

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 1**

**TRUSTEES OF BOSTON UNIVERSITY<sup>1</sup>**

**Employer**

**and**

**Case 01-RC-121020<sup>2</sup>**

**AMERICAN COALITION OF PUBLIC SAFETY (ACOPS)**

**Petitioner**

**APPEARANCES:**

Larry Elswit, Attorney, of Boston, Massachusetts, for the Employer.

Alan J. McDonald and Kristen Barnes, Attorneys of Southborough, Massachusetts, for the Petitioner.

**DECISION AND DIRECTION OF ELECTION**

The Petitioner seeks to represent a unit of eight patrol sergeants and one detective sergeant employed by the Employer in its Boston University Police Department. The only issue in this proceeding is whether the sergeants in the proposed Unit are supervisors within the meaning of Section 2(11) of the Act. There is no collective bargaining history between the parties that is relevant to this case, other than noted herein.

The Employer contends that the sergeants are supervisors because they assign work and responsibly direct officers and dispatchers, determining where, when, and if details are needed; recommend rewards and grant time off, discipline officers and dispatchers; handle grievances at the first step of the grievance procedure, sit on hiring panels and hire, and make effective recommendations for all of these actions. The Employer also asserts that the sergeants act as supervisors and managers when they use independent judgment to engage in various training and other tasks.

In addition, the Employer relies upon secondary factors including distinctive features of the sergeant's vehicles, uniforms, pay, the sergeants' office, completion of performance appraisals and attendance at monthly management meetings.

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> This case was transferred to the undersigned pursuant to the interregional assistance program under OM 03-77, for decision writing purposes only.

For the reasons set forth below, based on the record and relevant Board law, I conclude that the Employer has not satisfied its burden of proof regarding the sergeants serving as statutory supervisors, the unit is appropriate and they are eligible to vote. The sergeants do not exercise authority in the interest of the Employer requiring the use of independent judgment to assign, responsibly direct, reward or discipline employees, or effectively recommend such actions, required for a finding of supervisory status, and their role in the evaluation procedure does not affect the job status or tenure of other employees. The evidence does not show that the sergeants engage in any meaningful role in hiring employees, adjusting grievances, or in managing the police operations. Secondary indicia of uniforms, pay, offices, attending monthly management meetings, and having a vehicle designated “supervisor,” do not sway the balance for the Employer to a finding of supervisory status.

## **I. Overview**

The Employer, located in Boston, Massachusetts, operates the Boston University Police Department, which provides security and police coverage at Boston University, seven days a week, 24 hours a day. In addition to the patrol sergeants and detective sergeant at issue in this proceeding, the Employer employs a unit of police officers (patrol officers and detectives) and civilian dispatchers who are represented for the purposes of collective-bargaining by the Boston University Police Patrolmen’s Association (BUPPA).<sup>3</sup>

The parties stipulated, and I find that the following individuals are supervisors within the meaning of Section 2(11) of the Act: Chief of Police Thomas Robbins; Deputy Chief Scott Pare; Patrol Commander, Captain Robert Molloy of the Detective Unit; Commander, Lieutenant P. DiDomenica; Patrol Lieutenant R. Casey; and Patrol Lieutenant A. Giannopoulos.<sup>4</sup>

There are eight patrol sergeants and one detective sergeant (collectively referred to herein as sergeants) in the petitioned-for Unit. Sergeants work a scheduled rotation, working four consecutive days, then taking off two consecutive days. The Employer operates three shifts - day, evening and midnight. Each shift overlaps 30 minutes with the following shift. Two sergeants are assigned to work each shift. On the day shift, for two days of the rotation a sergeant is scheduled to work with another sergeant; on the other two days a lieutenant is scheduled to work with a sergeant. On the evening and midnight shifts there may be two sergeants scheduled. Typically, on each shift, five patrol officers are assigned to the main campus and two patrol officers are assigned to the medical campus, depending upon events and details.

The Employer instituted the police lieutenant classification in about July 2011. Prior to the institution of the lieutenant classification, Captain Molloy directly supervised the sergeants in the Patrol Division. Lieutenants work day and evening shifts, but not the midnight shift.

