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SEED OPINION 89-016

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Fraternal Order of Police, Ohio Labor Council, Inc.,
Employee Organization,
and
State of Ohio, Office of Collective Bargaining,
Employer.

CASE NUMBER: 87-REP-04-0124

DIRECTION TO ELECTION
(Opinion Attached)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
March 16, 1989.

On April 24, 1987, the Fraternal Order of Police, Ohio Labor Council, Inc. (Employee Organization), filed a petition for representation election seeking to represent a proposed bargaining unit of state employees classified as State Highway Patrol Sergeants. On May 11, 1987, the State of Ohio, Office of Collective Bargaining (Employer) filed a response to the petition objecting to the proposed unit. The matter was directed to hearing. The hearing on August 6, 1987, was limited to the issue of whether the petition was barred under the doctrines of estoppel and res judicata. On December 17, 1987, the Board issued an opinion holding that neither doctrines have any relevance to appropriate unit determinations and remanded the case to hearing for resolution of the remaining issues. On June 6-8, 1988, a hearing was held on the remaining issues.

The Board has reviewed the record, the hearing officer's recommended determination, exceptions and response. For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Stipulations and Findings of Fact, amends Conclusion of Law No. 4 to read: "All of the Highway Patrol Sergeants are not 'supervisors' within the meaning of O.R.C. Section 4117.01(F)" and adopts the Conclusions of Law as amended. Board Member Latané, who voted with the majority on March 16, 1989, changed her vote on March 30, 1989, dissenting.

The Board directs that an election take place in the following unit:

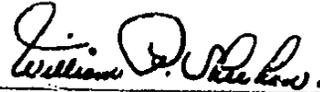
- Included: All Highway Patrol Sergeants
- Excluded: All confidential and other employees

Direction of Election
Case No. 87-REP-04-0124
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The time and place of the election shall be determined by the Administrator of Representation in consultation with the parties. No later than July 23, 1989, the Employer shall serve on the Employee Organization and file with the State Employment Relations Board a numbered alphabetized eligibility list with the names and addresses of those employees eligible to vote as of March 16, 1989.

It is so directed.

SHEEHAN, Chairman, and DAVIS, Vice Chairman, concur. LATANE, Board Member, dissents.



WILLIAM P. SHEEHAN, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Common Pleas Court within fifteen days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party and the representative of each party by certified mail, return receipt requested, on this 13th day of July, 1989.


CYNTHIA L. SPANSKI, CLERK

2106b:j1b

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Fraternal Order of Police, Ohio Labor Council, Inc.,
Employee Organization,

and

State of Ohio, Office of Collective Bargaining,
Employer.

CASE NUMBER: 87-REP-04-0124

OPINION

Sheehan, Chairman:

The Fraternal Order of Police, Ohio Labor Council, Inc. (FOP) sought to represent a proposed bargaining unit of state employees classified as State Highway Patrol Sergeants by filing a petition for representation election on April 24, 1987. The State of Ohio, Office of Collective Bargaining (OCB), as Employer, responded to the petition on May 11, 1987, by contending: 1) that all the employees in the proposed unit were either supervisors or managers within the meaning of Revised Code (R.C.) Chapter 4117; 2) that the FOP, in Case No. 85-RC-04-3501, had agreed to exclude these employees from the state unit and were, therefore, estopped from arguing a contrary position now; and 3) that a bargaining unit consisting solely of sergeants would not constitute an appropriate bargaining unit pursuant to R.C. §4117.06. On June 18, 1987, the Board directed the matter to hearing and a hearing was held on August 6, 1987, limited to the single issue of OCB's claim that the FOP's petition is barred under the doctrines of estoppel and res judicata. The Hearing Officer issued a recommended determination that the representation election petition be dismissed as barred by the doctrine of collateral estoppel. The Board subsequently ruled that neither the

doctrines collateral estoppel nor res judicata "have any relevance to appropriate unit determinations in labor law." In re State of Ohio, SERR 87-030 (12-17-87). The case was remanded to the Hearing Officer for resolution of the remaining issues.

At the hearing held on June 6-8, 1988, the OCB clarified its position by stating that if the Board determined that Highway Patrol Sergeants must be placed in some unit, OCB would not object to their being in a separate unit but would object to their being placed in State Unit 1, the original Highway Patrol Officers' unit. OCB also argued that at least two of the sergeants were confidential employees. The issues remaining were:

- 1) Whether the Highway Patrol Sergeants are supervisors within the meaning of R.C. §4117.01(F) or confidential employees within the meaning of R.C. §4117.01(B), or management level employees within the meaning of R.C. §4117.01(K)?
- 2) Assuming some Highway Patrol Sergeants are public employees within the meaning of R.C. §4117.01(C), what is the appropriate bargaining unit for them pursuant to the criteria of R.C. §4117.06?

II

On March 2, 1989, the Hearing Officer issued his recommended determination to dismiss the petition for representation election because, as set forth in Conclusion of Law No. 4, "all of the Highway Patrol Sergeants are supervisors within the meaning of O.R.C. §4117.01(F)." The Hearing Officer also concluded that Sergeant Richard Corbin is a "confidential employee" within the meaning of O.R.C. §4117.01(J), but Sergeant Ernst Howard is not. For the reasons adduced below, the Board amends Conclusion of Law No. 4 to read, "All of the Highway Patrol Sergeants are not 'supervisors' within the meaning of O.R.C. §4117.01(F)," and adopts the Hearing Officer's Stipulations; the Findings of Fact; Conclusions of Law

Nos. 1, 2, 3, 4 as amended, 5 and 6; and directs an election to be conducted in a bargaining unit consisting of all Highway Patrol Sergeants, excluding all confidential and all other employees.

