

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Ohio Patrolmen's Benevolent Association,

Employee Organization,

and

Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO,

Employee Organization,

and

State of Ohio, Department of Rehabilitation and Correction,

Employer.

Case No. 98-REP-09-0231

DIRECTIVE DISMISSING PETITION FOR REPRESENTATION ELECTION

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
September 16, 1999.

On September 29, 1998, the Ohio Patrolmen's Benevolent Association filed a Petition for Representation Election seeking to represent certain employees of the State of Ohio, Department of Rehabilitation and Correction ("Employer"). On October 14, 1998, the Employer filed objections to the petition. On October 22, 1998, the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("OCSEA") filed a motion to intervene.

On February 25, 1999, the State Employment Relations Board ("Board") granted OCSEA's motion to intervene and directed this matter to hearing to determine an appropriate bargaining unit and for all other relevant issues. On April 12 and 19, 1999, a hearing was held on the issue of whether the employees in question are "public employees" under Ohio Revised Code Section 4117.01. On June 22, 1999, the Administrative Law Judge's Recommended Determination was issued, recommending that the Board find that the Correction Captains and Correction Lieutenants are "supervisors" under Ohio Revised Code Section 4117.01(F) and "management level employees" under Ohio Revised Code Section 4117.01(L).

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On July 12, 1999, OCSEA filed its exceptions to the Recommended Determination. On July 16, 1999, the Employer filed a motion to strike OCSEA's exceptions as untimely filed. On August 2, 1999, the Employer filed its response to OCSEA's exceptions.

After reviewing the record, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Administrative Law Judge's Recommended Determination, incorporated by reference, and dismisses the Petition for Representation Election. In addition, the Board grants the Employer's motion and strikes OCSEA's exceptions as untimely filed pursuant to Ohio Administrative Code Rule 4117-1-13(A).

It is so directed.

POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



SUE POHLER, 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 State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Court of Common Pleas within fifteen (15) days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party by certified mail, return receipt requested, on this 17th day of September, 1999.



LINDA S. HARDESTY, CERTIFIED LEGAL ASSISTANT

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

OHIO PATROLMEN'S BENEVOLENT ASSOCIATION,	:	
	:	CASE NO. 98-REP-09-0231
	:	
Employee Organization,	:	
	:	
and	:	
	:	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,	:	
AFSCME LOCAL 11, AFL-CIO,	:	BETH C. SHILLINGTON
	:	Administrative Law Judge
	:	
Employee Organization,	:	
	:	
and	:	
	:	
STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION,	:	
	:	<u>RECOMMENDED DETERMINATION</u>
	:	
Employer.	:	
	:	

I. INTRODUCTION

On September 29, 1998, the Ohio Patrolmen's Benevolent Association ("OPBA") filed a Petition for Representation Election seeking to represent certain employees of the State of Ohio, Department of Rehabilitation and Correction ("ODRC" or "Employer"). On October 14, 1998, the Employer filed objections, asserting in part that the employees in question are supervisors and/or management level employees and therefore exempt from coverage under Ohio Revised Code Chapter 4117.¹

On February 25, 1999, after a preliminary investigation, the State Employment Relations Board ("SERB" or "Board") granted the motion to intervene filed by the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("OCSEA" or "Intervenor") and directed this matter to hearing to determine an appropriate bargaining unit and for all other relevant issues. On March 17, 1999, the Employer filed a Motion for Bifurcation of Hearing, which was granted on April 1, 1999. A hearing was held on April 12, 1999, and April 19, 1999, on the issue of whether the employees in question are "public employees" as defined by § 4117.01. Subsequently, all parties filed post-hearing briefs.

¹All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117.

II. ISSUES

1. Whether Correction Captains are "supervisors" within the meaning of § 4117.01(F).
2. Whether Correction Captains are "management level employees" within the meaning of § 4117.01(L).
3. Whether Correction Lieutenants are "supervisors" within the meaning of § 4117.01(F).
4. Whether Correction Lieutenants are "management level employees" within the meaning of § 4117.01(L).