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<sup>3</sup> The collective-bargaining agreement between the BUPPA and the Employer (hereafter the officer’s collective bargaining agreement) specifically excludes “sergeants” from its recognition clause.

<sup>4</sup> The parties stipulated that these named individuals possess and exercise one or more of the following authorities: to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or have responsibility to direct them or to adjust their grievances or effectively to recommend such action utilizing independent judgment in exercising such authority.

Lieutenant Giannopoulos works the day shift and Lieutenant Casey works the evening shift. When a lieutenant is not on the shift, a sergeant is the ranking officer on the shift. Both patrol lieutenants and Captain Molloy are available to sergeants by telephone if they are not on site, and sergeants contact them when officers may be assigned to details or as emergencies arise.

Generally, the patrol sergeants and the police officers spend their work time observing while patrolling, and listening to the radio for any transmissions. Patrol sergeants spend 60 to 80 percent of their time patrolling with the police officers. The record does not indicate any similar breakdown of time spent for detective sergeant Torchio or detectives.

## II. Analysis

### A. Board Law

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or effectively to recommend the same.

The Board has reaffirmed that the burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River*, supra, at 711-712. In addition, the Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status; the Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without specific explanation are not sufficient). Evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. *New York University Medical Center*, 324 NLRB 887, 908 (1997), enfd. in relevant part 156 F. Ed 405 (2<sup>nd</sup> Cir. 1998); *The Door*, 297 NLRB 601 n.5 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). See also, *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6<sup>th</sup> Cir. 2012) enfg. 356 NLRB No. 94 (2011).

Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given

controlling weight and will be rejected as mere paper, absent independent evidence that an individual asserted to be a supervisor actually possesses the described authority. *Id.*; *Golden Crest Healthcare Center*, supra at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

## **B. Application of Board Law to this Case**

### **1. Assignment of Work**

The Board in *Oakwood Healthcare* defined assigning work as “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, supra at 6.

#### **a. Time**

The Employer contends that sergeants have the authority to schedule officers for work. However, sergeants do not set police officers’ initial schedule; rather, the schedule is established by the officer’s collective bargaining agreement, Article 8 “Hours of Work.” The standard staffing level is five officers per shift. TeleStaff, a computerized record keeping system utilized by the Employer, has a built-in one-person buffer, so an asterisk will appear if fewer than six officers are working. While sergeants can approve a change within the six-officer buffer, TeleStaff governs who that individual will be by listing officers who are eligible as indicated by officers’ TeleStaff status, i.e., officers’ total accrued hours. If the officer count falls under five, a lieutenant or higher must approve the existence of a “shortfall”, thereby authorizing fewer than five officers on the shift. All employees have access to TeleStaff in some capacity. For instance, patrol officers enter their hours worked, and sergeants and lieutenants monitor TeleStaff throughout the shift.

An overtime list<sup>5</sup> is used when sergeants need to replace officers who are absent. Additionally, TeleStaff opens “a vacancy” [on a shift], and the sergeants send out a “page” to officers via TeleStaff regarding the overtime. If an officer needs to leave early and has vacation time, no approval is necessary if there is sufficient coverage on the shift. Each officer can independently enter vacation time in the TeleStaff computer program.

Officers typically work overtime if there is a training event or a detail, the latter involving a safety situation such as a construction project, but not a crime scene. Overtime for a detail is authorized by detail liaison officer/business manager Margie Doyle<sup>6</sup> or someone with the rank of lieutenant or higher. The sergeants only assign individuals to work a detail if an officer calls off at the last minute. The sergeants generally fill such a vacancy through the TeleStaff program. If

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<sup>5</sup> The overtime list is maintained separately from TeleStaff, but the record does not indicate by whom or how it is maintained.