III

The Hearing Officer in his analysis, which led to his recommendation that all sergeants are "supervisors" pursuant to R.C. §4117.01(F), relied extensively on three cases. Two of the three are Hearing Officers' recommended determinations, The Ohio State University, SERB Case No. 84-YR-07-1652 (5-8-85) and Cuyahoga County Sheriff, SERB Case No. 86-REP-3-0021 (1-15-87), where the Board adopted the Findings of Fact, Conclusions of Law, and Recommendations, but not the analysis and discussion. A Board Opinion was not issued on these two cases and, consequently, they are limited to the particular facts of the cases and are not considered to have precedential value and pursuant to Ohio Administrative Code Rule 4117-1-17(B) which states:

Hearing officers' recommendations shall not be cited as authority for any principle unless the hearing officer's analysis has been expressly adopted by the Board in accordance with Rule 4117-1-15' of the Administrative Code.

This Rule specifically precludes the consideration of hearing officer cases as authority for any principle unless the hearing officer's analysis has been expressly adopted by the Board.

¹O.A.C. Rule 4117-1-15(B) provides:

Board approval of a hearing officer's recommendation does not constitute adoption of the reasoning set forth in that recommendation unless the reasoning is expressly adopted by the board and the recommendation is incorporated by reference in the board order or directive.

The rationale for this Rule is that, in the absence of an opinion by the Board and when the hearing officer's analysis is not adopted, the reasoning for the Board's upholding the hearing officer's conclusions of law is not specified and, hence, no precedential principle of law exists.

The principal case on which the hearing officer in the case at issue relies is Ohio State University, *supra*, and is an excellent example of why hearing officers' recommendations have no authority when the analysis has not specifically been adopted. The Hearing Officer found many facts similar to both cases, hence drew the conclusion that since the Board upheld the supervisory status of the sergeants in Ohio State University the same should be determined in the case at issue. However, the record² in Ohio State University evidenced that the sergeants had effectively recommended the discharge of an officer. The sergeants in the case at hand have no such authority. This is a very important and significant difference. The authority to cause an employee's discharge is vastly greater authority than that vested in sergeants in the instant case who have no say in the degree of discipline.³ While the Board will take every precaution to assure that similar facts will prompt similar conclusions, the Board must reserve the right to determine the similarity of those facts. In contrast to Ohio State University, the facts in the instant case are dissimilar and require a different conclusion. Thus, the reliance on hearing officers' cases where

²See hearing officer's recommended determination in In re Ohio State University, SERB Case Nos. 84-VR-07-1652 and 84-RC-08-1761 (5-1-85).

³Finding of Fact (F.F.) No. 8.

no precedent exists is faulty and does not carry persuasive weight.*

The Board opinion relied upon by the hearing officer is Greater Cleveland Regional Transit Authority, SERB 86-013, in which the Board found

*The dissent focuses upon the significance of the hearing officer's recommendations and analysis. The dissent does not share the majority's dissatisfaction with the hearing officer's reliance upon inappropriate citations. In response, all that need be said is that the Board and only the Board creates precedent. The Board, not its staff, is the interpreter of the law. The dissent's contorted reading of O.A.C. rule 4117-1-17 is contrary to the essential duties vested in this three-member Board by R.C. Chapter 4117. In carrying out our duty of applying the law, the Board welcomes citations by parties and staff of legitimate legal authorities. The dissent, however, fails to recognize that when the Board adopts a hearing officer's recommended conclusions of law but declines to pen an opinion or to adopt the hearing officer's analysis, the Board does so because there are no legal issues of significance to warrant a precedent-setting statement of standards or analysis. Such rulings are limited to the facts of the individual cases. O.A.C Rule 4117-1-17(B) reflects this status and is comparable to rules promulgated by the federal and states' courts in which these judicial bodies have clarified the precedential status of certain rulings. See e.g., 6th Cir. R. 10 (F), 1988-89.

As the dissent concedes, issues of supervisory status are resolved on a case-by-case basis and turn on the facts of each particular case. This very point illustrates the inappropriateness of the efforts by the hearing officer and the dissent to extract precedential value from hearing officer recommendations that have been adopted without Board opinions or affirmation of the analyses.

The dissent's second point appears to be that the Board should defer to the hearing officer's legal decision. Certainly, a hearing officer's findings of fact generally receive substantial deference from the Board. However, the application of the law to those facts is within the special province and responsibility of the Board. If the dissenting Board Member disagrees with the majority's application of the law to the facts, then that is a legitimate reason to dissent. However, merely because the hearing officer reached a given result by applying the law to the facts is not a valid reason to support that conclusion. Such a misreading of the statute would result in an abdication of this Board's statutory obligation to interpret and apply the law.

The cases cited by the dissent are misplaced. The dissent misses the fundamental distinction between issues of fact and issues of law. The cases cited deal with situations where issues of fact, with regard to which there is deference to the trier of fact, are in dispute. However, this is not as in the instant case. As a matter of fact, in the case at hand the Board adopted the hearing officer's findings of fact. The dispute in this case is on issues of law, specifically on whether the facts in this case establish supervisory status. This legal determination is the duty and responsibility of the Board and only the Board.

the sergeants were not supervisors within the meaning of R.C. §4117.01(F), because they lacked authority to act in six essential areas. The hearing officer in the instant case found that the sergeants possessed partial authority in two⁵ of the six areas listed in R.C. §4117.01(F), and, consequently, concluded that they met the test for supervisory status. However, the relationship between this conclusion and the rationale of the Board opinion is not obvious nor is it warranted.

The determination of whether an individual or a group of similarly situated individuals are "supervisors" within the meaning of R.C. §4117.01(F) must be determined on a case by case basis.⁶ The general requirement has been that the exercise of authority must require the use of independent judgment, not judgment of a routine or clerical nature. Even when an employee has the power to exercise, or to effectively recommend the exercise of functions, supervisory status should not readily be accorded unless the power is accompanied by the authority to use independent judgment in determining how, in the interest of management, it will be exercised.⁷ It is settled that for an individual to be determined a supervisor, the individual must possess more than one of the responsibilities enumerated in

⁵F.F. No. 9 - Highway Patrol Sergeants are the first step of the contractual grievance procedure. Sergeants are supposed to call someone higher up before they resolve formal grievances.