III. FINDINGS OF FACT²

1. The State of Ohio is a "public employer" within the meaning of § 4117.01(B). ODRC is an agency of the State of Ohio. (S. 1.)
2. OCSEA is an "employee organization" within the meaning of § 4117.01(D). (S. 2.)
3. OPBA is an "employee organization" within the meaning of § 4117.01(D). (S. 3.)
4. OCSEA represents State Bargaining Unit 3, which is a unit comprised of guards and correction officers. (S. 4.)
5. ODRC manages and operates 31 correctional institutions. Levels of security at the various institutions include minimum-1, minimum-2, medium, close, high close, maximum, and super maximum. Each correctional institution has four shifts: first, second, third, and special duty. Captains, Lieutenants, and Correction Officers work each of these shifts. (T. 103-104; S. 10, 11.)
6. As of February 11, 1999, ODRC employed 7,447 Correction Officers, 344 Correction Lieutenants ("Lieutenants"), 205 Correction Captains ("Captains"), 31 Majors, 31 Wardens, and approximately 90 Deputy Wardens. (S. 9.)

²All references to the transcript of the hearing are indicated parenthetically by "T.," followed by the page number. All references to ODRC's exhibits are indicated parenthetically by "ODRC Exh.," followed by the exhibit letter. All references to OCSEA's exhibits are indicated parenthetically by "OCSEA Exh.," followed by the exhibit letter. All references to OPBA's exhibits are indicated parenthetically by "OPBA Exh.," followed by the exhibit number. All references to the Stipulations of Fact are indicated parenthetically by "S.," followed by the stipulation number. References to the transcript and/or 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 that related finding of fact.

7. Each of ODRC's correctional institutions employs one Warden, at least one Deputy Warden, and at least one Major. These employees do not work weekends. Rather, they work regular weekday daytime hours, typically between 8 a.m. and 5 p.m. Majors may keep one "late day" each week, working until 8 or 9 p.m. (T. 21, 22, 161, 458-460, 562; S. 24, 25, 26.)
8. The Warden, Deputy Warden, and Major are in the chain of command for Captains and Lieutenants. (S. 18.)
9. Captains and Lieutenants are employed at every correctional institution. (S. 23.)
10. Lieutenants are the raters on the probationary and annual performance evaluations of Correction Officers. As raters, Lieutenants recommend the retention or removal of probationary employees. These recommendations are followed at least 95 percent of the time. On annual evaluations of Correction Officers who are rated "below expectation" in one or more categories, Lieutenants prepare a Performance Action Plan. The Performance Action Plan tells the employee what he or she needs to do to improve his or her job performance. (T. 48-49, 135, 146-147, 226-227, 269, 282, 307-309, 409-412, 446-449, 488, 506-509, 633, 663, 705.)
11. Lieutenants are the "immediate supervisors" of Correction Officers pursuant to Appendix M, Section 2A of the collective bargaining agreement between the State of Ohio and OCSEA. Lieutenants may require Correction Officers to submit to drug testing in accordance with this provision. (T.141; OCSEA Exh. A, p. 309-310.)
12. When an incident report involving a Correction Officer has been filed, a Lieutenant is assigned to conduct an investigatory fact-finding interview with the Correction Officer. The Lieutenant then recommends whether the disciplinary process should proceed further. The recommendations are reviewed by a disciplinary committee that includes Captains and Lieutenants. These recommendations are followed a majority of the time. Captains also conduct investigatory interviews. Lieutenants serve as management representatives at pre-disciplinary hearings, presenting the facts justifying the disciplinary charge against a Correction Officer. Captains have served as hearing officers at pre-disciplinary hearings. (T. 17-18, 70, 78, 94-95, 185-186, 214-215, 268, 283-284, 318-320, 362-363, 406-407, 414-415, 477-478, 641, 662, 669.)
13. Captains and Lieutenants write the Step 1 response to Correction Officers' overtime grievances and grievances relating to requests for leave. Captains and Lieutenants have authority to resolve grievances involving matters that occurred on their shifts and can recommend, but not award, the payment of money to a grievant. Grievances involving discipline are automatically advanced to Step 3. Captains serve as management representatives at Step 3 grievance hearings. (T. 33, 134-135, 209, 270, 281, 291-293, 309, 319-320, 424-425, 477-478, 646, 653.)