<sup>6</sup> Although the record does not contain a stipulation as to the Section 2(11) status of detail liaison officer/business manager Doyle, I find that she is a manager and supervisor within the meaning of Section 2(11) of the Act.

there is a shortfall or emergency situation, a lieutenant must be consulted. Sometimes it occurs that an officer has to stay over at the end of a shift if that officer needs to write a report or otherwise complete his or her involvement in a specific incident. The officer does not have to consult with anyone before working this extra time.

Sergeant queries for additional personnel are run through TeleStaff. The Lieutenant monitors queries sent by sergeants through TeleStaff. The sergeants' role in consulting TeleStaff to fill vacancies does not impart them with supervisory authority. The Board has found that individuals should not be deemed to possess supervisory authority simply because they can approve of and agree to changes in other employees' computerized time clock entries. *Golden Crest Healthcare Center*, supra at 731, fn. 10.<sup>7</sup>

I find that the evidence is insufficient to establish that the sergeants assign the field employees to work times within the meaning of the definition set forth in *Oakwood Healthcare*. There is only evidence of infrequent instances of such conduct which is insufficient to confer supervisory authority. *Family Healthcare, Inc.*, 354 NLRB 254, 259-260 (2009), *Golden Crest Healthcare Center*, supra at 730, fn. 9. Thus, I find that sergeants do not exercise supervisory responsibilities with respect to assigning police officers to the times when they work.

#### ***b. Place and Tasks***

In *Oakwood Healthcare*, the Board found that emergency room charge nurses designated nursing staff to geographic areas within the emergency room. The Board found that this assignment of nursing staff to specific geographic locations fell within the definition of "assign" for purposes of Section 2(11). In this case, the Employer asserts that sergeants can assign officers to details; however, the evidence indicates that this role falls under the scope of the detail liaison officer, as well as command management. Participation in details is usually voluntary -- further limiting the sergeants' role in assigning officers to places or tasks. When participation is not voluntary, sergeants consult TeleStaff as well as a "force list."<sup>8</sup> Significantly, there is no evidence that sergeants evaluate any special skills possessed by officers for the purposes of detail selection.

In addition to assignment of detail positions, the Employer also asserts that sergeants assign officers to their daily locations and the tasks that accompany those location assignments. However, the evidence reveals otherwise. Information which might lead to officer postings is derived from roll call - a largely collaborative process. At roll call, which is held at the start of each shift, officers decide among themselves who should take up the two daily patrols at the

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<sup>7</sup> The Employer has provided evidence that a sergeant informed Doyle and other managers that he added an officer to a detail when the Flint Construction Company was not listed in TeleStaff. Such conduct appears to be limited in scope and occurred only as a result of the unavailability of TeleStaff in the specific situation.

<sup>8</sup> The record is devoid of any explanation of the force list.

Medical Campus. Police officers are not assigned to any particular geographic area on the campus, other than the medical campus.<sup>9</sup> If officers are assigned to the main campus side, they have free rein to patrol anywhere throughout the campus itself, although police officers can be asked to cover certain areas to ensure pedestrian safety; for example, in busy intersections where students are moving about. An officer can request that other officers assist him. Sergeants do question the numbers and movements of officers who are dispatched, but not on such a sustained basis so as to constitute the exercise of supervisory authority.

Dispatchers, following guidelines from their training and the policies and procedures established by the department, determine where officers and sergeants are needed in emergency situations and dispatch them accordingly. Dispatchers may determine that more than one officer is required. For example, a “B & E” alarm requires two officers. In conjunction with the officers’ freedom of movement, the role of dispatchers in assigning officers and sergeants to trouble spots undercuts any finding of supervisory authority on the part of the sergeants. *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 7 (2011).

The foregoing leads me to find that the evidence does not establish that the sergeants exercise Section 2(11) authority in their assignment of work locations [place] and tasks to officers.

### ***c. Independent Judgment***

Although I find that Sergeants do not assign officers to work specific times, places or to perform specific duties, I further conclude that, even if they do so, they do not exercise independent judgment in such assignments. Concerning the nurses’ assignments of [certified nursing assistants] to particular “times” of work, the Board held in *Oakwood Healthcare* that “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices;” but that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policy or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement.” *Oakwood Healthcare*, supra at 697-698. The initial scheduling of officers involves no choice at all on the sergeants’ part. In addition, the Employer’s practice does not allow for choices by the sergeants with regard to calling officers into work or requesting them to stay over their shift. All of this is governed by the detailed TeleStaff system, and the overtime and force lists, except under rare circumstances.