F.F. No. 12 - Written comments by sergeants are part of the written team evaluations used for personnel ratings and promotional decisions. The Lieutenant has the final say.

⁶In re Lucas County Recorder's Office, SERB 85-061 (11-27-85).

⁷29 USCS Sec. 152(11), City of Davenport v. Public Employment Relations Board.

R.C. §4117.01(F), with one crucial determinant being the exercise of independent judgment in the exercise of authority.*

In the instant case, the sergeants' actual responsibilities included tasks such as advising Clericals, Dispatchers and Weight Scale Operators of proper procedures,⁹ directing, evaluating and resolving problems. Responsibilities cited in the Hearing Officer's analysis also involved initiating employee commendations, involvement in performance evaluations, handling resisting arrest investigations, approving compensation time, sick leave and personal leave, and numerous other responsibilities. There is little evidence tending to establish that the sergeants exercised their authority in these areas in a manner indicating the required significant independent judgment or discretion in the interest of the employer. For instance:

- 1) Sergeants can use their discretion to approve reassignments of routes requested by a Trooper - but, on occasion, an experienced Dispatcher may change a line assignment.¹⁰
- 2) If the need for extra manpower is not just a local problem where a Sergeant can exercise his discretion, the Sergeant will check with higher authority.¹¹
- 3) Post Commanders usually delegate the investigation of a complaint against a Trooper to one of the Sergeants, although a Trooper could initiate an investigation of a fellow Trooper for misconduct.¹²

*Greater Cleveland Regional Transit Authority, SERB 86-015 (4-17-86).

⁹F.F. No. 5.

¹⁰F.F. No. 4.

¹¹F.F. No. 5.

¹²F.F. No. 8.

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- 4) The Sergeant is the first step of the contractual grievance procedure but the Sergeants are supposed to call someone higher up before they resolve formal grievances.¹³
- 5) A Sergeant can initiate the steps to have an employee rewarded or recognized for outstanding conduct. Anyone else can recommend anyone for a commendation.¹⁴
- 6) Sergeants are part of the evaluation team to rate actual performance of employees as well as their potential for a supervisory post. The teams consist of two or more Sergeants and a Lieutenant. The Lieutenant has the final say.¹⁵
- 7) If there is a pattern of inactivity or idle time, the Sergeant can use his discretion to either counsel the employee or bring it to the attention of the Post Commander.¹⁶
- 8) When a Post hires a clerical employee, a Sergeant may be asked to assist with the interviewing and to give input.¹⁷

All of the above facts show that, while the sergeants have certain authorities, the level of exercising their authorities is no more than routine and clerical in nature. In fact, anything which is out of the usual or calls for independent judgment in the interest of the Employer, is left to the higher-ups to decide. Consequently, the supervisory status of the Sergeants in question has simply not been proven.

¹³F.F. No. 9.

¹⁴F.F. No. 11.

¹⁵F.F. No. 12.

¹⁶F.F. No. 15.

¹⁷F.F. No. 16.

Moreover, once supervisory status is established, there is no question that such an individual does not have a statutory right to be represented in a collective bargaining unit. Conversely, to grant supervisory status when such status has not been adequately established is to deny those employees rights granted them under R.C. Chapter 4117. Any question regarding the Sergeants' status as employees must, therefore, be considered within the context of the goals of Chapter 4117 to ensure that the protection and rights granted public employees suffers no abridgment from over restrictive interpretation.

Davis, Vice Chairman, concurs. Latané, Board Member, dissents.

04418:HMPS/J16:7/12/89:F

FILE NO. B.

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,
and
Fraternal Order of Police, Ohio Labor Council,
Employee Organization,
and
State of Ohio, Office of Collective Bargaining,
Employer.

CASE NUMBER: 87-REP-04-0124

DISSENTING OPINION

Latané, Board Member:

I respectfully dissent from the majority determination in this case that Highway Patrol Sergeants are not supervisors within the meaning of O.R.C. §4117.01(F). I find that the Hearing Officer's Conclusion of Law No. 4, that Highway Patrol Sergeants exercise supervisory powers, is supported by substantial evidence in the record. As the Hearing Officer noted in his Analysis and Discussion, Section A of which is incorporated by reference in this dissent, supervisory and managerial issues are questions of fact in each case and such status must be determined on a case-by-case basis.

The Hearing Officer determined that the employees in question possess more than one of the responsibilities enumerated in O.R.C. §4117.01(F) while not meeting the test of managerial responsibility defined in §4117.01(K). The majority, citing Ohio Administrative Code Rule (O.A.C.) 4117-1-17(B), finds that the Hearing Officer sub judice improperly relied on two SERB cases where the Board adopted a Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendations.

The majority errs in its interpretation and application of the rule addressing citation of Hearing Officer recommendations. O.A.C. 4117-1-17(B) makes no mention of Board decisions which uphold Hearing Officer recommendations. It is questionable whether the Board may reasonably restrict parties or their advocates from citing any source of authority, be it a Hearing Officer or another tribunal. The relevance or persuasive value of a citation ultimately rests with the Board in any event. The Board has ruled in several cases that it is not bound by NLRB precedent, hence parties

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are a ready on notice that the Board looks only to its own decisions (to the extent it is not overruled by a higher tribunal) for controlling precedent.

Although the majority's zealous defense of its assumed legal right to limit use of its own public, legal record is eloquent, it is not persuasive. The State Employment Relations Board is a quasi-judicial public agency, not a court. As such, it is subject to the provisions of O.R.C. §119.09 and also to O.R.C. §121.22. O.R.C. §119.09 states in part:

No such recommendation (of a referee or examiner) shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

This provision of O.R.C. §119.09 makes clear the necessity for O.A.C. 4117-1-17(B). A recommendation by a Hearing Officer needs affirmation by the Board in order to be final, and clearly a tentative recommendation should not be cited.

