

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: CASE NO. PERA-R-19-116-E
: (PERA-R-17-274-E)
:
THE PENNSYLVANIA STATE UNIVERSITY :
:

PROPOSED ORDER OF DISMISSAL

On May 29, 2019, the Pennsylvania State University Police Officers Association (Association) filed a Petition for Representation with the Pennsylvania Labor Relations Board (Board) seeking to include 15 Sergeants and 14 Lieutenants into an existing unit of 140 security guard employes of the Pennsylvania State University (University or Employer) certified at PERA-R-17-274-E. The previously existing unit includes all full-time and regular part-time security guards as defined in Section 604(3) of the Public Employee Relations Act (PERA or Act) including but not limited to Police Officers 1, Police Officers 2, Police Officers 3, Police Officers 4 and Public Safety Specialists 1; and excluding student auxiliary officers, management level employes, supervisors, first level supervisors and confidential employes as defined in the Act. The Association is the exclusive representative of the existing unit. As the combined number of Sergeants and Lieutenants exceed 15% of the existing unit, the Association requested an election pursuant to Westmoreland Intermediate Unit, 12 PPER ¶ 12347 (Order and Notice of Election, 1981).

On February 28, 2019, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and designating July 23, 2019, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was continued and held on October 16, 2019, in State College, Pennsylvania, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. A second day of hearing was held on January 16, 2020, in State College.

The Association filed a post-hearing brief in support of its petition on April 13, 2020. The University filed its post-hearing brief on May 15, 2020.

The Hearing Examiner, on the basis of the evidence presented at the hearing, and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The University is a public employer pursuant to PERA. (N.T. 7).
2. The Association is an employe representative pursuant to PERA. (N.T. 7).
3. The Association represents Police Officers and Public Safety Specialists at the University's 22 different campuses throughout the Commonwealth. The numerical titles for Police Officers listed in the certification (Police Officers 1, Police Officers 2, Police Officers 3,

Police Officers 4) are no longer used by the University. At the time of the hearing, there were approximately 121 Police Officers and 27 Public Safety Specialists spread out among the multiple campuses of the University. Police Officers are also referred to as Patrol Officers. (10/16/19 N.T. 12-13, 24; Association Exhibit 1).

4. The Parties are subject to a Collective Bargaining Agreement with the effective dates of March 5, 2019 through June 30, 2021. (Joint Exhibit 1).

5. At the time of the hearing, there were 14 Sergeants and 14 Lieutenants. (10/16/19 N.T. 15).

6. A University Assistant Vice President, Charlie Noffsinger, runs the University Police and Public Safety Department. Noffsinger has many direct reports, but relevant to this case, the Chief of Police, Joseph Milek, reports to Noffsinger. Underneath Milek, and reporting to him, are the Department's seven Deputy Chiefs and Assistant Chief of Staff. Besides the Deputy Chief of Administration, the other six Deputy Chiefs are District Commanders for the six Department districts. The Districts are broken up by campus into six regions: Northwest, Southwest, Central, Southeast, Northeast, and University Park. Each of those regions has various campuses located in it (except University Park). Each campus, except University Park, will have a Station Commander assigned. The Station Commander is either a Lieutenant or Sergeant. (1/16/2020 N.T. 16-23; University Exhibit 18, 19).

7. Sergeants are paid hourly and are eligible for overtime. Sergeants and Patrol Officers have similar hours and schedules. (10/16/19 N.T. 16-17, 33).

8. Lieutenants and Police Officers have similar patrol duties. Lieutenants are eligible for overtime but only at a rate lower than sergeants and Patrol Officers. (10/16/19 N.T. 16-17).

9. Lieutenants, Sergeants, Police Officers and Public Safety Specialists are subject to the same chain-of-command in the University's Police Department which is led by Assistant Vice President Charlie Noffsinger. Underneath Noffsinger is the Chief of Administration (which was vacant at the time of hearing) and the Chief of Operations Joe Milek. Underneath those two Chiefs are one Assistant Chief (Bill Moerschbacher) and 10 Deputy Chiefs. Underneath the Deputy Chiefs are the Lieutenants. (10/16/19 N.T. 18-20).

10. Lieutenants, Sergeants, Police Officers and Public Safety Specialists all receive similar pensions and health benefits and are subject to the same University Human Relations department. (10/16/19 N.T. 20).

11. Lieutenants, Sergeants, Police Officers and Public Safety Specialists all work at similar locations: the campuses of the University across the Commonwealth. (10/16/19 N.T. 21).