The Employer argues that sergeants use independent judgment in “directing” the officers but the record testimony presented on this issue is leading and conclusory. Rather, as far as the assignment of duties, the record demonstrates that the officers’ days are governed by (1) the locations to which they are dispatched or choose to go on their own; (2) their status in TeleStaff, i.e., how many total hours they have accrued; and, (3) which details are assigned to them by lieutenants or the Employer’s detail liaison officer. In the spectrum set forth by the Board, the

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<sup>9</sup> According to Chief Robbins, sergeants assign police officers to certain sectors under a community policing model. However, Chief Robbins also testified that he did not know whether the police officers pick their own assignments. He testified that he has been present when the shift assignments are given out by the sergeants but he did not know the last time that happened.

sergeants' assignment of discrete tasks to officers falls closer to "completely controlled" actions, rather than "free actions." They do not involve a "degree of discretion that rises above routine or clerical." *Oakwood Healthcare*, supra at 693.

Thus, the evidence does not demonstrate that any assignment of tasks by sergeants requires the use of independent judgment within the meaning of Section 2(11) of the Act.

## 2. Responsible Direction

For direction to be responsible, the person directing employees must have oversight of another's work and be held accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others' deficiencies. *Oakwood Healthcare*, supra, 691-692, 695.

The first question is whether the Employer has established that its sergeants *direct* other employees within the meaning of Section 2(11). The record provides few examples of such direction beyond the conclusory testimony of Detective Sergeant Torchio, largely in response to leading questions, that he selects detectives to perform certain tasks, determines where detectives are assigned, and assigns overtime. His testimony is not supported by specific examples or concrete evidence.

Detective Sergeant Torchio cited one example of "assigning" a detective to VIP duties; however, the evidence established that the detective had performed such VIP duties before Torchio became a detective sergeant and Torchio simply continued a well-established practice. Torchio described "supervising" court prosecutions without indicating what this specifically entailed. Such vague and sparse testimony is insufficient for the Employer to carry its burden of establishing supervisory status. *Frenchtown Acquisition Co.*, supra at 305 ("[g]eneral testimony asserting that employees have supervisory responsibilities is not sufficient to satisfy the burden of proof when there is no specific evidence supporting the testimony." (citations omitted)). Mere inferences or conclusory statements without supporting evidence are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). The record contains no evidence which indicates that any other sergeants directed the work of any of the Employer's officers. Thus, there is insufficient evidence that sergeants direct the other employees.

Even assuming that some sergeants may direct employees, it must further be established that any direction is responsible, requiring a showing that the sergeants are *accountable* for their actions in directing the officers. The Employer cites the example of a sergeant who heard an officer direct inappropriate language toward a dispatcher during a conversation with her. The sergeant was issued a letter of reprimand and required to undergo extra training in sexual harassment for his failure to take proper action. Under the Employer's sexual harassment policy, all employees are required to report any conduct that might constitute discrimination or harassment of another employee. Chief Robbins confirmed that had a *police officer* observed this discussion and viewed it as a discriminatory or harassing commentary by the other officer, Robbins would expect the officer to report that incident, and the officer would also be subject to discipline if he failed to do so. The record contains no examples of discipline issued to a

sergeant who was held accountable for an officers' conduct. Also, there is no evidence that the Employer imparted clear and formal notice to the sergeants that they would be held accountable for the job performance of officers. See *Golden Crest Healthcare Center*, supra at 731.

The Employer relies upon *Harvard University*, 01-RC-07959 (May 31, 2012), for the proposition that the sergeants in the instant case can responsibly direct employees. *Harvard University* is distinguishable in that the supervisors were shown to assign tasks to officers independently, and regularly were held accountable for the performance of subordinates. Moreover, there was evidence of closer day-to-day supervision by the sergeants over the officers, including the sergeant's filing of reports which led to discipline, evidence which is not present in the instant case.