The State Employment Relations Board is also subject to the provisions of O.R.C. §121.22, which requires (with a few exceptions) decisions to be reached in public, which further differentiates this Board from a court. A Hearing Officer's Recommended Determination or Proposed Order, the Order or Directive of the Board, and Opinions of the Board are a matter of public record, whether or not precedential.

To forbid the citation of a case for its applicable Findings of Fact and Conclusions of Law, when affirmed by the Board, lessens the Board's accountability for its actions by potentially allowing arbitrary and inconsistent decisions by the Board with no ability by the public to determine what those rulings are. The Findings of Fact and Conclusions of Law, if affirmed by the Board, have legal status whether or not the legal reasoning is agreed with by the entity that has affirmed them.

In this case the Hearing Officer was careful to refer only to the Facts and Conclusions of Law in the cases cited as affirmed by the Board with no opinion, The Ohio State University, SERB Case No. 84-VR-07-1652 (5-8-85), and Cuyahoga County Sheriff, SERB Case No. 86-REP-3-0021 (1-15-87). He relied on those two decisions, other cases, and his own analysis of the record in reaching his recommendations. I found his Conclusions of Law to be well supported by the Findings of Fact and his Analysis and Discussion. I do not find his Analysis and Discussion flawed by the inclusion of the above cited cases.

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It is unreasonable to restrict the citation of the Board's own decisional authority, whether it emanates from a Hearing Officer's Findings of Fact and Conclusions of Law adopted by the Board, or from the Board's own handiwork. In any case, the Board's affirmance of a Hearing Officer's proposed order, based upon the specific facts in that case, must be accorded some, albeit limited, instructive value. The fact that the Board has affirmed a Hearing Officer's recommended determination not only brings SERB into compliance with O.R.C. §119.09, but also clearly takes such decision beyond the purview of O.A.C. 4117-1-17(B). There should be a Board policy that cases with the same or similar facts should be decided alike, and this view of what constitutes precedent would help to ensure consistency.

To reiterate, supervisory cases must be decided on a case-by-case basis, and substantial evidence should be presented to repudiate the decision of the trier of fact. I do not find that evidence, factual or legal, present in this case. See Mosher Steel Co. v. NLRB, 568 F. 2d 436 (5th Cir. 1978); cf. Standard Dry Wall Products, Inc., 91 NLRB No. 103 (1950).

The Hearing Officer's Conclusion of Law No. 4, finding that Highway Patrol Sergeants' duties are supervisory, is well supported by the Findings of Fact and Analysis and Discussion and should be upheld.

0452B:JL/b:7/13/89:f

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Fraternal Order of Police, Ohio Labor Council, Inc.,
Employee Organization,

and

State of Ohio, Office of Collective Bargaining,
Employer.

CASE NUMBER: 87-REP-04-0124

HEARING OFFICER'S RECOMMENDED DETERMINATION

Paul Cox and Deborah Bukovan, Esquires, 3360 East Livingston Avenue,
Columbus, Ohio 43227, (614) 235-3800, representative for FOP/OLC.
Steven Chesler, Esquire, 65 East State Street, 16th Floor, Columbus, Ohio
43215, (614) 466-1758, representative for State of Ohio, OCB.

I. STATEMENT OF THE CASE

On April 24, 1987, the Fraternal Order of Police, Ohio Labor Council, Inc. (FOP), filed a petition for representation election seeking to represent a proposed bargaining unit of state employees classified as State Highway Patrol Sergeants. The State of Ohio, Office of Collective Bargaining (OCB), as Employer, on May 11, 1987, filed a response to the petition in which it urged that (1) all of the employees in the proposed unit were either supervisors or managers within the meaning of Revised Code Chapter 4117; (2) that the FOP in Case No. 85-RC-04-3501 had agreed to exclude these employees from the state unit and were, therefore, estopped from arguing a contrary position now; and (3) that a bargaining unit consisting solely of sergeants would not constitute an appropriate bargaining unit pursuant to R.C. 4117.06. On June 18, 1987, the Board directed this matter to hearing.

The hearing on August 6, 1987, in this case, was limited to the OCB's claim that the FOP's petition is barred under the doctrines of estoppel and res judicata. The Hearing Officer issued a recommended determination on September 9, 1987, that the representation election petition be dismissed as barred by the doctrine of collateral estoppel. In an opinion written by then-Chairman Day on December 17, 1987, the Board held that neither the doctrines of collateral estoppel nor res judicata "have any relevance to appropriate unit determinations in labor law." This case was remanded to the Hearing Officer for resolution of the remaining issues.

A hearing on the remaining issues was held on June 6-8, 1988. At hearing, the OCB clarified its position by stating that if the Board determined that Highway Patrol Sergeants must be placed in some unit, OCB would not object to their being in a separate unit but would object to their being placed in State Unit 1 (i.e., the original Highway Patrol Officer unit). (I. 9-10). OCB also argued at hearing that at least two of the sergeants were confidential employees. Both parties filed post-hearing briefs with the Hearing Officer on August 12, 1988.

II. ISSUES

1. Whether the Highway Patrol Sergeants are supervisors within the meaning of Revised Code Section 4117.01(F), or confidential employees within the meaning of Revised Code Section 4117.01(J), or management level employees within the meaning of Revised Code Section 4117.01(K).
2. Assuming some Highway Patrol Sergeants are public employees within the meaning of Revised Code Section 4117.01(C), what is the appropriate bargaining unit for them pursuant to the criteria of Revised Code Section 4117.06?

