour days, Monday through Thursday, in person. (9:21-9:22 a.m.)

23. Director Kula officially works during day shift hours, Monday through Friday. However, in practice, he works almost every day. Due to the COVID-19 pandemic, Kula currently works from home on occasion. (9:20 a.m., 9:22 a.m.)

24. Pursuant to the CBA, each year, Police Officers “bid for the following year’s schedule based on seniority.” (12:14-12:15 p.m., 1:35 p.m., 2:56 p.m., 3:04 p.m., Exh. R-1 at 14.) Subsequently, Police Officers “may trade regularly scheduled shifts within the same pay period with the consent of their [Sergeant], provided that no overtime or premium pay will result from the trade.” (11:14 a.m., Exh. R-1 at 16.)

25. Sergeant Gaylor is generally in charge of the Department’s annual scheduling. (9:24-9:25 a.m., 2:41 p.m., 2:56 p.m.) Among other things, Gaylor ensures that all the Department’s shifts are covered. (2:56 p.m.) Gaylor also approves or denies annual vacation requests. When deciding whether to approve or deny an annual vacation request, Gaylor uses a seniority list and considers the Department’s minimum staffing levels (which are addressed below). (2:56-2:57 p.m.)

26. Police Officers and Community Service Officers submit their other time off requests to their Sergeants, and subsequently those Sergeants either approve/grant or deny those requests. (10:11 a.m., 1:35 p.m., 2:16 p.m., 2:41 p.m.) When deciding whether to approve or deny a time off request, Sergeants consider whether minimum staffing levels would be met, the “timeliness of the request,” whether a “special event” is occurring, and other factors. (Exh. R-3 at 387.) However, sergeants can approve a time off request even if granting the request would put the Department below minimum staffing, and may choose to offer other subordinates overtime work to offset an approved absence (as detailed below). Sergeants can also deny a request if staffing would be above the minimums despite the requested absence (*e.g.*, if the Sergeant knew of a significant planned event such as a protest), though that is not the norm. Furthermore,

Sergeants normally do not need to get a Lieutenant's approval when approving or denying a time off request. (10:11-10:12 a.m., 11:13-11:14 a.m., 1:35-1:36 p.m., 1:45-1:47 p.m., 2:42 p.m.) Nevertheless, a Lieutenant may issue a directive banning the use of vacation time during a particular period, the CBA and applicable letters of agreement must always be followed, and Sergeants "shall not authorize time off requests if the employee does not have enough time on the books to honor the request." (1:56-1:57 p.m., Exh. R-3 at 387.)

27. If needed, an "Acting Sergeant" can approve or deny a time off request as well. (1:56 p.m.) As explained below, an Acting Sergeant is a Police Officer that has been selected to temporarily replace a Sergeant while the Sergeant is off duty.

28. Sergeants can make their subordinates work overtime when the Department is not meeting its minimum staffing levels, and/or when a Sergeant has decided that additional help is needed (regardless of minimum staffing levels). When that happens, a Sergeant can choose to seek out volunteers, hold someone over beyond the end of a shift, or call someone in to work early. The Sergeant does not need permission from a Lieutenant or the Director to mandate overtime. (9:38-9:39 a.m., 10:07 a.m., 10:37 a.m., 12:43-12:44 p.m., 1:46 p.m., 2:17 p.m., 2:58 p.m.) When a Sergeant holds a subordinate over beyond the end of his or her normal shift, the Sergeant will select a person in accordance with the CBA, a seniority list, and the Sergeant's discretion. (1:34-1:35 p.m., 2:58 p.m., 3:05 p.m., Exh. R-3 at 387.)

29. Alternatively, a Police Officer can ask a Sergeant for authorization or permission to work beyond the end of a shift, and subsequently the Sergeant can either approve or deny that overtime request. (10:07 a.m., 11:14 a.m., 1:44-1:45 p.m., 2:16-2:17 p.m., 2:57-2:58 p.m.) A Police Officer cannot work beyond the end of a shift without getting a Sergeant's permission first. (10:07 a.m., 2:57 p.m.) That said, according to policy, certain types of reports (*e.g.*, arrest or use of force reports) generally need to be completed before a Police Officer leaves work, while other types of reports can be completed during the Police Officer's next shift. (2:57-2:58 p.m., 3:05 p.m.)

30. An Acting Sergeant can also grant or deny an overtime request or call someone in for overtime work (*e.g.*, if the Department is short of its minimum staffing levels) without a superior's approval. However, Acting Sergeants generally ask for guidance or assistance from a Lieutenant when considering overtime. (12:47-12:49 p.m., 1:56 p.m.)

31. Article 9.2 provides, in part, that Police Officers are "compensated at the rate of one and one-half (1½) times their regular rate of pay for overtime worked." (Exh. R-1 at 20.)

32. Article 9.4.1 of the CBA, titled "Voluntary Overtime," provides,

"Where the overtime is not directly related to activities begun by an officer during the officer's regular shift, overtime opportunities will be offered in order of seniority. The Employer shall provide and post a seniority list providing the opportunity for officers to indicate their willingness to work overtime. The list will span the pay period and at least two pay periods will be posted. Once each eligible officer has had the opportunity to work shift overtime in a pay period, officers may once again use their seniority to work shift overtime as described above, and the

seniority list shall rotate in the same fashion thereafter for the balance of the pay period. This section does not apply to overtime with less than 24 hours' notice.”

(Exh. R-1 at 20-21.)

33. Article 9.4.2 of the CBA, titled “Mandatory Overtime,” provides, in part,

“If an overtime assignment is not filled with a volunteer from the overtime sign-up list described in Section 9.4.1 above, the eligible officer with the least amount of overtime hours worked (voluntary and mandatory) shall be ordered to work. A list indicating the total amount of overtime worked to date shall be kept by the department.”

(Exh. R-1 at 20.)

34. Article 9.4.3 of the CBA, titled “Continuation of Activities,” provides, in part,

“When the need arises for an officer’s shift to be extended beyond their scheduled ending time by activities begun during the shift, the officer will notify the [Sergeant]. The [Sergeant] may approve or deny the overtime.”

(Exh. R-1 at 20.)

35. Article 9.4.4 of the CBA, titled “Emergency Overtime,” provides, “In all cases of emergency, the Employer may assign overtime to any employee as operating needs require.” (Exh. R-1 at 20.)