Thus, I find that sergeants do not engage in responsible direction of officers under Section 2(11) of the Act.

### 3. Adjustment of Grievances

In asserting that sergeants are supervisors, the Employer relies upon the language of the officers' collective bargaining agreement. The grievance procedure in Article 5 Step B, Step 1 of the contract provides:

If an employee believes he or she has a grievance involving a violation of this agreement, he/she may discuss this with his/her **immediate supervisor**. If the employee desires, he or she may ask to be accompanied by an Association steward. Such grievance shall be presented within seven calendar days from the date on which the alleged infraction giving rise to the grievance occurred. (emphasis added).

According to Chief Robbins, the sergeant is the "immediate supervisor." Despite Robbins' testimony, sergeants testified that they do not handle employee grievances. Chief Robbins testified that sergeants discussed grievances at roll call. However, he acknowledged that this "discussion" did not constitute a step in the grievance procedure.

Officers have informed sergeants that they planned to file a grievance, but sergeants play no further role. For example, an officer told Sergeant Healy of his disagreement with one of Healy's decisions, but that was the last Healy heard of it. Another officer informed Sergeant Nuzzi that he was filing a grievance about overtime that the officer thought should have been offered to him. (Sergeant Nuzzi testified that he had been instructed by the Captain to reserve the overtime for a dispatcher.) Sergeant Nuzzi suggested that the disgruntled officer file a grievance. Nuzzi does not know whether he filed the grievance or what happened with the grievance if it was filed. No one in the command staff ever discussed with him the grievance that was filed. Nuzzi has never testified at an arbitration proceeding. Another sergeant testified that he simply forwards any officer complaints to a lieutenant.<sup>10</sup>

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<sup>10</sup> Chief Robbins testified that sergeants could settle grievances on behalf of the University, but he could not remember any situation when that occurred.

There is no evidence of sergeants receiving any grievance training or participating at a grievance meeting. The Employer suggests that some minor issues might be resolved between the sergeants and the officers regarding workload or personality conflicts which have not otherwise been documented. However, resolution of such minor issues has not been found to be sufficient to constitute adjustment of grievances to establish supervisory status. *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 15 (2014).

Thus, the evidence does not establish that the sergeants adjust, or effectively recommend adjustment of grievances of officers under Section 2(11) of the Act.

#### **4. Sergeants' Reports and Evaluations of Officers Do Not Establish Supervisory Status**

According to the Employer, sergeants complete "supervisory observation reports" that constitute part of the Employer's overall performance evaluation system, wherein the sergeants, as the first line supervisors, evaluate the officers under their command.

These reports document a sergeant's observations of an officer as to one of several pre-printed "factors," including contribution to the organization's goals & objectives; follows oral and written directions of supervisors; dependability / reliability; cooperation / interpersonal skills; personal appearance / demeanor; knowledge / compliance of P&P's, R&R's, / laws; oral / written communication skills; initiative / dedication; care / maintenance of equipment; leadership capabilities / skills;" and other specific factors. There are sections in the report for comments and recommendations, as well as a box to check for an observation report that is "forwarded for awards consideration."<sup>11</sup> After completion, the observation report is placed in the officer's performance evaluation file. This observation report stays in the officer's record for one year and could become part of his/her evaluation.

It is undisputed that in addition to the "supervisory observations report" described above, sergeants complete evaluation forms for officers and dispatchers. This pre-printed form is untitled. There is little narrative component to this document. Sergeants complete the officers' performance evaluations, which are then countersigned by either the lieutenant or the captain. Sergeants review the evaluation with the officer.

The officers' collective bargaining agreement, Article 20, L. Performance Evaluations, beginning with the 2008/2009 contract year, provides that each officer or dispatcher is to be evaluated annually by his or her "immediate supervisor." Personnel files of officers are maintained by the Chief. Sergeants do not consult the personnel files of the officers. The officers' pay does not depend upon the content of their performance evaluations. Officers move through their pay steps annually, regardless of whether they have a good, fair, or poor evaluation. There is no evidence of any benefit or advantage that an employee has received from an evaluation form completed by a sergeant.