12. Lieutenants, Sergeants, and Police Officers all perform some similar work such as patrolling the University's campuses and responding to calls. The amount of time a Sergeant goes on patrol or responds to calls varies depending on the shift and campus. In some campus locations, Sergeants perform a lot of patrol activity. When not on patrol or responding

to calls, Patrol Officers are in the office performing clerical functions such as completing written reports, preparing documentation, entering evidence, making follow-up calls, and performing interviews. Sergeants perform office work similar to Police Officers, but also review reports, handle scheduling, handle phone calls regarding requests or complaints from the public or University employes, and direct patrol strategy. Sergeants work is approximately 50-60% different than what Patrol Officers do. (10/16/19 N.T. 22, 51, 109-114, 118-122, 183-184, 210-211; 1/16/20 N.T. 32-33, 105-106, 176).

13. Sergeants and Lieutenants spend less than a majority of their working time responding to calls. (1/16/20 N.T. 36).

14. Lieutenants, Sergeants, and Police Officers wear similar uniforms and have similar professional certifications. (10/16/19 N.T. 32, 167-168).

15. Sergeants do not transfer or recommended the transfer of any employes, lay off or recommended the layoff of any employes, recall or recommended the recall of any employes, promote or recommended the promotion of any employes, reward or recommend the reward for any employes, discharge or recommended the discharge of any employes, or address grievances. (10/16/19 N.T. 38-45, 51, 87-94, 124-132; 1/16/20 N.T. 102, 165-166).

16. Sergeants do direct Police Officers to do particular functions such as traffic control and assigning Police Officers to districts within a campus. Sergeants are also part of the process of approving requests for compensatory time, sick leave, vacation, etc. The Sergeants function is to review the patrol compliment and determine whether the request for leave can be accommodated following the Collective Bargaining Agreement. A Sergeant can deny requests for leave for reasons such as the request, if granted, would leave the local campus shorthanded. In general, the Sergeants responsibility is to make sure that there is proper manpower on their assigned shifts based on what the University determines the proper manpower levels to be. Sergeants do not determine what the proper staffing levels are. Sergeants fills out daily schedules by referencing bidding procedures for the bargaining unit members found in the Collective Bargaining Agreement. (10/16/19 N.T. 45-48, 64-69, 91-93, 141; 1/16/20 N.T. 25, 187, 192-193).

17. The rules for overtime for Police Officers are contained in the Collective Bargaining Agreement. With respect to overtime, it can be pre-scheduled or approved when needed. When it is pre-scheduled, a list can be created with the overtime opportunity in the Department's POSS scheduling system. Employes may then sign up for the overtime opportunity. Scheduled overtime assignments that are voluntary are based on the number of hours worked in the previous six months (i.e., the employe with the lowest number of hours gets the first bid). Sergeants and Lieutenants may also make the determination to assign unscheduled overtime for an event that is less than 24 hours from the time the decision to grant overtime is made. In these cases, overtime will also be offered to the eligible employes on the preceding shift or scheduled to work the following shift and assigned in order starting with the volunteer with the least number of overtime hours worked. In either case, if there are insufficient volunteers or exigent situations, mandatory overtime is assigned by the Sergeants and Lieutenants in order starting with the eligible employe with the least number of overtime

hours worked. However, within the applications of these rules, the Sergeants and Lieutenants have discretion in mandating overtime. (1/16/20 N.T. 152-165, 187-189, 199-201, 218, 252; Joint Exhibit 1).

18. The staffing guidelines or policy was developed by the Assistant Vice President in consultation with the Chief and District Commanders. The staffing policy for the Department is for University Park: three police officers and one supervisor on-duty at all times. For the Commonwealth campuses: one police officer on-duty at all times during service hours. The station commanders are responsible for determining which police officer is on-duty to meet the staffing requirements. Additionally, Department policy is to have Lieutenant staffed as a Station Commander at residential campuses which require 24-hour police services the entire year. At some of the residential campuses, the Lieutenant are assigned a Sergeant as a shift supervisor. At commuter campuses, the policy is to have Sergeants as station commanders due to having less activity compared to residential campuses. At commuter campuses, services are provided six or seven days a week for 16 hours a day. At the time of hearing, the Department was in the midst of a reorganization plan, so where people were assigned did not completely match the intended policy. (1/16/20 N.T. 23-29, 115, 161-162).