Assignment and Direction

36. As stated in the Sergeants’ position description, a Sergeant “[a]ssigns duties and responsibilities to subordinate personnel and ensures that assignments are carried out in an appropriate and responsible manner.” (9:35 a.m., 1:51 p.m., 2:51 p.m., Exh. R-2 at 1-2.)²

37. At the beginning of each shift (*i.e.*, during rollcall or a briefing), Sergeants frequently assign their Police Officers to one of three physical locations/posts: (1) the Marquam Hill campus, (2) the South Waterfront campus, or (3) the emergency room. (9:32-9:34 a.m., 10:08 a.m., 2:02 p.m.) A Sergeant can also choose to let their Police Officers decide where they are assigned for themselves, which happens the “vast majority” of the time. In practice, Police Officers usually choose to rotate where they are assigned each day. (9:33-9:34 a.m., 10:05 a.m., 12:19-12:20 p.m., 1:32 p.m., 1:43-1:44 p.m., 2:02-2:03 p.m., 2:12 p.m., 2:34 p.m.) However, a Sergeant can also take a different approach or choose to assign himself or herself to a post. Additionally, a Sergeant can always give a more specific assignment or reassign someone to a different area or an incident during a shift. (9:34 a.m., 10:08 a.m., 12:18 p.m., 1:44 p.m., 2:52-2:53 p.m.) When

²The position description (Exh. R-2) indicates that Sergeants spend 60% of their time on “Leadership and Supervisory Duties.” Currently, that percentage is too high. (1:37-1:38 p.m., 2:02 p.m., 2:35-2:36 p.m.)

deciding where to assign their Police Officers, a Sergeant can use his or her own discretion. (10:08 a.m., 12:19 p.m.)

38. As indicated above, Sergeants are generally responsible for making sure that the Department's minimum staffing levels are met. (9:30 a.m., 9:37 a.m.) However, Sergeants generally have the authority to let the Department fall below those minimums if they determine that doing so is appropriate. (10:37 a.m.)

39. Policy 208.2 provides,

“Minimum staffing levels should result in the scheduling of at least two regular officers (one may be the Sergeant or [A]cting Sergeant) on duty for the Marquam Hill Campus whenever possible after officers have been assigned to the South Waterfront area and Emergency Department. Sergeants will ensure that an Acting Sergeant is assigned during each shift that a Sergeant is not on duty. South Waterfront and Marquam Hill officers may respond between areas, and may be temporarily re-assigned as necessary, but officers should be returned to original assignment as soon as possible.”

(Exh. R-3 at 45.)

40. Under current staffing levels, typically, two Police Officers are assigned to the Marquam Hill campus, one Police Officer is assigned to the South Waterfront, and one Police Officer is assigned to the emergency room. If more Police Officers were hired, the Department would also have two Police Officers at the South Waterfront campus. The minimums may also change depending on whether the shift is day or night shift, whether a Sergeant is available to cover a post, and other circumstances. In general, the Police Officer assigned to the emergency room is not supposed to leave that post unless there is an emergency or some other significant event. (10:08 a.m., 10:36 a.m., 12:15-12:18 p.m., 1:32 p.m., 2:04-2:05 p.m., 2:53 p.m.)

41. Police Officers also regularly respond to calls. Most of those calls come from Dispatch. Moreover, if a call involves something in a particular area (*e.g.*, the South Waterfront), the call is usually assigned to the Police Officer already assigned to that area. (10:09 a.m., 1:34 p.m., 2:04 p.m.) Nevertheless, a Sergeant can also assign a Police Officer a call, ask Dispatch to assign a call to an available Police Officer, or redirect a Police Officer away from a Dispatch-initiated call to a different call or location. (9:35 a.m., 10:08-10:09 a.m., 12:13 p.m., 1:34 p.m., 2:03 p.m.) A Sergeant can also choose to respond to calls. (12:13 a.m., 1:33 p.m.)

42. As indicated above, Sergeants are responsible for selecting a Police Officer to temporarily serve as an Acting Sergeant while the Sergeant is off work (*e.g.*, on vacation or out sick). A Sergeant does not need to select the most senior Police Officer for this role. (12:37 p.m.) Additionally, a Sergeant can exercise discretion and does not need a Lieutenant's approval when selecting. (10:01-10:03 a.m., 12:37 p.m., 1:49 p.m., 2:17 p.m., 2:59 p.m.) That said, a Lieutenant may suggest that a particular Police Officer not be chosen if that Police Officer has performance issues. (1:49 p.m.) Further, in practice, a Sergeant will not select a new Police Officer to be Acting

Sergeant. (10:02 a.m.) Police Officers “receive a five percent (5%) differential when assigned as the Acting Sergeant.” (10:02 a.m., 10:36 a.m., 1:49 p.m., Exh. R-1 at 24.)

43. Policy 202.2 states, in part, “A member may be assigned as an Acting Sergeant by a [Sergeant] or the most senior [P]olice [O]fficer on the shift may designate themselves or another member the Acting Sergeant.” (11:27 a.m., Exh. R-3 at 32.) Nevertheless, the most senior Police Officer will only appoint himself or herself or another Police Officer to be Acting Sergeant when there is no Sergeant on duty and the Sergeant who was supposed to select an Acting Sergeant failed to do so. (12:37 p.m.) A Lieutenant or the Director may also appoint an Acting Sergeant. (11:27 a.m.)

44. Administrative Lieutenant Mudrick is generally in charge of investigations, and can assign investigations to specific Police Officers. However, Sergeants can also assign investigations to Police Officers (*e.g.*, fraud, sexual assault, threat assessment investigations). (9:15 a.m., 9:33-9:37 a.m., 2:07 p.m., 2:06-2:07 p.m., 2:51 p.m.) When deciding which Police Officer to assign an investigation, a Sergeant can consider the particulars of the investigation and the Police Officers’ experience and skills. (10:05-10:06 a.m.) A Sergeant can use his or her own judgment and discretion when assigning investigations, and does not need to consult with a Lieutenant or the Director about it. (10:06 a.m.)

45. As detailed in Policy 315, Sergeants decide whether to approve or deny another jurisdiction or law enforcement agency’s request for assistance from the Department’s Police Officers. One factor that a Sergeant considers in that context is whether granting the request for assistance will lead to a Department Police Officer being called to testify, which could affect the Department’s staffing. (10:48-10:50 a.m., Exh. R-3 at 124.)