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<sup>11</sup> The record indicates that Detective Sergeant Torchio marked the "forwarded for Awards Consideration" boxes on the supervisor observation reports he completed for some officers. The record does not indicate by and to whom it is forwarded, what the consideration consists of, the result, or what the award might have been.

An officer can request a review of his evaluation from the police commander. For example, Captain Molloy could reopen and decide whether to change the evaluation by reaching out to the officer and to the supervisor to determine if it could be changed. In January 2013, Sergeant Cuzzi was instructed by Lieutenant Casey to redo all the evaluations, because, as Casey told him, the evaluations were done on the wrong form -- a different form than the one Cuzzi had access to on the computer.

In the course of their work, sergeants also complete incident reports that record dispatched and other incidents that occur during the shift. Lieutenant Casey has ordered sergeants to write incident reports. The sergeants do not recommend any discipline or rewards be issued to the officers involved. Instead these reports appear to be a recitation of facts and events. There is no evidence of discipline or rewards issued to officers as a result of sergeants signing incident reports. Sergeants testified that they did not know what command staff did with these incident reports.<sup>12</sup>

Chief Robbins could not identify any particular report issued by a sergeant that has altered the rating of any police officer in the evaluation process. Robbins cited one report authored by Detective Sergeant Torchio which he thought resulted in discipline of an officer -- although he didn't recall what action was taken. Torchio himself did not know what happened to the report, stating "it would be submitted to my supervisor, who is a member of the command staff, and then I am assuming it would go from there...I'm not sure...You know, the Union was involved so I'm not quite sure on where it would go." Torchio acknowledged that this was an internal affairs investigation report, so he looked to the Detective Unit Commander, Lieutenant DiDomenica, for guidance on how to prepare the document.

The record evidence thus demonstrates that sergeants are limited to making observational and factual reports that are subject to additional scrutiny and investigation by command staff, primarily the lieutenant. The Board will not find supervisory status on that basis. *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Northwest Nursing Home*, 313 NLRB 491, 597-498 (1993); *The Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

The Employer also has not established that the involvement of sergeants in the officer evaluation process establishes supervisory authority as there is no evidence that any reward or detriment inures to officers as a result of the evaluations written by sergeants. The Board has consistently declined to find supervisory status based on evaluations without evidence that they constitute effective recommendations to reward, promote, discipline, or otherwise affect the evaluated employee's job status. *Coventry Health Continuum*, 332 NLRB 52, 53-55 (2000); *Ten Broeck Commons*, supra at 813 (1996).

Thus, I do not find that sergeants' participation in generating reports and written performance evaluations of officers constitutes evidence of Section 2(11) authority.

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<sup>12</sup> The officer's collective bargaining agreement does not include incident reports as a category under the progressive discipline policy.

## **5. Sergeants Do Not Have the Authority to Discipline Officers**

The Employer asserts that the sergeants have authority to issue verbal warnings to police officers; however, there is no evidence that verbal warnings have been issued by sergeants. General Order 3.6, at 5.1 provides that there shall be written documentation of reprimands: “verbal warnings shall be documented” and “minor infractions of the rule should be documented in writing for a required verbal warning.” Yet, the record is devoid of documentation confirming that verbal reprimands or minor infractions have been issued by sergeants. Article 7, Discipline, of the officers’ collective bargaining agreement does not provide for verbal warnings. Even those who testified that they did issue verbal warnings, such as Lieutenant Giannopoulos (when he was a sergeant), did not relay any specific example.

There is also no evidence that sergeants have issued written warnings. Indeed, General Order 3.6 at 3 requires that sergeants cannot do so without consulting the Division Commander or superior officer. Lieutenant Giannopoulos testified that he had never been consulted about a written warning. In *Sanctuary at Mcauley*, 359 NLRB No. 162 slip op. at 1, 3-4 (2013), the Board affirmed the regional director who found that where the putative supervisors’ role in issuing counselings or warnings was “circumscribed by both the [director of nursing] and human resources department,” those disciplines did not constitute indicia of supervisory authority. Sergeants do not have access to employee personnel files, which are maintained by the Chief, and there is no evidence that they have been trained on any dimension of a disciplinary role. *Chevron Shipping Co.*, supra at 381 fn. 6 (1995).