19. Management creates the outline for the schedule for the Police Officers. For example, the University determines that there is an 8-hour shift schedule. It is up to the Sergeants to put names on the shift schedule by following Department policy and the Collective Bargaining Agreement to determine who to put into slots in the schedule through the scheduling software Police Officer Scheduling System. The Sergeant does not have discretion on whom to pick, he or she must follow a predetermined process for populating the schedule with names of Police Officers. (10/16/19 N.T. 48-50, 53, 91-92).

20. Sergeants review and approve written reports completed by Police Officers. A Sergeant may send a report back to a Police Officer if it needs corrections and provide other feedback. (10/16/19 N.T. 81, 104-105, 140, 223).

21. A Station Commander is the highest ranking officer at the a campus location that reports directly to a District Commander. Sergeants as well as Lieutenants serve as Station Commanders. Duties as a Station Commander do not substantially differ based on whether a Lieutenant or Sergeant has been assigned. Station Commanders are in charge of the police operations of the campus they are assigned to. In general, Station Commanders ensure staffing needs are met, ensure the schedule is completed, provide direction and guidance in assignment of work, provide feedback to Police Officers, ensure training is completed, and conduct performance evaluations. The Station Commander represents the Department at various committees at their respective campus, represent the Department in interaction with their respective campus administration, staff, and faculty, and students. They are responsible for ensuring that timely warnings and emergency alerts are issued pursuant to policy and law. They are responsible for completing reports pursuant to the Clery Act. (10/16/19 N.T. 82, 158, 198-199, 219-220; 1/16/20 N.T. 25-29).

22. Sergeants may complete Supervisory Notes and Letters of Conversation. Supervisory Notes and Letters of Conversation document discussions Sergeants have with Police Officers. The Notes and Letters can commend the Police Officer for performing well or remind that Police Officer of a rule or policy that the Police Officer is not following. Supervisory Notes and Letters of Conversation are not disciplinary and expire after one year. (10/16/19 N.T. 99-101, 142-153, 164, 213, 221; 1/16/20 N.T. 61; University Exhibits 8, 9, 10).

23. Sergeants perform annual written evaluations of Police Officers. The Sergeant will assist Police Officers in setting goals and documenting achievement. Performance evaluations are consulted by management as part of the promotion process. (10/16/19 N.T. 88, 110, 106-109, 128-130; 1/16/20 N.T. 25, 61; University Exhibits 5,6).

24. Sergeants and Lieutenants may issue Corrective Action Plans pursuant to the progressive discipline policy. Corrective Action Plans are created with input from University Human Resources and the appropriate Deputy Chief. (10/16/19 N.T. 154, 221-222; 1/16/20 N.T. 214; Association Exhibit 8, University Exhibit 36).

25. Sergeants and Lieutenants ensure that the Police Officers under them have the training required by state agencies. (1/16/20 N.T. 169).

26. Lieutenants do not transfer or recommended the transfer of any employes, lay off or recommended the layoff of any employes, recall or recommended the recall of any employes, promote or recommended the promotion of any employes, reward or recommend the reward for any employes, discharge or recommended the discharge of any employes, or address grievances. (10/16/19 N.T. 135-138, 176-177; 1/16/20 N.T. 102, 165-166).

27. Lieutenants' work is very similar to Sergeants. However, Lieutenants are often assigned additional projects that create an additional workload and a higher expectation of performance compared to Sergeants. (1/16/20 N.T. 34, 264-255).

28. Lieutenants do not patrol as much as Police Officers or Sergeants. However, they still do patrol and respond to service calls. Lieutenants also are responsible for scheduling (similar to Sergeants), responding to emails on a variety of topics concerning the police, and compiling statistics required by state and federal law. Lieutenants approve incident reports from Police Officers and Sergeants. (10/16/19 N.T. 124, 179, 187-190; 1/16/20 N.T. 33, 264-255).

29. Lieutenants are assigned to special projects. A Lieutenant is assigned to lead the hazardous detection team, the bomb squad, and the K-9 unit. Such assignments require specific skill sets and training requirements. Lieutenants are also assigned to specific projects like developing a training program for the community on sexual assault awareness and self-defense. Lieutenants are also assigned to lead special units such as the Special Event Unit. (1/16/20 N.T. 37-38)/