46. As detailed in Policy 319, Sergeants determine when citizen “ride-alongs” will occur and who will be given that assignment. However, currently, due to the COVID-19 pandemic, those assignments are limited. (10:50-10:51 a.m., Exh. R-3 at 132.)

47. Sergeants are responsible for holding their subordinates accountable, keeping their subordinates “on track,” and making sure that the subordinates fulfil their duties, meet OHSU’s expectations of them, and follow the Department’s various policies. (9:30 a.m., 1:42 p.m., 2:44-2:45 p.m., Exh. R-2 at 1.) Among other things, that can involve Sergeants sharing their opinions with subordinates and giving them advice, counsel, guidance, and instruction. (11:17 a.m., 1:42 p.m., 1:51 p.m.)

48. Sergeants make sure that Police Officers respond to calls appropriately and assist Police Officers with scene or “incident management.” (9:30 a.m., 9:39 a.m., 10:13 a.m., 1:51 p.m., 2:55 p.m., Exh. R-2 at 2.) If a Sergeant sees a Police Officer doing something wrong during a call, the Sergeant may have a conversation with the Police Officer and “redirect” that Police Officer. (2:13 p.m.) Sergeants can also take command of a scene and, while doing so, tell Police Officers what to do. (9:39-9:40 a.m., 2:40 p.m.)

49. The Department’s Field Training Officers (FTOs) are responsible for training and directing new employees. Currently, all the Department’s FTOs are Police Officers. (3:06 p.m.)

However, Sergeants are also responsible for coaching and providing ongoing training their employees. (2:45-2:47 p.m., 2:50 p.m., Exh. R-2 at 1-2.) In addition, a Sergeant may serve as an FTO “when assigned.” (Exh. R-2 at 1-2.) Under the organizational chart, a vacant Sergeant position directly reports to the Training Lieutenant (as do five vacant Police Officer positions). (Exh. R-10.)

50. Policy 100.7 of the Policy Manual states, in part, “Each Sergeant will ensure that members under his/her command are aware of any Policy Manual revision.” (Exh. R-13 at 13, 10:27 a.m.) Policy 100.7 further states, “All department members suggesting revision of the contents of the Policy Manual shall forward their written suggestions to their Sergeants, who will consider the recommendations and forward them to the command staff as appropriate.” (Exh. R-3 at 13.)

51. Sergeants regularly monitor (*e.g.*, over the radio), observe, and formally evaluate the performance of their subordinate Police Officers and Community Service Officers. (2:47-2:49 p.m., Exh. R-2 at 1.) OHSU’s current version of a performance evaluation is called a “GROW Conversation.” The acronym GROW stands for Goals, Results, On-Track/Off-Track, and Way Forward. (Exh. R-11 at 3-4.) A Sergeant completes a GROW Conversation every six months for each subordinate. Previously, OHSU used more traditional performance evaluations that rated an employee’s performance over the course of a year. (10:09-10:10 a.m., 2:48-2:49 p.m., Exh. R-12.)

52. In sum, each GROW Conversation results in a written document that includes an employee’s goals and a rating schedule, and a Sergeant determines whether the employee is “on-track” or “off-track” to meet each of those goals and provides relevant comments. Being deemed on-track signals that the employee “is meeting job responsibilities, behavioral expectations, and achieving results.” It also signals that the employee “is progressing in [his or her] role as expected.” Being deemed “off-track” signals the employee “is not meeting job responsibilities, behavioral expectations, and/or is not achieving results as expected.” If an employee is deemed off-track, “[a]ction planning and immediate improvement are required.” (Exh. R-11 at 3 and 12.) The ratings a Sergeant selects “will determine the employee’s merit pay, if an annual merit budget is available.” (Exh. R-12 at 2.) Further, “any merit pay considerations must follow the applicable contract.” (Exh. R-12 at 2.)

53. Lieutenants generally do not work directly with Police Officers or Community Service Officers. As a result, a Lieutenant may not know whether a Police Officer or a Community Service Officer is meeting performance standards unless the Sergeant tells the Lieutenant about it. (10:03-10:04 a.m., 10:57-10:58 a.m., 12:38-12:39 p.m.) In practice, Lieutenants rarely respond to scenes or incidents, but it does occur. (12:38 p.m., 12:40-12:42 p.m.) Lieutenants also do not patrol campus. (10:03-10:04 a.m.)

54. Policy 300 addresses the use of force. (Exh. R-3 at 47.) Policy 300.7 provides, in part, “A [Sergeant] should respond to a reported application of force resulting in visible injury, if reasonably available.” (Exh. R-3 at 52.) It also provides, among other things, that a Sergeant should “[o]btain the basic facts from the involved officers,” and “[e]valuate the circumstances surrounding the incident and initiate an administrative investigation if there is a question of policy noncompliance or if for any reason further investigation may be appropriate.” (10:37-10:39 a.m.,

Exh. R-3 at 52.) Subsequently, all uses of force are independently reviewed by Lieutenants and the Director/Chief. (11:28-11:35 a.m.) Policy 302.7 provides, in part, “A Use of Force Review Workgroup, comprised of members designated by the Chief of Police or designees, may convene quarterly.” (11:30 a.m., Exh. R-3 at 60.)

55. Policy 305 addresses the usage of Tasers. (Exh. R-3 at 73.) Policy 305.9 provides, in part, “When possible, [Sergeants] should respond to calls when they reasonably believe there is a likelihood the Taser may be used. A [Sergeant] should respond to all incidents where the Taser was activated.” It also provides, “A [Sergeant] should review each incident where a person has been exposed to an activation of the Taser.” (10:38-10:39 a.m., 11:34 a.m., Exh. R-3 at 77.)

56. Policy 306 addresses critical and traumatic incident response. (Exh. R-3 at 78.) Policy 306.5 provides, in part, that when a Sergeant receives notification of a critical or traumatic incident, the Sergeant shall “[r]espond to the scene as soon as possible.” If needed, a Sergeant can also take over for the responding Police Officer, direct Police Officers at the scene, call additional Police Officers to the scene, or direct Police Officers away from the scene. (10:40-10:41 a.m., 11:38 a.m.) Relatedly, Sergeants are expected to oversee situations in which someone is threatening suicide. When that happens, a Sergeant may decide whether a Police Officer should approach the individual or should back away. (10:41-10:42 a.m.) “If the incident is reported by a [P]olice [O]fficer, [C]ommunity [S]ervice [O]fficer or [D]ispatcher to have been a traumatic incident, the [Sergeant] will assess the employee’s ability to continue to work and make service referral and staffing adjustments as necessary.” (10:42 a.m., Exh. R-3 at 79.)