III. STIPULATIONS

1. The Fraternal Order of Police, Ohio Labor Council, Inc., is an "employee organization" within the meaning of Ohio Revised Code §4117.01(D). (I.7).
2. The State of Ohio, Office of Collective Bargaining, is a "public employer" within the meaning of Ohio Revised Code §4117.01(B). (I.7).
3. Sergeant Richard Corbin is a "confidential employee" within the meaning of Ohio Revised Code §4117.01(J). (I. 201).
4. In the Ohio Highway Patrol there are a total of 700-800 Troopers; 250 Dispatchers, including Communications Technicians and Electronics Technicians; and 253 Sergeants. The Highway Patrol has 57 Posts in Ohio, and 220 of the Sergeants are assigned to those Posts. The remaining 33 Sergeants are assigned to the General Headquarters, District 6, in Cleveland Operations. (II. 171).
5. Since April of 1986, until the date of hearing, the Highway Patrol has had 333 grievances filed. (II. 171).
6. State Highway Patrol Sergeants do not have authority to hire, transfer, suspend, lay off, recall from layoff, or discharge an employee. (I. 62, 117-119).

OCB's Position

4230-1171

All references to the transcript of the hearing are indicated parenthetically by the volume in Roman numerals, followed by the page number. References to exhibits are indicated parenthetically by "Exh." preceded by a reference to the party whose exhibit is being referenced.

IV. FINDINGS OF FACT

1. The Ohio State Highway Patrol has 57 Posts located in 57 of Ohio's 88 counties. These are further grouped into nine Districts in addition to the Turnpike. A Lieutenant is in charge of a Post, while a Captain is in charge of a District. There are also Majors, Lieutenant Colonels and a Colonel. (I. 158-159).
2. The Posts operate on three shifts, twenty-four hours a day. The Lieutenant of the Springfield Post, as Post Commander, works Monday through Friday, 8:00 a.m. to 5:00 p.m. Sergeants are in charge of the Post whenever the Lieutenant is absent, which includes two shifts every day, as well as other occasions when the Lieutenant is on leave or taking his two days off each week. (I. 19-20, 29).
3. Line assignments and shift schedules for Troopers and Sergeants are made up in advance for a 30-day period of time by the Lieutenant. Sergeants rotate shifts as Shift Supervisors. In the absence of the Lieutenant (e.g., vacation), the Sergeant as Acting Post Commander has the same authority as the Lieutenant. When a Lieutenant is gone for a short period of time, the responsibility of Acting Post Commander is rotated, depending on which Sergeant is working the day shift. However, long absences may result in a particular Sergeant being chosen as Acting Post Commander with a temporary increase in pay. (I. 17-18, 29-31, 121-122, 139-140).
4. A Highway Patrol Sergeant (Sergeant) supervises a shift. The Sergeant is responsible for ascertaining that Troopers report for duty, have proper patrol assignments for the day, and have all the necessary equipment, such as arrest reports, etc. Troopers are assigned to patrol certain routes in advance. The Shift Sergeant makes any schedule adjustments as necessary during the shift, such as when someone calls in sick. The Sergeant is not required to consult the Lieutenant before doing so. Shift Sergeants can also use their discretion to approve reassignments of routes requested by a Trooper, such as where light traffic exists on the original assignment. On occasion, an experienced Dispatcher may change a line assignment based on knowledge of priorities, particularly if the Shift Sergeant cannot be reached when the need arises. However, the ultimate responsibility for seeing to it that all necessary assignments are covered rests on the Shift Sergeant. (I. 18-19, 58-60, 107-108, 142; II. 29-31, 122-123, 156-157).
5. Shift Sergeants perform most of the same functions as the Lieutenant with regards to the actual supervision of employees, including clericals, Dispatchers, and Weight Scale Operators; advising as to proper procedures, directing, training, evaluating, and resolving as appropriate. References to the transcript or to exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the related Findings of Fact.

problems. Shift Sergeants assign Troopers to give speeches when needed and to do investigations. A Sergeant can use his discretion to send employees home that he deems are unfit to work. In the event of a special need (e.g., a snowstorm), he or she can use his or her own discretion to call out the next shift early or hold over a shift late, even though this may result in overtime pay. If the need for extra manpower is not just a local problem, the Sergeant will check with higher authority, otherwise the Lieutenant is notified after the fact in most cases. If the Trooper responds to an accident near the end of his shift, he must call the Shift Supervisor to get authorization for overtime. The Sergeant using his discretion can authorize overtime, or send a Trooper on the new shift to handle it, or handle it himself. Sergeants can approve overtime and dispute overtime claimed by an employee. (I. 23-26, 25, 60-61, 106-107, 114, 116, 142, 156-157, 178-180, 184-185; II. 34, 128-133, 157-159; III. 9-10).

6. Dispatchers are entitled to half-hour lunch breaks. The Shift Sergeant decides when the Dispatchers can go to lunch and who will fill in for the Dispatcher. Sergeants have authority to approve compensatory time, sick leave and personal leave after ascertaining that adequate staffing will be available and that the proper procedures have been followed. A timely request for leave except in emergencies must be made at least 24-48 hours in advance. (I. 34, 44, 106-107, 141-142, 184; II. 56-57, 146-147).
7. At the Springfield Post, Sergeants are required to respond to all fatal accidents, serious injury accidents, and situations where a road may be blocked and additional assistance is needed. At other times the Sergeant may use his discretion in responding. At an accident scene, the Sergeant is in charge as the highest ranking officer at the scene. Sergeants spend approximately 30% of their time doing patrol work like other Patrol Officers, but they will still supervise via their radio when they work patrol. A Sergeant has authority to call from off-duty a Trooper trained as a Technical Accident Investigator to the scene of a serious accident or fatality. (I. 39-41, 97-98, 124, 130-131, 186, 192-193).
8. Sergeants handle resisting arrest investigations. Post Commanders usually delegate the investigation of a complaint against a Trooper to one of the Sergeants. The Sergeant can attempt to resolve the problem with the complaining party. If the Sergeant discovers improper behavior, he can counsel the employee or give a verbal reprimand or give a formal report to the Post Commander. In the case of a formal investigation, the Sergeant will issue a report on the facts and recommend whether or not discipline should be taken (i.e., chargeable or non-chargeable). The degree of discipline is left to the General Headquarters to assure uniformity of discipline throughout the state considering the employee's past record. Only about 2% of the time does a Sergeant's recommendation of chargeable or non-chargeable get reversed by higher level officers. Although a Trooper could initiate an investigation of a fellow Trooper for misconduct, this virtually never happens. tardiness situations are controlled by the collective bargaining agreement, but a Sergeant can use discretion on a first offense to