30. Lieutenants perform evaluations of Police Officers similarly to Sergeants. (10/16/19 N.T. 177-178).

31. Lieutenants assign, schedule and direct Police Officers similar to Sergeants. (10/16/19 N.T. 178, 200-201).

32. Sergeants and Lieutenants are assigned by the Police Chief to conduct internal professional standards investigations of department employees. Sergeants and Lieutenants are also assigned by the Police Chief to conduct investigations on service complaints against Department employees. A Sergeant or Lieutenant in this circumstance have investigated Police Officers. If a Sergeant is being investigated, a Lieutenant would be assigned to the investigation. A Sergeant would not investigate a Lieutenant. The Sergeant or Lieutenant assigned to lead the investigation has the authority to control how the investigation is conducted. At the end of the investigation, the Sergeant or Lieutenant in charge of the investigation makes a recommendation for a finding and discipline, if applicable. The Chief of Police reviews the report and can agree with or modify the finding and recommended discipline. The Assistant Vice President also reviews the reports. The Assistant Vice President has the final decision on these cases and, while recommendations are sometimes changed, the Assistant Vice President typically concurs with the investigating officer's report. Sergeants and Lieutenants have recommended suspension and termination as part of their professional standards investigations. (10/16/19 N.T. 52-53; 1/16/20 N.T. 50-58, 89-99, 126-127, 182-183, 282-285; University Exhibits 25, 26).

33. The Department has a Use of Alcohol and Other Drugs Policy. Under this policy, a supervisor has the role of identifying concerns about employees they believe may be in violation of the policy and reporting incidents up the chain of command. Under this policy a District Commander and Sergeant investigated a report that a Police Officer was on-duty while under the influence of alcohol. The District Commander and Sergeant found the Police Officer under the influence of Alcohol and placed him on administrative leave. The Sergeant had the authority to put the Police Officer on administrative leave even if the District Commander was not present. The Police Officer resigned before the end of the investigation. Had the investigation completed, the Sergeant had the authority to recommend discipline including termination. (1/16/20 N.T. 44-48, 82-83).

34. The Department has an Administrative Lieutenant. The Administrative Lieutenant does not wear a uniform but is armed and a sworn officer. The Administrative Lieutenant reviews and develops policies for the Department in conjunction with the Accreditation Manager. The Administrative Lieutenant creates policies in draft form and shares them with supervisors including Sergeants and Lieutenants for review and comment. The Administrative Lieutenant and the Accreditation Manager then collect and review the comments and edit and correct the draft policies as necessary. The Administrative Lieutenant and the Accreditation Manager then present the draft policies to the Chief and the Assistant Vice President with a recommendation. The Assistant Vice President reviews the proposed policies and has sent them back to the Administrative Lieutenant for more work or for corrections. Generally, the Assistant Vice President accepted policies when they were in their final draft stage. The Administrative Lieutenant is also responsible for coordinating with independent accreditation agencies and ensuring that draft policies meet the requirements of accreditation agencies. The Administrative Assistant is also responsible for the overall

administration of the POSS system. The Administrative Assistant approves requests for training. The Administrative Lieutenant oversees the Training Coordinator, the Accreditation Manager and the Quartermaster. The Administrative Lieutenant works out of the Police Headquarters building. The Administrative Lieutenant does not perform patrol work. (10/16/19 N.T. 14-15; 1/16/20 N.T. 122-125, 130-150, 157, 173, 180, 184; University Exhibits 27, 28).

37. As part of the hiring process, Sergeants and Lieutenants may interview candidates in an interview called a Station Interview. From that interview, a Sergeant or Lieutenant, if they are Station Commander, may make a recommendation as to hiring a candidate. If the Station Commander recommendation is negative, the Department generally follows the negative recommendation. (1/16/20 N.T. 128-129).

38. The Special Events Sergeant is a Sergeant assigned to University Park who coordinates with various University officials regarding requested events such as concerts and sporting events. The Special Events Sergeant creates overtime assignments for the special events and assigns officers to the events based on the rules for overtime. The Special Events Sergeant also oversees the Student Auxiliary Officers. The Special Events Sergeant hires the Student Auxiliary Officers, makes sure they are trained, and may terminate them. (10/16/19 N.T. 14-15; 1/16/20 N.T. 120-122, 165; University Exhibit 42).

39. The University has Job Responsibility Worksheets (JRWs) for employees. University Exhibit 40 is a JRW for Sergeant Mark Groff. University Exhibit 41 is a JRW for Lieutenant Mike Nelson. University Exhibit 42 is the JRW for Sergeant Jon Torres. University Exhibit 43 is the JRW for Lieutenant John Bessey. These four JRWs are substantially accurate breakdowns of the time generally spent by Sergeants and Lieutenants with the exception that some of the Sergeants and Lieutenants have special tasks assigned to them which are not universal. (1/16/20 N.T. 220-226, 261-269, 292-300; University Exhibits 41-44).