57. Policy 307 addresses officer-involved shootings and deaths. (10:43 a.m., 11:36 a.m., Exh. R-3 at 81.) Policy 307.5.1 provides, in part, “Upon learning of an officer-involved shooting or death, the Sergeant shall be responsible for coordinating all aspects of the incident until he/she is relieved by the Chief of Police or a[n] Operations Lieutenant.” (Exh. R-3 at 82.) Policy 307.5.3 provides, in part, that the first uninvolved Sergeant shall “[t]ake command of and secure the indecent scene with additional members until properly relieved by another [Sergeant] or other assigned personnel or investigator.” (10:43 a.m., Exh. R-3 at 83.)

58. Policy 309 addresses missing persons investigations, which could involve a missing patient, for example. (Exh. R-3 at 97.) In part, Policy 309.12.1 provides that, during a missing person investigation, a Sergeant is responsible for “[e]nsuring resources are deployed as appropriate,” “[i]nitiating a command post as needed,” and facilitating the transfer of a case if it falls within the jurisdiction of another agency. (10:43-10:45 a.m., Exh. R-3 at 104.)

59. Policy 405 “provides guidelines for interacting with those who may be experiencing a mental health or emotional crisis.” (10:58-10:59 a.m., Exh. R-3 at 162.) Policy 405.8 provides that a Sergeant “should respond to the scene of any interaction with a person in crisis,” and should consider “strategic disengagement,” which could include “removing or reducing law enforcement resources.” (Exh. R-3 at 164.)

60. Policy 406.5.3 provides that a Sergeant should respond to the area where a foot pursuit is occurring and take command. That responsibility includes terminating the foot pursuit “when the danger of pursuing officers or the public appears to unreasonably outweigh the objective

of immediate apprehension of the subject.” (10:59-11:00 a.m., Exh. R-3 at 170.) The Sergeant can also assign other Police Officers to assist. (11:00 a.m.)

61. Policy 409.4 provides that a Sergeant will take control over a vehicle pursuit and determine how many units are needed. (Exh. R-3 at 182-83.) A Sergeant exercises his or her own judgment when making that decision, and will “continuously assess the situation and risk factors associated with the pursuit.” (11:01-11:02 a.m., Exh. R-3 at 182.) Some of those factors include where the pursuit is and where it is headed, for example. (11:02 a.m.) A Sergeant can also determine that a vehicle pursuit should be terminated “if, in his/her judgment, it is unjustified to continue the pursuit * * *.” (Exh. R-3 at 182.)

62. Police Officers submit their written reports to a Sergeant. (10:46 a.m.) Sergeants review the reports and can “make recommendations for sentence structure, spelling, grammar, completeness of information and investigation, including the elements of the crime in arrest reports.” (9:31 a.m., 10:46 a.m., 11:41 a.m., Exh. R-2 at 3, Exh. R-3 at 113.) Additionally, a Sergeant can either approve a report and submit it to a Lieutenant for further review, or return the report to the Police Officer for the Police Officer to make corrections. Policy 311.4 provides, in part, “[Sergeants] shall review reports for content and accuracy. If a correction is necessary, the reviewing [Sergeant] should notify the author stating the reasons for rejection.” (10:46-10:47 a.m., Exh. R-2 at 113.) If a Police Officer wants to change or alter a completed report, the Police Officer needs the Sergeant’s permission to do so. (10:47 a.m.) Acting Sergeants also review Police Officer reports. (11:41 a.m.)

63. After a Lieutenant reviews a Police Officer’s report, the Lieutenant can approve the report, return the report to the Police Officer for the Police Officer to make corrections, or have the Police Officer make a supplemental report. (10:46 a.m., 11:41-11:44 a.m.)

64. Policy 321 addresses off-duty law enforcement actions. Policy 321.5 provides, in part, “Any off-duty officer who engages in any law enforcement activity, regardless of jurisdiction, shall notify the Sergeant as soon as practicable. The Sergeant shall determine whether a report should be filed by the employee.” (10:50-10:51 a.m., Exh. R-3 at 139.)

65. Policy 414 addresses hostage and barricade incidents. (Exh. R-3 at 202.) Policy 414.5 provides, in part, “Upon being notified that a hostage or barricade situation exists, the [Sergeant] should immediately respond to the scene, assess the risk level of the situation, establish a proper chain of command and assume the role of Incident Commander until properly relieved.” At that point, a Sergeant has the authority and discretion to “[r]equest crisis negotiators, specialized units, additional personnel, resources or equipment as appropriate,” and “[d]esignate assistants who can help with intelligence information and documentation of the incident.” (11:03-11:04 a.m., 11:51-11:53 a.m., Exh. R-3 at 205.)

66. Policy 421 addresses “First Amendment assemblies.” (Exh. R-3 at 229.) Policy 421.5 provides that, after a Police Officer responds to an unplanned or spontaneous public gathering, a Sergeant should be requested by Dispatch. After that, the Sergeant “shall assume command of the incident until command is expressly assumed by another, and the assumption of command is communicated to the involved members.” (11:05-11:06 a.m., Exh. R-3 at 230.)

67. Policy 803 addresses the usage of personal communication devices (PCDs). Policy 803.7 addresses a Sergeant's responsibilities related to that subject, which include, among other things, providing "appropriate training," taking "prompt corrective action if a member is observed or reported to be improperly using a PCD," and monitoring and investigating PCD usage in the workplace. (11:07 a.m., Exh. R-3 at 316-317.)

68. In addition to a Sergeant's unique duties, a Sergeant "also performs the full scope of Officer responsibilities." (2:01 p.m., Exh. R-2 at 1.) As noted, Sergeants can choose to respond to calls from Dispatch. (2:01 p.m., 2:12-2:13 p.m.) That is more likely to occur when the Department is understaffed. (1:33 p.m., 2:37 p.m.) Furthermore, Sergeants commonly act as "cover officers" at a scene. While a cover officer, a Sergeant provides backup for and can take direction from the "primary" or "first responding" Police Officer. (11:39-11:41 a.m., 12:39 p.m., 1:33-1:34 p.m., 2:01 p.m., 2:38-2:39 p.m.) However, a Sergeant can also choose to take over the call or scene from the primary Police Officer. (12:39 p.m., 2:40 p.m.) Sergeants may also patrol campus, which can be done with Police Officers. (9:30-9:31 a.m., 12:13 p.m.)