- dock his pay but issue no reprimand if the Sergeant believes it was not the Trooper's fault (e.g., a flat tire). (I. 20-22, 46-47, 105-106, 115, 117, 143, 148, 170-174, 178; II. 31-33, 36-40, 82-84, 91-93, 123-128, 133-138, 150-155; III. 5-7, 27-29, 32-33; State Exhs. 5-7).
9. The Sergeant is the first step of the contractual grievance procedure. Many problems at the Post are resolved by Sergeants with employees and never become grievances. Sergeants are supposed to call someone higher up before they resolve formal grievances in order to ensure consistency in the interpretation of policy and procedure. Ultimately, 37% of all grievances are resolved at Step One of the grievance procedure. A grievance is considered resolved at Step One if the employee doesn't pursue it beyond Step One. (I. 24, 49, 110-111, 143-144, 181; II. 34-36, 165; III. 24-27, 35-38; State Exhs. 4, 14, 18 and 19).
 10. Sergeants ride with Troopers to observe and evaluate their handling of situations and to advise or correct problems. Sergeants evaluate how proficient Troopers are with the radar equipment. (I. 27-28, 109, 145; II. 85-86, 99-100, 167-168).
 11. A Sergeant can initiate the steps to have an employee rewarded or recognized for outstanding conduct. Anyone else can recommend anyone for a commendation. Troopers would make a recommendation to their Sergeant or Lieutenant and so on up the line. Once a recommendation comes to the General Headquarters, some form of commendation is almost always given. (I. 62-63, 144-145, 162, 182-183; III. 29-32).
 12. Written performance evaluations of employees are used to rate actual performance as well as the person's potential to be a supervisor. The Highway Patrol utilizes team evaluations of Troopers at each Post. The team consists of the Lieutenant and two or more Sergeants. One type of evaluation used to measure supervisory potential after three years, the Trooper Performance Report, is semi-annual and is described in State Exhibit 15. Another type of evaluation rates performance and not supervisory potential, and is administered semi-annually to Troopers with more than one year's service. (State Exh. 17). In most instances, the Sergeants jointly sign Trooper evaluations with the Lieutenant. The Lieutenant usually relies a lot on the Sergeant's impressions of the Troopers because the Sergeants work most closely with them. In case of a conflict regarding the rating, the Lieutenant has the final say. (I. 31, 53-56, 114, 125-126, 146, 148, 161, 189-190; II. 63-66, 96-99, 147-149).
 13. FOP Exhibit 4 is a computer-generated list of time spent by each officer performing various duties: patrolling (PTL), accident investigation (ACC), court time (CRT), case investigation time (CASE), supervising (SPV), dispatching (DESK), special detail function (SPC), and contract function hours (CFH). FOP Exhibit 5 is a list on the number of production-related activities by employees: warnings (WAR), arrests (ARR), commercial vehicle enforcement (COM), driving under the influence (DUI), accident investigation (ACC), motor vehicle inspections

V. ANALYSIS AND DISCUSSION

A. SUPERVISORY AND MANAGERIAL ISSUES.

Section 4117.01(K) provides in relevant part:

(K) "Management level employee" means an individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of collective negotiations, administer collectively negotiated agreements, or have a major role in personnel administration ..."

Section 4117.01(F) provides in relevant part:

(F) "Supervisor" means any individual who has authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment. ...

Those individuals found to be managers and/or supervisors within the meaning of the above definitions are not considered "public employees" pursuant to §4117.01(C)(10), and the Employer cannot be compelled to bargain with them. The Employer could choose to recognize and bargain with a unit of supervisors voluntarily. In re City of Canton, SERB 85-011 (4-2-85), 2 OPER Par. 2439; University of Cincinnati v. SERB, 1987 SERB 4-25 (CP, Hamilton, 2-9-87).

"Members of the State Highway Patrol" are separately defined in R.C. Section 4117.01(H), and are not included in the definition of "members of a police department" within the meaning of R.C. Section 4117.01(M). Therefore, the determination of their supervisory status is controlled by R.C. Section 4117.01(F) above.

Supervisory and managerial issues are a question of fact in each case and such status must therefore be determined on a case-by-case basis. In re Lucas County Recorder's Office, SERB 85-061 (11-27-85), 3 OPER Par. 3001. The burden of establishing an exclusion from a bargaining unit under §4117.01 rests upon the party seeking it. In re Franklin Local School District Bd of Ed, SERB 84-008 (11-8-84), 1 OPER Par. 1308; and Mad River Township Professional Fire Fighters and Mad River Township Trustees, Case Nos. 84-VR-04-0854 and 84-RC-04-0863, 1 OPER Par. 1547 (SERB 12/5/84); See also Tuscan Gas and Electric Co., 241 NLRB 181 (1979).

See also Mossburg v. Standard Oil Company, 98 N.J. Sup. Ct. 393, 237 A 2d 508, 67 LRRM 2386 (1967); Beverly Enterprises v. NLRB, 661 F 2d 1095 (6 Cir. 1981).

In order to be determined to be a supervisor, an individual must possess more than one of the responsibilities enumerated in §4117.01(F); and key to that supervisory status is the use of independent judgment in the exercise of authority. In re Greater Cleveland Regional Transit Authority, SERB 86-015 (4-17-86), 3 OPER Par. 3032; In re Lucas County Recorder's Office, supra. A combination of supervisory and managerial responsibilities will also result in an exclusion of the individual. In re Ohio Historical Society, SERB 86-004 (2-12-86), 3 OPER Par. 3009.

In this case, the individuals at issue hold the title of Sergeant. Although Sergeants are usually included in bargaining units, particularly when members of a police department, the Board has held that job descriptions and job titles are not determinative of supervisory status, but rather the actual job duties performed and the authority that the individual or classification actually possesses. AFSCME, Ohio Council 8 and Lucas County Recorder's Office, supra.