DISCUSSION

The Association in this matter seeks to add Sergeants and Lieutenants into a previously existing unit of security guard employees, as defined in Section 604(3) of the Act¹, of the University which consists of Police

¹Section 604(3) of PERA provides, in part:

The [B]oard shall determine the appropriateness of a unit which shall be the public employer unit or a subdivision thereof. In determining the appropriateness of the unit, the [B]oard shall:

...

(3) Not permit guards at prisons and mental hospitals, employes directly involved with and necessary to the functioning of the courts of this Commonwealth, or any individual employed as a guard to enforce against

Officers and Public Safety Specialists. Since the amount of employees the Association wishes to accrete is greater than 15% of the existing unit, the Association is seeking a Westmoreland election. The University counters that the Sergeants and Lieutenants do not share an identifiable community of interest with members of the existing unit and that the Sergeants and Lieutenants are statutory supervisors and managers pursuant to PERA and therefore must be excluded from the existing unit.

It is the burden of the petitioning party, in this case the Association, to show an identifiable community of interest. Section 604 of PERA provides, in relevant part, as follows:

The [B]oard shall determine the appropriateness of a unit which shall be the public employer unit or a subdivision thereof. In determining the appropriateness of the unit, the [B]oard shall:

(1) Take into consideration but shall not be limited to the following: (i) public employees must have an identifiable community of interest, and (ii) the effects of over fragmentation.

43 P.S. § 1101.604.

When determining whether employees share an identifiable community of interest, the Board considers such factors as the type of work performed, educational and skill requirements, pay scales, hours and benefits, working conditions, interchange of employees, grievance procedures, bargaining history, and employees' desires. West Perry School District v. PLRB, 752 A.2d 461, 464 (Pa. Cmwlth. 2000). An identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours, working conditions, or other factors. Id.

In addition, the Board has long favored a policy of certifying broad-based units. In the Matter of the Employees of University of Pittsburgh, 16 PPER ¶ 16205 (Order Directing Amendment of or Request to Withdraw Petition for Representation, 1985) citing Athens Area School District, 10 PPER ¶ 10128 (Order and Notice of Election, 1978).

Differences among employees in a unit may reflect the division of labor at an employer and do not destroy a clearly identifiable community of interest. See In the Matter of the Employees of Wissahickon School District, 47 PPER 26 (Order Directing Submission of Eligibility List, 2015); In the Matter of the Employees of Temple University Health System Episcopal Hospital, 41 PPER 177 (Order Directing Submission of Eligibility List, 2010), citing

employees and other persons, rules to protect property of the employer or to protect the safety of persons on the employer's premises to be included in any unit with other public employees, each may form separate homogenous employee organizations with the proviso that organizations of the latter designated employee group may not be affiliated with any other organization representing or including as members, persons outside of the organization's classification.

43 P.S. § 1101.604(3).

Pennsylvania State University v. PLRB, 24 PPER ¶ 24117 (Court of Common Pleas of Centre County, 1993) (holding that the Board need not find an identical community of interest but merely an identifiable community of interest).

The general policy of the Board is "to certify units as broadly as possible in order to avoid the deleterious effects of over fragmentation." Berks County, 27 PPER ¶ 27110 (Final Order, 1996). The Board favors unit descriptions that use "including" language "so that unit clarification petitions need not be filed whenever an employe within the coverage of the unit is hired." Beaver County Community College, 23 PPER ¶ 23070 (Final Order, 1992), aff'd 24 PPER ¶ 24110 (1993).

In this matter, and without yet considering the arguments that the Sergeants and Lieutenants are supervisory and management level positions, it is clear the Association met its initial burden by showing that the Sergeants and Lieutenants share an identifiable community of interest with the Police Officers in the existing unit. Like the Police Officers, the Sergeants and Lieutenants are employes of the University, work at the University's various campuses, work closely with the Police Officers, perform similar police functions as the Police Officers, have similar shifts as the Police Officers, wear similar uniforms as the Police Officers, and have similar state certifications as the Police Officers. The Sergeants and Lieutenants are subject to the same chain of command as the Police Officers, and all, ultimately, report up to the same Assistant Vice President who runs the University's Police Department. Thus the record in this matter shows that, subject to the University's arguments that the Sergeants and Lieutenants are supervisory and management level positions, that the Sergeants and Lieutenants share an identifiable community of interest with the members of the existing unit sufficient for the Association in this case to meet its initial burden.