69. Sergeants are generally "responsible" for what their subordinates do. (9:30 a.m., 2:13-2:15 p.m., 2:45 p.m.) Policy 1301.8 provides that a Sergeant may be disciplined for (1) failure to take appropriate action to ensure that their subordinates adhere to the Department's policies and procedures and the law, (2) failure to timely report subordinates' misconduct to a superior or document such misconduct properly, or (3) exercising the Sergeant's authority unequally or disparately for a malicious or other improper purpose. (11:08-11:10 a.m., Exh. R-3 at 367.) Additionally, Policy 200.4 provides, "[Sergeants] and managers shall be accountable for the performance of the members under their immediate control." (10:34 a.m., Exh. R-3 at 30.)

70. Despite the above-referenced policies, both of which are currently in effect, no Sergeants have been disciplined because of their subordinates' mistakes or poor performance. (11:26 a.m., 11:56 a.m., 12:43 p.m., 12:48-12:50 p.m.) In February or March 2021, Sergeant Buchtel was removed from the standard Operations assignment of overseeing a shift. However, that removal was generally the result of issues with how Buchtel performed that assignment (*e.g.*, Buchtel not knowing what his team was doing) rather than issues with his subordinates' performance (though Lieutenant Habibi also believed that Buchtel's team's performance was unacceptable at the time). (9:23 a.m., 10:34-10:35 a.m., 11:25-11:26 a.m., 12:45 p.m.)

Discipline and Suspend

71. When Sergeants deem it appropriate, Sergeants can give a "coaching and counseling" to a subordinate without getting approval from a superior. For more serious discipline, which includes verbal warnings, written warnings, suspensions, and discharges, Sergeants can make a recommendation to a Lieutenant and/or the Director when the Sergeants deem it appropriate. In practice, if a Sergeant wants to issue discipline that is more severe than a coaching and counseling, the Sergeant will check with a Lieutenant about it first. (9:40 a.m., 9:43 a.m., 9:54 a.m., 12:44-12:45 p.m., 1:29-1:31 p.m., 1:52-1:53 p.m., 2:56 p.m.) The Department does not consider a coaching and counseling to be "formal discipline," but a verbal warning and more serious forms of discipline are considered formal discipline. (9:41-9:42 a.m., 9:54 a.m.)

72. Lieutenant Habibi and Director Kula generally follow the Sergeants' discipline recommendations. (12:45 p.m.) Broadly speaking, the Director is the final decision-maker for all discipline unless the Director delegates that authority in a particular instance. (11:54-11:55 a.m.)

73. Sergeants "[i]nitiating and managing investigatory processes for policy violations, up to and including coaching and counseling, verbal warnings and written warnings." (Exh. R-2 at 2, 9:40 a.m.) Sergeants also personally conduct internal disciplinary investigations (*i.e.*, Internal Affairs investigations). (2:17 p.m.) A Sergeant can be assigned such an investigation, initiate an investigation based on a personnel complaint (*i.e.*, a complaint from someone who is not employed by the Department), or initiate his or her own disciplinary investigation. (Exh. R-3 at 155, 390.)

74. While conducting a disciplinary investigation, a Sergeant may conduct investigatory interviews. (Exh. R-6 at 1, 9:46 a.m.) In some but not all cases, a Lieutenant, an OHSU Human Resources Business Partner, an OHSU Equal Opportunity Officer (from OHSU's Affirmative Action and Equal Opportunity Department), an Association representative, and/or an Association attorney may also attend and participate in a Sergeant's investigatory interview of a Police Officer. (Exh. R-6 at 1, Exh. R-7 at 1, Exh. R-8 at 2, Exh. R-9 at 1.) The Association's attorney attends every investigatory interview of a Police Officer. (1:48-1:49 p.m.)

75. Once a Sergeant completes a disciplinary investigation, the Sergeant writes an investigatory report that is sent to a Lieutenant. (Exh. R-3 at 367.) That investigatory report can state whether the Sergeant found a policy violation and can include the Sergeant's discipline recommendation, which can potentially be a recommendation that no discipline is appropriate. (9:50-9:51 a.m.) The Lieutenant can either accept or reject a Sergeant's discipline recommendation. In practice, the Lieutenant "typically" accepts it. (9:51 a.m.) After a Lieutenant approves a report, it is submitted to the Director for additional review. (11:54-11:55 a.m., Exh. R-3 at 367.)

76. Policy 1301.10 provides, in part,

"Upon receipt of an investigatory report, the Chief of Police shall review the recommendation and all accompanying materials.

"The Chief of Police may modify any recommendations and/or may return the file to [the] investigating supervisor for further investigation or action.

"Once the Chief of Police is satisfied that no further investigation or action is required by staff, the Chief of Police shall determine the amount of discipline, if any, to be imposed."

(Exh. R-3 at 367.)

77. OHSU's Human Resources Department can give the Department assistance and guidance regarding discipline if the Department asks for it. (11:55-11:56 a.m., 12:47 p.m.)

78. Article 21 of the CBA addresses discipline and discharge. Article 21.1 of the CBA provides,

“The principles of progressive discipline shall be used except when the nature of the problem requires more serious discipline or immediate action. Progressive discipline includes the following steps: (1) documented verbal warning; (2) written warning; (3) suspension without pay and/or final written warning; and (4) discharge.”

(Exh. R-1 at 49.)

The CBA does not specifically list coaching and counseling as a form of progressive discipline. (9:41-9:42 a.m.) Article 21.2 of the CBA provides, “An employee may be disciplined or discharged for just cause.” (Exh. R-1 at 49.)³

79. Policy 1317 addresses the reporting, investigation, and disposition of personnel complaints. In essence, all personnel complaints are routed to or initiated by Sergeants, who make an initial determination regarding (1) whether the complaint has merit or (2) a formal investigation is necessary. Further, whenever a complaint is received, a Sergeant must eventually fill out a “Complaint Tracking Form.” (11:14-11:16 a.m., 1:29-1:30 p.m., Exh. R-3 at 390-91.)