There were three previous cases where Sergeants who are not "members of a police department" have had their supervisory status determined by SERB. In re Ohio State University, no official citation, Case Nos. 84-VR-07-1652 and 84-RC-08-1761, 2 OPER ¶ 2566 (5-1-85), the Board held that such employees were supervisors, upholding a Hearing Officer's recommendation. The facts in that case demonstrated that the employees in issue routinely assigned subordinate employees' duties and used staffing requirements and common sense in approving compensatory time and leave. These same factors are present in the instant case.

Likewise, in Ohio State University, the alleged supervisors at issue tried to resolve grievances informally and, when that failed, served as the first step of the contractual grievance procedure. In addition, it was noted that the Chief and the Deputy Chiefs were all absent 60-70% of the time leaving the employees at issue as the highest ranking officers in charge. It was noted that calls to superior officers were made not to seek direction but rather to notify of an action already taken.

In the instant case, Sergeants try to first resolve grievances informally and then serve as the first step of the contractual grievance process. The Post Commander, who only works 40 hours a week, is absent from the Post about 76% of the time, leaving Sergeants as the highest ranking officer in charge. Although one or two Sergeants testified they would call their Lieutenant before making any significant discretionary decision, most of the Sergeants testified that they usually only call the Lieutenant to inform him of their decision after the fact, except in certain previously specified situations where they are required to get approval from higher ups. (III. 10). It is the existence of the supervisory authority that is controlling, not merely whether the employee has chosen to exercise this authority. See, Morelle v. Federal Barge Lines, Inc., 746 F 2d 1347 (8th Cir. 1984).

Finally, in Ohio State University, the employees at issue attended regular management meetings, recommended commendations, conducted evaluations which were considered in transferring or promoting an officer, and effectively recommended discipline, although they did not determine the amount of discipline. All these factors are present in the instant case.

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Because a recommendation is reviewed by higher authority and an independent investigation is made before recommendations are acted upon, does not render the recommendation less effective. Eastern Greyhound Lines v. NLRB, 57 LRRM 2241 (6th Cir. 1964). The testimony in this case was that once a Sergeant initiated discipline against an employee, some kind of discipline was given to that employee 98% of the time.

In re Greater Cleveland Regional Transit Authority, SERB 86-015, 3 OPER ¶ 3032 (4-17-86), the Board held that Transit Police Sergeants were not supervisors. In that case, all Transit Officers Grade 3 (who are in the bargaining unit) served regularly as shift supervisors in addition to the Sergeants. In this instance, it is relatively rare that a non-Sergeant serves as a shift supervisor. Similarly, the Board specifically found that recommendations of Transit Police Sergeants for discipline were not effective.

The Board found there was no evidence that Transit Police Sergeants adjusted grievances, and that the authority of Transit Police Sergeants was routine and clerical in nature and did not require the use of independent judgment. In this instance, Highway Patrol Sergeants are involved both formally and informally in resolving grievances, and the record was replete with statements about how often the use of independent judgment and discretion are needed by the Shift Sergeant. (For example, see I. 22-24, 97-98, 107-108, 114, 129-130, 144-145, 184, 188-189; III. 9-10.)

In the Greater Cleveland RTA case, the Board noted that Sergeants in that instance could not promote employees. In the present instance, the written team evaluations, which include the written comments of the Sergeants, are specifically and explicitly used in making promotional decisions. The Sergeants testified that their input on the evaluations had a real bearing on promotional decisions. (I. 189-190).

The last case where Sergeants were found to be supervisors was In re Cuyahoga County Sheriff, Case No. 86-REP-3-0071, Hearing Officer Recommended Determination issued 12-4-86, affirmed without opinion by SERB 1-15-87. unpublished. In that case it was noted that Correction Officer Sergeants were the highest ranking officers in the jail on second and third shifts. In both that case and the instant case, higher ranking officers above a Sergeant could usually be reached via a pager (II. 103-104), yet the record in both cases demonstrated that it was impractical to call a higher ranking off-duty officer every time a situation arose requiring that discretion be exercised. Certain emergencies require that immediate action be taken and thus higher ranking officers usually are notified of decisions made and actions taken by Sergeants after the fact.

Although once a written grievance is filed, Sergeants must check with higher ups to assure uniformity of contract interpretation and department policies.

(6 Cir. 1964)

In the Cuyahoga County Sheriff case, Sergeants assigned and transferred correction officers within the jail, signed off on leave requests, initiated discipline but not the degree, had overall authority and responsibility of their shift, added comments to subordinates' evaluations, and responsibly directed the workforce using necessary discretion when the occasional non-routine situation arose. All of these factors exist in the present case. In addition, the Highway Patrol Sergeants can approve and disapprove overtime requests. Because Highway Patrol Sergeants also supervise clericals, maintenance staff, dispatchers and weight scale operators on their shift (I. 106-108), the supervisor-to-employee ratio is about 4 to 1.⁵ Without Sergeants as supervisors, that ratio jumps to about 20 to 1 at the Post level and leaves each Post without a supervisor 76% of the time.

Authority in a paramilitary organization increases as rank increases. At what point in the hierarchical pyramid that authority becomes sufficient to satisfy the supervisory criteria of Section 4117.01(F) is a question of fact in each case. Each paramilitary authority may be organized differently and responsibilities vary. The conclusion reached in this case will thus not be controlling on other cases, where a Sergeant may have less authority and responsibility. My recommendations are thus limited to the facts of this particular case.

Regarding the claim that Highway Patrol Sergeants are managerial employees, I conclude that the employer failed to carry its burden of persuasion on this point. First line supervisors are rarely managerial level employees, and this case is no exception. Highway Patrol Sergeants do not formulate policy, nor do they have a major role in personnel administration. They are not involved in collective bargaining with one exception regarding one Sergeant that was noted in the record. The fact that two or three Sergeants out of 253 serve on various employer committees does not render the classification managerial. Likewise, merely carrying out orders in the implementation of policy does not make these Sergeants the kind of management level employee the legislature had in mind when it created this exclusion from collective bargaining rights.