I now move to the University's arguments that the Sergeants and Lieutenants should be excluded as statutory supervisors. The party arguing for the exclusion of an employe from a unit on a statutory ground bears the burden of proving a basis for the exclusion. School District of Philadelphia v. Commonwealth of Pennsylvania, PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998).

Section 301(6) of PERA provides as follows:

"Supervisor" means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

43 P.S. § 1101.301(6).

In Abington Heights School District, 42 PPER 18 (Final Order, 2011), the Board quoted Luzerne County Community College, 37 PPER 47 (Final Order, 2006) and opined as follows:

Employes must be excluded from the bargaining unit as supervisory if they have the authority to perform one

or more of the functions listed in Section 301(6), actually exercise such authority and use independent judgment in exercising that authority. McKeesport Area School District, 14 PPER ¶ 14165 (Final Order, 1983).

In determining the difference between a lead worker and a statutory supervisor, the Board has examined the requirement that the employe "responsibly" "direct" other employes. The Board explained the meaning as follows:

'Direct' infer[es] authority to order employes as to the nature, quality and quantity of their work. "Responsibly" infers authority to grant reward or sanction should such orders not be followed, or, to a substantial degree, to be able to effectively recommend such reward or sanction. The right to order the work force and the ability to effect reward or sanction are what distinguish a "supervisor" from a "task leader."

In the Matter of the Employes of Danville Area School Dist., 8 PPER 195 (Order and Notice of Election, 1977). Since Danville, the Board has repeatedly and consistently emphasized that "an employe who lacks the authority to effect reward or sanction simply cannot be excluded from a bargaining unit as a supervisor." In the Matter of the Employes of Pennsylvania State University, Milton S. Hershey Medical Center, 20 PPER 20126 (Final Order, 1989); Findlay Township Water Authority, 21 PPER ¶ 21130 (Final Order, 1990) (reiterating that "[t]he hallmark of supervisory status under [PERA] is the ability to effect reward or sanction").

The Board has held that employes are supervisors if they execute performance evaluations which formed the basis for pay increases or discipline. Cumberland County, 12 PPER ¶ 12198 (Order Directing Submission of Eligibility List, 1981), 13 PPER ¶ 13035 (Final Order, 1982); Quakertown Community School District, 11 PPER ¶ 11011 (Order and Notice of Pre-Election Conference, 1979).

It must also be noted that Section 604(5) of PERA provides that the Board, in making supervisory determinations, "may take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 P.S. § 1101.604 (5). The Board, with appellate court approval, has looked to the extent to which supervisory duties are performed and concluded that employes who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are not supervisors within the meaning of PERA. West Perry School District v. PLRB, 752 A.2d 462 (Pa. Cmwlt. 2000), petition for allowance of appeal denied, 795 A.2d 984 (2000); State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlt. 1999); Independent Association of Pennsylvania Liquor Control Board Employees v. PLRB, 409 A.2d 532 (Pa. Cmwlt. 1980). Conversely, where the employe performs predominantly supervisory duties, that employe is excluded from the rank and file unit as supervisory. AFSCME v. PLRB, 342 A.2d 155 (Pa. Cmwlt. 1975).

Turning to this case, the record is clear that the Sergeants and Lieutenants do perform duties that fit the statutory definition of supervisory under Section 301(6). The record shows that Sergeants and Lieutenants may on their own initiative issue Corrective Action Plans, which is the first step of discipline under the Collective Bargaining Agreement, to

Police Officers. The record is also clear that the Sergeants and Lieutenants perform evaluations of Police Officers and that those evaluations are used as part of the University's promotion process. The record also clearly shows that Sergeants and Lieutenants, when serving as Station Commander, make effective recommendations to not hire individuals to their respective station as part of the "Station Interview" process. Sergeants and Lieutenants may also effectively suspend Police Officers pursuant to the Department's Drug and Alcohol Policy if the Sergeant or Lieutenant believes the Police Officer is in violation of that policy.