80. All personnel complaints and their Complaint Tracking Forms are forwarded to the Operations Lieutenant, who subsequently reviews them. At that point, the Lieutenant uses his or her discretion and determines if the appropriate action was taken. If the Lieutenant approves of the action, the complaint and the Complaint Tracking Form are forwarded to the Director. If the Operations Lieutenant decides that the action chosen (*i.e.*, dismissal or investigation) was inappropriate, the Operations Lieutenant will ask another Lieutenant for his or her opinion on the matter, or will consult with the Sergeant to about it. (11:58 a.m.-12:04 p.m., 1:30-1:31 p.m., Exh. R-3 at 392.)

81. Ultimately, if an investigation into a personnel complaint is deemed necessary, a Sergeant is assigned the investigation. At the end of that investigation, the Sergeant will write a report with a recommendation regarding what should be done about the matter, if anything. Later, the report is carefully reviewed by the Operations Lieutenant and the Director. The Director may accept or modify any recommendation or return the matter to the Operations Lieutenant for further investigation or action. (12:03-12:04 p.m., Exh. R-3 at 397-98.)

82. On November 17, 2016, Sergeant Arnie Belton (who does not appear on the provided organizational chart), issued a “Written Warning letter for Performance” to a Police Officer because of the Police Officer’s subpar investigation. (Exh. R-6 at 1.) The letter notes the Police Officer’s prior discipline (which was a “Verbal Warning letter for Conduct” issued by a Lieutenant), described Sergeant Belton’s investigatory interviews of the Police Officer, and includes Sergeant Belton’s conclusions that certain Department and OHSU policies had been violated. The letter also notes that the Police Officer’s “supervisor” would be meeting with the

³Policy 1301 also addresses discipline. Policy 1301.2 addresses the usage of progressive discipline. Policy 1301.3 lists some of the causes of disciplinary action.

Police Officer on a regular basis using a work plan. After that, the letter states, *“Please be aware that any further violations of a similar nature will result in progressive discipline up to and including dismissal from employment.”* (Exh. R-6 at 2, emphasis in original.) The end of the letter includes a signature line for Sergeant Belton and does not include a signature line for a Lieutenant. (9:45-9:47 a.m.) This particular disciplinary investigation was assigned to Sergeant Belton by Lieutenant Habibi after another Sergeant raised concerns. Further, either Lieutenant Habibi or Director Kula authorized Sergeant Belton to issue this warning letter. (9:46 a.m., 12:25-12:27 p.m.)

83. On January 1, 2017, Sergeant Buchtel sent Director Kula a memorandum concerning a disciplinary investigation of a Police Officer. The memorandum notes that Sergeant Buchtel was directed to investigate the Police Officer, describes Sergeant Buchtel’s investigatory interview of the Police Officer and Sergeant Buchtel’s findings, and includes Sergeant Buchtel’s recommendation that the Police Officer should receive coaching and counseling. (The record does not reveal whether the recommendation was followed.) (9:55-9:56 a.m., 12:33-12:36 a.m., Exh. R-9.)

84. On March 13, 2017, Sergeant Belton sent a memorandum to Lieutenant Habibi regarding Sergeant Belton’s investigation of two Police Officers. (Exh. R-8.) The memorandum details Sergeant Belton’s findings, describes a number of Sergeant Belton’s investigatory interviews, and includes Sergeant Belton’s recommendation that the Police Officers’ actions did not justify any discipline. Lieutenant Habibi oversaw this disciplinary investigation but did not directly participate in it. Ultimately, neither Police Officer was disciplined. Either Lieutenant Habibi or Director Kula made the initial decision to investigate in this instance, and Habibi told Sergeant Belton to conduct these interviews. (9:51-9:54 a.m., 12:31-12:32 p.m.) The same memorandum otherwise notes that a different Sergeant previously gave a coaching and counseling to one of the Police Officers involved in this investigation for not taking enforcement action on someone suspected of trespassing. (Exh. R-8 at 7.)

85. In 2020, Sergeant Sullivan wrote an investigatory report concerning her investigation of two Police Officers suspected of being biased while responding to a call. (9:47-9:48 a.m., Exh. R-7 at 1.) The report includes a summary of Sullivan’s investigation, details Sullivan’s multiple interviews, provides Sullivan’s conclusions and her recommendation that it be found that the Police Officers did not violate any Department policies. In this instance, Sullivan conducted the investigation and authored the investigatory report as assigned, but Lieutenant Mudrick oversaw the investigation and actively participated in the interviews. In the end, Lieutenant Mudrick agreed with Sullivan’s recommendation and neither Police Officer was disciplined. (9:48-9:50 a.m., 12:28-12:30 p.m., Exh R-7.)

86. On December 1, 2020, Sergeant Buchtel wrote and presented a “Verbal Warning letter for Substandard Performance” to a Police Officer because of the Police Officer’s substandard report writing. (Exh. R-5 at 1.) The letter describes Sergeant Buchtel’s investigatory interview of the Police Officer, what is expected of the Police Officer, and Sergeant’s Buchtel’s finding that the Police Officer had violated Department and OHSU policies. The end of the letter states, *“Please be aware that any further violations of a similar nature will result in progressive discipline up to and including dismissal from employment.”* (Exh. R-5 at 2.) The letter also includes a signature line for Lieutenant Habibi but has no line for Sergeant Buchtel. Furthermore, in this instance,

Lieutenant Habibi actually issued the discipline. Before Habibi did so, he consulted with Director Kula, who agreed with Habibi. Habibi also spoke with Lieutenant Mudrick about the matter before issuing the discipline, and Mudrick similarly approved the level of discipline used. (9:43-9:44 a.m., 12:23-12:27 p.m., 12:46-12:47 p.m.)

87. A Sergeant can send a Police Officer home if the Sergeant believes that the Police Officer is unfit for duty. (10:06 a.m.)

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. Sergeants are “supervisory employees” as defined by ORS 243.650(23)(a) and cannot be added to the Association’s bargaining unit.

Standards of Decision

Under Oregon’s Public Employee Collective Bargaining Act, “[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. However, under ORS 243.650(19), “supervisory employees” are not “public employees” and therefore cannot be appropriately included in a bargaining unit. *Office and Professional Employees International Union, Local #11 v. City of Hillsboro*, Case No. RC-4-99 at 6-7, 18 PECBR 269, 274-75 (1999).

To determine supervisory status, the Board assesses whether an employee meets the specific criteria set out in ORS 243.650(23)(a), which 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 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.”