B. CONFIDENTIAL ISSUE.

The parties stipulated that one Sergeant was a confidential employee, but another is still in dispute. R.C. Section 4117.01(J) provides that:

"Confidential employee" means any employee who works in the personnel offices of a public employer and deals with information to be used by the public employer in collective bargaining; or any employee who works in a close continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer.

This is about the same ratio as the Ohio State University case.

Findings of Facts, Continued

20. Sergeant Ernest Howard works at General Headquarters in the Fiscal Management Section. This section prepares the budget and payroll of the agency, and does cost studies for grievance settlements and collective bargaining proposals. The Section Commander is a Captain. Sergeant Howard is the Assistant Commander. State Exhibit Number Nine is an accurate reflection of Howard's job duties. (II. 5-6).
21. Thirteen people work beneath Sergeant Howard, including the Fiscal Officer, which was previously exempted from AFSCME's state bargaining unit. Howard interviews all the temporary employees and effectively recommended that four such employees be hired. Howard directs the work of his subordinates and is the final signature for leave requests in his section. The Fiscal Officer supervises the budget and auditing employees, while Howard supervises both the payroll employees as well as the budget and auditing employees. (II. 6-16; State Exh. 8).
22. Employees in the Fiscal Management Section are jointly evaluated by the Fiscal Officer and Sergeant Howard, and then the evaluations are reviewed by the Captain. The Captain has the final say on evaluations. The Fiscal Officer is evaluated by Howard individually. Howard jointly interviewed with the Captain to hire two Accountant I's. (II. 17-22).

Analysis and Discussion, Cont'd

The Board has previously indicated that it will construe the confidential designation criteria of R.C. Section 4117.01(J) narrowly, and will apply the anti-dilution principle of In re City of Loveland, SERB 85-010 (3-28-85) to situations where the employer seeks more confidential designated employees than is reasonably needed for collective bargaining. In re University of Cincinnati, SERB 86-023 (6-5-86). In the present instance, Sergeant Howard does not work in the personnel offices of a public employer unless that phrase is construed broadly. Thus, the first definition of a confidential does not apply to him.

He arguably might fit under the second definition of confidential if the Section Commander directly participates in collective bargaining. The record is silent on that point.⁴ In the Fiscal Management Section, the Employer already has the Fiscal Officer as an exempt employee to cost out collective bargaining proposals. The Employer has the burden to establish why it needs a second confidential-designated employee to perform this same function. In my opinion, the Employer has not met that burden.

⁴ Where the Chief of Police was excluded from negotiations to set wages and conditions of employment for police officers, his personal secretary is not a confidential employee pursuant to R.C. Section 4117.01(J). In re City of Loveland, SERB 85-010 (3-28-85).

Nevertheless, I recommend that Sergeant Howard be excluded from the bargaining unit as a supervisor within the meaning of R.C. Section 4117.01(F). He responsibly directs 13 employees directly or indirectly, jointly evaluates most of these employees and solely evaluates the Fiscal Officer, and has interviewed and successfully recommended the hiring of a number of employees in the section. As such, he qualifies for designation as a supervisor. There is no evidence tending to establish that Howard is a management level employee under R.C. Section 4117.01(K).

C. APPROPRIATENESS OF BARGAINING UNIT.

If the Board concurs in my recommendation to designate all the Highway Patrol Sergeants as supervisors, then the unit appropriateness issue is moot. However, in the interest of saving time, I will address this issue in case the Board disagrees with my other recommendations. Of course, the Employer could choose to engage voluntarily in bargaining with a unit of supervisors. R.C. Section 4117.06(D)(3) provides:

(D) In addition, in determining the appropriate unit, the Board shall not:

* * * *

(3) Include members of a police or fire department or members of the state highway patrol in a unit with other classifications of public employees of the department.

OCB, as the Employer, and the FOP prefer that State Highway Patrol Sergeants be placed in a separate bargaining unit from the Patrol Officers. I concur. Although the unit of about 250 employees would be the smallest unit of state employees by far, the concurrence of the parties on this issue as well as the usual separation of Sergeants from rank and file employees in other police department bargaining units state-wide militates in favor of a separate bargaining unit in this instance.

VI. CONCLUSIONS OF LAW

1. The State of Ohio, Office of Collective Bargaining, is a "public employer" within the meaning of O.R.C. §4117.01(B).
2. The Fraternal Order of Police, Ohio Labor Council, Inc., is an "employee organization" within the meaning of O.R.C. §4117.01(D).
3. Sergeant Richard Corbin is a "confidential employee" within the meaning of O.R.C. §4117.01(J), but Sergeant Ernest Howard is not.
4. All of the Highway Patrol Sergeants are "supervisors" within the meaning of O.R.C. §4117.01(F).
5. None of the Highway Patrol Sergeants are "management level employees" within the meaning of O.R.C. §4117.01(K).

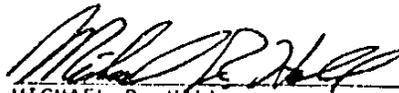
6. A bargaining unit consisting of all Highway Patrol Sergeants and excluding all confidential and all other employees is an appropriate unit for collective bargaining.

VII. RECOMMENDATIONS

Based upon the foregoing, it is recommended:

1. The Board adopt the Stipulations of Fact, Findings of Fact, and Conclusions of Law set forth above.
2. The Board dismiss the petition in Case No. 87-REP-04-0124.

ISSUED and SUBMITTED to the State Employment Relations Board in accordance with Ohio Administrative Code Rule 4117-1-15 and SERVED on all parties by certified mail, return receipt requested, this 17th day of January, 1989.



MICHAEL R. HALL
Chief Hearing Officer

MRH:feA

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