14. Captains and Lieutenants call overtime on their shifts. When calling overtime, they follow ODRC policies and collective bargaining agreement provisions that specify the number of positions that need to be filled and the order in which employees are called to fill overtime assignments. (T. 150, 194-195, 208-209, 235-237.)
15. Captains and Lieutenants recommend the granting or denying of Correction Officers' requests for personal, vacation, sick, and compensatory leave. In so recommending, they follow a policy that sets forth the number of Correction Officers who may be off on each of these types of leave on a given shift. (T. 44-45, 64-65, 123-124, 212-213, 237-238, 322-324, 336-337, 481-482, 644, 661.)
16. Captains serve on applicant selection committees to fill vacant Lieutenant positions. Typically, these three-member committees interview Correction Officers who are candidates for promotion and recommend to the Warden the selection of a candidate. Selection committee recommendations are followed in virtually every instance by the Warden. (T. 53, 144-145, 310-312, 644-645; ODRC Exhs. B, p. 40-47; H, p. 27; I., p. 18; K, p. 32-36.)
17. Correction Officers other than relief officers are assigned to posts based on the pick-a-post agreement with OCSEA. Captains and Lieutenants assign relief officers to fill vacant posts based upon an assessment of the relief officers' abilities or other factors that are within the discretion of the Captains and Lieutenants to determine. For example, one Captain prefers to randomly assign relief officers; another rotates relief officers' assignments so that the relief officers do not become too familiar with any particular inmates. (T. 31, 274, 300-301, 366-367, 374, 387-388, 614-615, 657.)
18. Captains and Lieutenants provide Correction Officers with corrective counseling. Corrective counseling provides Correction Officers with advice for the improvement of their performance. This advice is based on the Captains' and Lieutenants' knowledge, experience, and judgment. (T. 19, 128-129, 186, 390-391, 392-393, 464.)
19. In addition to corrective counseling, Captains and Lieutenants provide Correction Officers with on-the-spot direction. Captains and Lieutenants instruct Correction Officers on how to handle situations with inmates and other employees. Captains and Lieutenants tell Correction Officers how to quiet loud housing units at night. (T. 128, 136, 218-219, 224, 536-537, 540-542.)
20. A cell extraction occurs when an inmate must be removed from his or her cell. A Lieutenant generally directs an institution's cell extraction team. As part of this duty, the Lieutenant must decide whether to remove the inmate from the cell and may attempt to talk the inmate out. If the Lieutenant decides to remove the inmate, the Lieutenant assembles a cell extraction team from among those employees present who have been trained in cell extraction. The Lieutenant then instructs the team to perform the extraction. The Lieutenant coordinates any necessary equipment and ensures that the members of the cell extraction team follow the appropriate policies and procedures. (T. 210, 225, 229-230, 271-272; OPBA Exh. 4.)

21. Captains and Lieutenants also respond to inmate assaults. In such situations, the Captain or Lieutenant who initially responds to the scene instructs the Correction Officers on how to handle the situation. (T. 259-261.)
22. The procedure for handling serious incidents within an institution is called Critical Incident Management. Critical Incident Management has been employed in situations including a fire, a gas-line leak, a roof that blew off, and a flood. If a critical incident occurs outside daytime working hours or on the weekend, a Captain may serve as the incident commander as the highest ranking employee on duty. Captains and Lieutenants may also be assigned command of staging areas, search groups, security groups, strategic response teams, and rapid response teams. Captains and Lieutenants may be the first to respond to a critical incident and the Wardens rely upon them to use their judgment in containing the situation. For example, at The Ohio State University Hospital when a fire broke out on the floor that housed inmates, a Lieutenant assigned employees to inmates during the incident. During a flood at Noble Correctional Institution in 1998, the Captains and Lieutenants were assigned to various administrative operations each day for a week to ensure that prison operations were maintained during the critical incident. When responding to a critical incident, Captains and Lieutenants do not contact their superiors before taking action because the situation could get out of control with any delay. (T. 152-153, 159-161, 184-185, 199-204, 316-317, 394-395, 472-473, 622-630, 665-669; ODRC Exhs. BB, CC, DD.)