The supervisory status issue therefore requires the resolution of three questions, each of which must be answered in the affirmative for an employee to be deemed a statutory supervisor: (1) Does the employee have the authority to take action or to effectively recommend action be taken in any one of the 12 listed activities? (2) Does the exercise of that authority require the use of independent judgment? (3) Does the employee hold the authority in the interest of management? *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22-23, 25 PECBR 996, 1017-18 (2014) (citing *Deschutes County Sheriff’s Association v. Deschutes County*, Case No. UC-62-94 at 12-13, 16 PECBR 328, 339-40 (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 just one of the 12 statutory criteria. We also recognize that an employee’s title or rank in a law enforcement paramilitary structure is not dispositive of supervisory status under the statute. *Keizer Police*

Association v. City of Keizer, Case No. UC-004-18 at 19, _ PECBR _, _ (2019) (citing *City of Portland*, UC-17-13 at 22-23, 25 PECBR at 1017-18).

For an employee to “effectively recommend” actions, the employee’s 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, among other things, a lack of any independent review or investigation of the recommendation by a higher-level supervisor. *City of Portland*, UC-017-13 at 22-23, 25 PECBR at 1017-18 (citing *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)).

When determining whether an individual exercises “independent judgment,” the Board considers related 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) (citing *International Association of Firefighters, AFL-CIO, Local No. 314 v. City of Salem*, Case No. C-96-83, 7 PECBR 6163 (1983)); *Lane County Sheriff’s Office*, C-281-79 at 11, 5 PECBR at 4517. That said, the exercise of independent judgment does not mean that decisions can never be reviewed, reinvestigated, or changed. Such a possibility is inherent in a chain of command or other multi-level management structure, such as the paramilitary structure of a police department. Instead, the determinative factors in such cases are the circumstances and frequency of such changes. *City of Keizer*, UC-004-18 at 23 n 17, _ PECBR at _ (citing *Oregon State Police Officers’ Association v. State of Oregon, Department of State Police*, Case No. UC-7-07 at 32, 22 PECBR 717, 749 n 10 (2008)).

As this is a representation case, no party bears a burden of proof. OAR 115-010-0070(5)(a). Nevertheless, because a “supervisory employee” is a statutory exclusion from the otherwise broadly defined term “public employee,” there must be sufficient evidence establishing that the statutory exclusion applies before we will conclude that an otherwise “public employee” is a “supervisory employee.” Mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a statutory supervisor. Accordingly, in the absence of detailed, specific evidence establishing that a putative supervisor has authority under the statutory indicia, we will conclude that the employee is a “public employee” covered by the PECBA and not a “supervisory employee” under ORS 243.650(23). *City of Portland*, UC-017-13 at 23, 25 PECBR at 1018.

In OHSU’s objections, OHSU specifically asserted that that petitioned-for Sergeants “possess the authority to exercise one or more of the supervisory duties listed in ORS 243.650(23)(a), including the authority to assign and responsibly direct employees.” At the outset of the hearing, OHSU specifically asserted that the sergeants assign, responsibly direct, and discipline, and stipulated that the Sergeants could not reward. (9:01-9:04 a.m.) In OHSU’s post-hearing brief, OHSU reiterates its assertions from the hearing, but for the first time also asserts that the Sergeants reward and suspend. Meanwhile, the Association contends that the Sergeants have no supervisory authority, and that their work resembles that of a lead worker. (9:06 a.m.) (Given the stipulations made during the hearing, the Association’s post-hearing brief naturally focuses on the previously asserted authority to assign, responsibly direct, and discipline.) The “in

the interest of management” factor is not specifically in dispute. Below, we conclude that the Sergeants assign and direct with independent judgment in the interest of management.

Discussion

Assign

The statutory term “assign” can refer to 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 overtime period), or giving significant overall duties (*i.e.*, tasks) to an employee. However, choosing the order in which the employee will perform discrete tasks within those assignments is not indicative of exercising the authority to “assign.” *City of Portland*, UC-017-13 at 23-26, 25 PECBR at 1018-1021 (citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688-89 (2006)). For the following reasons, we conclude that the petitioned-for Sergeants “assign” with independent judgment in the interest of management.

Sergeants do not assign their subordinates to their regularly scheduled shifts or approve or deny annual vacation requests using independent judgment. Sergeants also do not decide when shifts normally start and stop. However, Police Officers do need a Sergeant’s approval to trade their basic shifts with other Police Officers. In addition, Sergeants approve or deny their subordinates’ other time off requests. As noted, when deciding whether to approve or deny a time off request, Sergeants consider whether minimum staffing levels would be met, the timeliness of the request, whether a special event is occurring, and other factors. Moreover, Sergeants can approve a time off request even if granting it would put the Department below minimum staff, choose to offer other subordinates overtime work to offset an approved absence, and deny a request even if staffing would be above the minimums despite the requested absence. Sergeants also generally do not need to get a superior’s approval when approving or denying a time off request.

Separately, Sergeants assign subordinates overtime and approve or deny subordinates’ overtime requests without a superior’s approval. Further, when Sergeants do so, it is not simply a routine or clerical matter, and goes beyond making sure minimum staffing levels are met. Sergeants can decide whether to seek out volunteers, hold someone over, or call someone in to work. As outlined above, certain aspects of overtime are strictly defined by the CBA. But a significant amount of discretion remains, and Sergeants (rather than the CBA) generally decide when or whether overtime is needed. We also note that Police Officers earn one and one-half times their regular payrate for overtime worked. *See The Dalles Police Association v. City of The Dalles*, Case No. UC-07-08 at 15, 22 PECBR 995, 1009 (2009); *Teamsters Local 206 v. City of Reedsport*, Case No. UC-46-98 at 9, 18 PECBR 189, 197 (1999).

In addition to the foregoing, Sergeants regularly assign Police Officers to specific locations and posts. We recognize that Police Officers usually decide among themselves to rotate these assignments. But Sergeants do not have to handle assignments that way and can always reassign their subordinates during a shift or choose to assign themselves to a location. As noted, Sergeants can use their own discretion when assigning subordinates to posts, and are not strictly limited by minimum manning levels. *See Klamath County v. Teamsters Local 223*, Case No. UC-003-20 at 19-20, _ PECBR _, _ (2021); *City of Portland*, UC-017-13 at 26, 25 PECBR at 1021.