I find that the record shows that the Sergeants and Lieutenants provide supervisory direction by their direction of work during a shift, review of work by Police Officers, review and approval of reports, and ensuring that training is completed. Specifically, the record shows that Sergeants and Lieutenants independently issue Corrective Action Plans to Police Officers as part of their responsibility to direct Police Officers. Importantly, and following Board law, the issuance of these Corrective Action Plans takes the Sergeants and Lieutenants out of the realm of lead worker and into the realm of statutory supervisor. University Exhibit 36 is illustrative of this authority. In this exhibit, a Lieutenant issued a Corrective Action Plan to a Police Officer which "focused on the [Police Officer's] action while performing [their] job duties." The Corrective Action plan highlighted the following issues; "not following proper procedure, mishandling of weapons, and mishandling of cases due to lack of knowledge of the PA crime codes." These categories are reflective of the Lieutenant's responsibility to direct Police Officers in their duties.

I further find that the duties performed by Sergeants and Lieutenants with respect to internal professional standards investigations and service complaints are supervisory because they effectively recommend discipline. The record shows that, while the Assistant Vice President has the final and substantive say on these reports, he typically concurs with the investigating officer's report. The record also shows that Sergeants and Lieutenants perform supervisory work in the authorization and granting of overtime. While Sergeants and Lieutenants do in general follow the Collective Bargaining Agreement in the assignment of employees to overtime shifts, the creation of the overtime opportunity is based on the judgment of the Sergeant or Lieutenant and the Sergeants and Lieutenants have discretion in applying the assignment rules. Finally, the Special Events Sergeant performs supervisory duties with respect to hiring, terminating, assigning and directing Student Auxiliary Officers.

In so finding that the above duties of the Sergeants and Lieutenants are supervisory in nature, I find that some of the duties performed by the Sergeants and Lieutenants are not supervisory. I find that the issuance of Letters of Conversation and Supervisory Notes is not supervisory. These Letters and Notes do not effectively reward or sanction the Police Officers. They are put in the Police Officer's file for one year and are not part of any disciplinary process. I also find that the duties performed by the Sergeants and Lieutenants with respect to scheduling and leave requests, not including overtime discussed above, to not be supervisory as their scheduling and approval duties are routine in nature and follow Department policy and the Collective Bargaining Agreement.

The University has also shown on this record that Sergeants and Lieutenants perform supervisory work for a substantial portion of their work time. Specifically, the JRWs show the following.

University Exhibit 40, which is a JRW for Sergeant Mark Groff, shows the following with respect to time spent conducting statutory supervisory duties:

10% (Oversee assigned staff, both sworn and non-sworn, to ensure compliance with laws, regulation, and policies.)

5% (Conduct performance reviews for employes, consulting with Lieutenant and District Commander for final input.)

20% (Prioritize and direct the activities of the work shift to ensure proper daily police overage as well as respond to emergency and non-emergency incidents. Refer to the Lieutenant or District Commander for higher level incidents regarding personnel issues, complaints from citizens and officers, and internal issues.)

10% (Assign cases, provide case management, and review submitted reports and paperwork.)

10% (Conduct criminal investigations, assign investigations, and provide guidance to officers for their investigations. Conduct professional standards investigations as directed by the administration.)

5% (Receive recommendations of commendations and reports of complaints and misconduct. Investigate service complaints and other professional standards investigations as assigned.)

These categories total to 60% of Groff's time, which is a substantial period of his work time.

University Exhibit 41, which a JRW for Lieutenant Michael Nelson, shows the following with respect to time spent conducting statutory supervisory duties:

40% (Coordinate work and oversee the daily operations of the police for which includes: performance evaluations, investigations, training, disciplinary process, hiring, promotion, authorizing vacation requests, reviewing employee time-cards, interpreting and communicating laws and policies, assuring staff comply with established laws and policies, assisting with the development and delivery of training and case management.)

10% (Conduct investigations involving employe conduct.)

These categories total to 50% of Nelson's time.

University Exhibit 42, which is a JRW for Sergeant John Torres, shows the following with respect to time spent conducting statutory supervisory duties:

50% (Events Coordinator: Responsible for receiving events requests for police officers and auxiliary officer services. Assess event requests for consideration of scheduling police/security services, working with event requestors regarding their requested needs/logistics of their event in regards to providing police/security services, creating events in SPOC/POSS, creating event assignment details, posting event details, assigning event details/OT assignments, and entering event billing information into POSS and SPOC for both full-time employees and auxiliary officers.)

30% (Auxiliary Unit Coordinator: Supervise assigned staff (both sworn and non-sworn). Responsible for the overall coordination of the student auxiliary division to include hiring, reviewing assignments, scheduling, deployment of personnel, resource management, retention of student employees, positive and negative performance management, and assisting with various personnel issues in collaboration with HR as needed. Participate in interviews/processes for initial employment or advancement with Auxiliary Police Unit. Collaborate and supervise new initiatives [sic] within the AI unit, including technology, processes, and documentation.)