IV. ANALYSIS AND DISCUSSION

A. Captains and Lieutenants are Supervisors.

Those individuals found to be supervisors within the meaning of § 4117.01(F) are not considered "public employees" pursuant to § 4117.01(C)(10), and public employers cannot be compelled to bargain collectively with them. Supervisory 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). The burden of establishing an exclusion from a bargaining unit under § 4117.01(C) rests upon the party seeking it. In re Fulton County Engineer, SERB 96-008 (6-24-96); In re Franklin Local School District Board of Education, SERB 84-008 (11-8-84).

Section 4117.01(F) provides in relevant part as follows:

"Supervisor" means any individual who has authority, in the interest of the public 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[.]

An individual will be excluded from a bargaining unit if the record contains substantial evidence that the employee has the authority to perform one or more of the functions listed in § 4117.01(F), actually exercises that authority, and uses independent judgment in doing so. In re Mahoning County Dept. Of Human Services, SERB 92-006 (6-5-92), at 3-19.

The record reflects that Captains and Lieutenants have authority to responsibly direct Correction Officers and to assign work to them. Furthermore, Lieutenants have the authority to effectively recommend the discharge of probationary Correction Officers. Also, Captains have the authority to effectively recommend the promotion of Correction Officers to Lieutenant positions.

Captains and Lieutenants responsibly direct their subordinates when they issue corrective counseling, when they direct Correction Officers on how to quiet housing units and handle inmate assaults, and when they handle a cell extraction or critical incident. Even the OPBA's witness, Norman Holloway, testified that he offers corrective counseling based on his own judgment. (T. 536-537.)

Captains and Lieutenants use independent judgment when they assign relief officers to vacant positions. The fact that different Captains and Lieutenants use different methods to assign relief officers is indicative of the independent judgment they exercise in making these assignments.

The Board has held that "[p]erformance evaluations, whether for a probationary period or an annual review, are one vehicle for a supervisor to 'responsibly direct' or 'effectively recommend' such direction." In re City of Dayton, SERB 98-004 (2-27-98), at 3-22. Correction Officers who are rated "below" in any category on a performance evaluation are provided with a Performance Action Plan instructing them how to improve their job performance over the next rating period. The Board has held that such action plans are a form of responsible direction of subordinate employees. In re State of Ohio, Office of the Ohio Public Defender, SERB 97-015 (11-13-97), at 3-100. Furthermore, performance evaluations of Correction Officers completing their probationary periods carry with them a recommendation whether such Correction Officers' employment should be continued or terminated. These evaluations are effective recommendations because the un rebutted testimony of the Wardens reveals that these recommendations have been followed in virtually every instance. The fact that Lieutenants who write performance evaluations recommending discharge accompany these recommendations with supporting documentation does not make their recommendations any less effective.

Finally, the evidence reveals that in the Lieutenant selection process, ODRC uses a three-member selection committee on which a current Captain frequently serves. The selection committee makes a consensus-based recommendation of a candidate to the Warden. These recommendations are virtually always followed, making them effective recommendations.

OPBA argues that Captains and Lieutenants now have the same duties that were formerly performed by Correction Supervisor 1s. Correction Supervisor 1s had the working titles of Correctional Counselor and Correctional Sergeant at the time the status of Correction Supervisor 1s as public employees was litigated in Case No. 88-REP-02-0016. OPBA argues that because Correction Supervisors 1s were determined not be supervisors, neither the Captains nor the Lieutenants can be supervisors. However, a review of the Hearing Officer's Recommended Determination in Case No. 88-REP-02-0016 (Sept. 29, 1989) reveals that Captains and Lieutenants do not perform the same duties as did the Correction Supervisor 1s. For example, the only involvement a Correction Supervisor 1 had in the disciplinary process was completing an incident report. Higher authorities reviewed the incident reports and conducted fact-finding conferences. In the present case, by contrast, Captains and Lieutenants investigate incident reports, conduct investigatory interviews, and serve as management representatives and hearing officers in the pre-disciplinary process. OPBA's argument is simply misplaced on the facts.