Most of the calls that Police Officers respond to come from Dispatch and many calls go to the Police Officer already assigned to the call's location. Nevertheless, Sergeants can assign Police Officers to calls as well, ask Dispatch to call an available Police Officer, or redirect a Police Officer away from another call. Significantly, Sergeants also have full, independent authority to select Police Officers to serve as Acting Sergeants in their absence, for which Police Officers receive a 5 percent pay differential. *See Hillsboro Sergeant's Association v. City of Hillsboro, Oregon*, Case No. CC-009-14 at 5-6, 26 PECBR 491, 495-96 (2015). Sergeants separately assign Police Officers investigations, and when doing so can consider the particulars of the investigation and the Police Officers' experience and skills. Further, Sergeants can use their own judgment and do not need to consult with a superior when assigning investigations. Sergeants likewise can assign Police Officers to work with another jurisdiction or law enforcement agency or conduct a citizen ride-along.

Responsibly to Direct

The statutory term "direct" can refer to deciding what job shall be undertaken next or who shall do it. Moreover, the person "responsibly" directing must be "accountable" for the success or failure of those whom he or she is directing. *City of Portland*, UC-017-13 at 25-26, 25 PECBR at 1020-21 (citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691-92 (2006)). Additionally, employees "responsibly" direct others as the statute requires when they are accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. *City of Portland*, UC-017-13 at 27, 25 PECBR at 1022 (quoting *Oakwood Healthcare, Inc.*, 348 NLRB at 691-92). For the following reasons, we also conclude that the Sergeants "direct" with independent judgment in the interest of management.

As detailed above, Sergeants make sure that Police Officers respond to calls appropriately, which often can involve giving instruction to and "redirecting" the Police Officers. It might also involve responding in person and/or taking full command over a scene and reassigning subordinates as the Sergeant deems appropriate. While managing a scene, a Sergeant may be required to continually assess the situation and adjust and instruct accordingly. Importantly, Lieutenants normally do not respond to scenes. On top of that, Lieutenants generally do not work during weekends, and currently mostly work remotely. Likewise, the Director officially only works during the workweek, and currently works from home on occasion. Separately, Sergeants review Police Officers' reports and make recommendations and corrections to them (though we do note that many reports require additional review from a Sergeant's superiors). Sergeants also train and formally evaluate their subordinates on their own. Additionally, Sergeants clearly coach and counsel their subordinates.

Regarding whether the Sergeants "responsibly" direct, we recognize that no Sergeant has actually been disciplined for a subordinate's poor performance. However, the mere absence of a Sergeant being so disciplined is not dispositive. Ultimately, the standard is whether there is a *prospect* of adverse consequences for the putative supervisor if the supervisor does not take action to correct subordinates' work performance issues. *City of Keizer*, UC-004-18 at 22, _ PECBR at _ (citing *City of Portland*, UC-017-13 at 27, 25 PECBR at 1022). Here, Sergeants are generally

responsible for holding their subordinates accountable. Moreover, Policies 1301.8 and 200.4 formally make Sergeants accountable for their subordinates' performance.

Reward

Once again, Sergeants can select Police Officers to temporarily serve as Acting Sergeant, which can result in a pay differential. However, in this case, that selection is much more akin to an assignment than a reward. *See City of Portland*, UC-017-13 at 31, 25 PECBR at 1026. There is likewise no evidence that overtime is ever given out as a reward. One of OHSU's exhibits provides some indication that a Sergeant's positive GROW Conversation may affect an employee's merit pay. Yet that aspect of the evaluations was not addressed in detail during the hearing. Furthermore, as noted above, OHSU stipulated that the Sergeants could not "reward." Under these circumstances, there is insufficient evidence to conclude that Sergeants "reward" within the meaning of ORS 243.650(23)(a).

Discipline

This Board considers five elements of the discipline process to decide supervisory status: (1) how the process is initiated, (2) who investigates the conduct in question, (3) who defines and determines culpability, (4) how and by whom the type and severity of discipline is determined, and (5) who imposes the discipline and in what manner. We have also said that the authority to reprimand alone is insufficient to establish supervisory status. *City of Reedsport*, UC-46-98 at 8-9, 18 PECBR at 196-97 (citing *Department of Administrative Services*, UC-35-95 at 18, 16 PECBR at 863; *Tualatin Police Officers Association v. City of Tualatin*, Case No. UC-61-89 at 11, 12 PECBR 413, 423 n 7 (1990)). In this case, we conclude that Sergeants do not "discipline" within the meaning of ORS 243.650(23)(a).

Sergeants can give coaching and counseling without getting approval from a superior, and coaching and counseling may be noted during later disciplinary investigations. On the other hand, coaching and counseling is not considered formal discipline within the Department or under the parties' CBA. Sergeants also can initiate the disciplinary process by starting the investigations of subordinates, manage those investigations, and even recommend more severe discipline to their superiors. Moreover, those superiors generally follow Sergeants' disciplinary recommendations. However, importantly, the overall record indicates that Lieutenants and the Director carefully reevaluate every disciplinary recommendation. The record does contain a number of examples of discipline. But after careful review, we conclude that none of those examples plainly demonstrate that Sergeants are effective, independent voices in issuing or recommending discipline. Limited testimony (*e.g.*, 9:53-9:54 a.m., 12:44-12:55 p.m.) suggests that Sergeants can issue warnings without a Lieutenant's approval under certain, unspecified circumstances. Nevertheless, that testimony generally conflicts with the rest of the record and lacks the level of detail needed here. We therefore conclude that there is insufficient evidence to establish that the Sergeants "discipline."

Suspend

As noted above, a Sergeant can send a Police Officer home if the Sergeant believes that the Police Officer is unfit for duty. Further, a suspension is listed as a type of discipline in the CBA and the Policy Manual. However, the record does not reveal whether a suspension has occurred, or whether sending someone home necessarily affects the Police Officer's pay. It also does not explain how a Sergeant makes this decision. Accordingly, independent judgment has not been shown. We otherwise note that OHSU did not specifically assert that Sergeants can suspend until after the hearing had concluded. For these reasons, the record does not demonstrate that Sergeants "suspend" within the meaning of ORS 243.650(23)(a).

Conclusion

The Sergeants employed by OHSU in the Department of Public Safety can "assign" and "direct" with independent judgment in the interest of management. Accordingly, the Sergeants are "supervisory employees" as defined by ORS 243.650(23)(a) and cannot be added to the Association's bargaining unit.

PROPOSED ORDER

The petition is dismissed.

SIGNED AND ISSUED on December 28, 2021.



Martin Kehoe
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@erb.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.)