5% (conduct investigations involving complaints received regarding performance/behavior and/or reports of employee misconduct. Assist with development and interpretation of both laws and policies ensuring assigned staff are in compliance with same.)

These categories total to 85% of Torres's time, which is a substantial period of his work time.

University Exhibit 43, which is a JRW for Lieutenant Bessey, shows the following with respect to time spent conducting statutory supervisory duties:

10% (Report reviewing and approval).

15% (supervise employes, including case management, case follow-up).

These categories total 25% of Bessey's time, which is not a substantial period of his work time.

The four JRWs provided above are generally an accurate breakdown of the time spent by Sergeants and Lieutenants across the Department. When averaged together, the JRWs show that these employes spent 55% of their work time performing supervisory duties. This is sufficient to show that Sergeants and Lieutenants spend a substantial period of time performing supervisory functions pursuant to Board law.

Thus, the record is clear that in this matter Sergeants are the first line of supervision. As Lieutenants are above Sergeants, they are management level employes pursuant to Section 301(16) of the Act as they are above the first line of supervision.

Finally, the last topic to address in this order is the University's argument that Sergeants are management level employees. If Sergeants are management level employees, then they are not the first line of supervision. The record is clear in this matter that they are not management level employees.

Section 301(16) of PERA states:

"Management level employe" means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level of supervision.

43 P.S. § 1101.301(16). Under this provision, a position is at the management level if the employe holding that position (1) is involved directly in the determination of policy; (2) directs the implementation of policy; or (3) is above the first level of supervision. Pennsylvania Association of State Mental Hosp. Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1988); Commonwealth of Pennsylvania (Attorneys Examiner I), 12 PPER ¶ 12131 (Final Order, 1981). In Pennsylvania Association of State Medical Hospital Physicians v. Commonwealth, PLRB, 554 A. 2d 1021 (Pa. Cmwlth. 1989), the Commonwealth Court adopted the Board' s definition of the first part of Section 301(16) of PERA as set forth in Horsham Township, 9 PPER 9157 (Final Order, 1978):

An individual who is involved directly in the determination of policy would include not only a person who has authority or responsibility to select among options and to put proposed policies into effect, but also a person who participates with regularity in the central process which results in a policy proposal and a decision to put such proposals into effect. Our reading of the statute does not include a person who simply drafts language for the statement without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

Id.

The Board's policy is that the use of independent judgment and discretion by the employe when implementing the employer' s policies is necessary to satisfy the second prong of the statutory test for management level employe under Section 301 (16) of PERA. Id.; Municipal Employees of Borough of Slippery Rock v. PLRB, 40 PPER 64 (Proposed Order of Unit Clarification, 2009), 40 PPER 122, (Final Order, 2009), aff'd 14 A.3d 189 (Pa. Cmwlth. 2011). In order to be considered a management level employe, the employe must be responsible for not only monitoring compliance with a policy, but also for taking action in situations where noncompliance is found. Slippery Rock, 14 A.3d 189 (Pa. Cmwlth. 2011).

In this matter, it is clear that the Sergeants are not management level employees. They have no authority to determine policy at all. The Assistant Vice President is the person responsible for determining policy for the whole

Department, not the Sergeants. Additionally, the Sergeants do not participate with regularity in the central process which results in a policy proposal and a decision to put such proposals into effect. On this record, policy is determined and implemented at the level of the Chief and the Assistant Vice President. Finally, to the extent Sergeants perform actions which appear to implement policies, they are merely discharging the routine duties of a security guard who has the responsibility of enforcing University policies throughout the University's campuses.

As I found that Sergeants are the first line of supervision and the Lieutenants are management, the provisional finding above that they share an identifiable community of interest with the members of the bargaining unit is moot. The Lieutenants, as management level employees, are not "public employees" pursuant to Section 301(2) of PERA. First-level supervisors are, unlike Lieutenants, public employees, however pursuant to Section 604(5) of PERA, Sergeants must not be included in other units of public employees.

Therefore, Sergeants and Lieutenants should rightly be excluded from the bargaining unit and the Association's Petition to add them shall be dismissed.

CONCLUSION

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The University is a public employer within the meaning of Section 301(1) of PERA.
2. The Association is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. Sergeants are statutory supervisors and the first level of supervision.
5. Lieutenants are statutory management level employees.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the petition for representation is dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this 20th day of August, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich
STEPHEN A. HELMERICH, Hearing Examiner