OCSEA argues that Captains and Lieutenants are "leadmen" rather than supervisors. In In re University of Cincinnati, SERB 89-028 (10-12-89), the Board defined a "leadman" as follows:

The term "leadman" suggests some responsibility beyond that of the rank and file employee; it is customarily applied to an individual who directs the work of a small group of employees, while at the same time performing the same work as those employees. Leadman status is often conferred upon the most experienced employee on the job. The critical element is whether their direction of the work is routine in nature and does not call for frequent exercise of independent judgment or managerial decision.

Id. at 3-193 (citing Davenport v. PERB, 264 N.W.2d 307, 319, 98 L.R.R.M. 2582 (1978)). The record does not reflect, and indeed no suggestion has been made, that either Captains or Lieutenants perform the work of Correction Officers. Furthermore, as discussed above, the work of Captains and Lieutenants requires the exercise of independent judgment. Moreover, the ratio of Captains to Correction Officers is approximately 1:36, while the ratio of Lieutenants to Correction Officers is approximately 1:21. These ratios are not indicative of leadman status.

Captains and Lieutenants meet more than one of the statutory criteria that mandate their exclusion from the definition of public employee as supervisors. Captains and Lieutenants use independent judgment when assigning work to public employees, when responsibly directing them, and when effectively recommending their discharges. Captains also use independent judgment when effectively recommending the promotions of public employees. Therefore, Captains and Lieutenants are not "public employees" pursuant to Chapter 4117.

B. Captains and Lieutenants are Management Level Employees

Section 4117.01(C)(7) excludes management level employees from the definition of public employees. Section 4117.01(L) defines a management level employee in relevant part as follows:

[A]n individual ... who may reasonably be required on behalf of the public employer to ... have a major role in personnel administration.

Captains and Lieutenants have a major role in personnel administration. In particular, Lieutenants must perform investigations of complaints made against Correction Officers, which include making a recommendation to the Warden or other superiors regarding the next step to be taken in the disciplinary process. Captains and Lieutenants serve as management representatives in the pre-disciplinary and grievance processes. Captains are also among those employees who are called upon to serve as hearing officers at pre-disciplinary hearings. In In re City of Wilmington, SERB 94-007 (4-27-94), the Board held that a chief detective who performed internal investigations of complaints made against patrol officers and sergeants, and who made recommendations to the Chief of Police or other superiors regarding disciplinary action to be taken, had a major role in personnel administration and, thus, was a management level employee. Id. At 3-53. Given the personnel administration aspects of their positions, Captains and Lieutenants are management level employees, and thus excluded from the definition of public employees on this basis as well.

C. The Document Proffered By OPBA and OCSEA Was Properly Excluded

Even assuming *arguendo* that OPBA/OCSEA Joint Exhibit 1, a document entitled "Information Request" that has a facsimile header indicating that it was sent by the State of Ohio to the Marion Correctional Institution, was not a work product, it was properly excluded as irrelevant. At most, this document is evidence only of ODRC's litigation strategy in preparing for the hearing. Litigation strategy is not an issue of material fact. No allegation has been made in this case that ODRC wrongfully attempted to suppress any material evidence or that ODRC failed to comply with any discovery requests or subpoenas issued by OPBA or OCSEA. Furthermore, OPBA and OCSEA each had a full opportunity to call and question witnesses, including rebuttal witnesses, at the hearing.

V. CONCLUSIONS OF LAW

1. The State of Ohio is a "public employer" within the meaning of § 4117.01(B). The Department of Rehabilitation and Correction is an agency of the State of Ohio.
2. The Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO is an "employee organization" within the meaning of § 4117.01(D).

3. The Ohio Patrolmen's Benevolent Association is an "employee organization" within the meaning of § 4117.01(D).
4. Correction Captains and Correction Lieutenants are "supervisors" pursuant to § 4117.01(F).
5. Correction Captains and Correction Lieutenants are "management level employees" pursuant to § 4117.01(L).

VI. RECOMMENDATIONS

1. The Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The Board issue an Order dismissing the Petition for Representation Election.

ISSUED and **SUBMITTED** to the State Employment Relations Board in accordance with Ohio Administrative Code Rule 4117-1-15 and **SERVED** on all parties listed below by Certified U.S. Mail, return receipt requested, this **22nd** day of **June, 1999**.

/s/ BETH C. SHILLINGTON
Administrative Law Judge

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