Additionally, the Employer has failed to establish that reports completed by the sergeants, including the internal affairs investigative reports cited by the Employer, constituted effective recommendations of discipline. The report prepared by Sergeant Healy regarding a dispatcher contains no recommendation for discipline. Chief Robbins was unaware as to whether discipline had been administered as a result of the Torchio report concerning a dress code issue, and uncertain as to whether any discipline had been administered as a result of the Healy report.

As a result of the foregoing, I find that sergeants do not exercise authority to discipline or make effective recommendations of same under Section 2(11) of the Act.

## **6. Sergeants Do Not Have the Authority to Hire Officers or Recommend Officers for Hire**

The Employer asserts that when Lieutenant Giannopoulos was a sergeant, he served on a three person committee that included a human resource officer and upper management, hiring a police officer for NEIDL.<sup>13</sup> However, he was accompanied by high level management officials; they were hiring police staff for another entity, and the record is devoid of evidence concerning Giannopoulos’ specific role versus the other panel participants.

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<sup>13</sup> The Employer also provides officers and sergeants for patrol at the Employer’s National Emerging Infectious Disease Laboratory (NEIDL).

The Employer also claims that sergeants “hire” officers for details; however, the prominent roles of command managers, the detail liaison official, and TeleStaff in the “hiring” of staff for details undercuts this position. *Service Employees Local 1-J*, 273 NLRB 929, 933 (1984). See also, *Quality Chemical*, 324 NLRB 328, 329 (1997) (The Board did not find disputed employees to be statutory supervisors although they guided job applicants on a tour through the facility while interviewing them, and completed an evaluation form for the applicants. Although acknowledging that the putative supervisors had a role in the employer’s hiring process, the Board determined that final decisions on all hiring were made by upper management).

The testimony from sergeants establishes that they do not hire employees and have been wholly unsuccessful in their efforts to recommend employees to the Employer for hire.

## 7. Managerial Authority

Although the Employer does not specifically assert that sergeants are not employees within the meaning of the Act by virtue of being managerial employees, the Employer asserts that the sergeants, with their participation in significant projects such as the lock down drill, community alerts, service as physical fitness coordinator, trainer, attendance at Com Stat/Impact Meetings, shutting down dangerous jobs, and administration of a bike initiative program exercise managerial authority and “independent judgment” on behalf of the Employer.

Even though the Act makes no specific reference to “managerial employees,” under Board policy this category of personnel is excluded from coverage of the Act, and is not entitled to bargaining rights. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). See also *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Managerial employees are defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. To be considered managerial, an individual must exercise discretion within, or even independently of, established employer policy and be aligned with management. *Id.* at 682-683.

The examples of the sergeants’ activities provided by the Employer do not constitute the establishment of managerial policy or alignment with management but reflect the exercise of discrete tasks, often under the careful watch of admitted supervisors. For example, the bike program is tightly controlled by a lieutenant, not a sergeant. Sending community alerts appears to be a task among many allocated to sergeants; however, not one that would confer any managerial or supervisory status as it involves the mere reporting of information. Police officers and others attend the monthly Com Stat/Impact meetings, and only command staff, not sergeants, attend the weekly Command Staff meetings, undercutting the proposition that the sergeants are closely aligned with command staff.

The determination of an employee’s managerial status depends on the extent of his or her discretion, and an employee who exercises limited discretion, bordering on routine performance, will not be deemed managerial. *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963). The discrete tasks cited by the Employer, such as shutting down jobs, participating in a lock

down drill, or running a physical training program do not rise above the level of routine performance, especially considering the control of admitted supervisors over these activities.

## 8. Secondary Indicia

The Employer further urges that the existence of secondary indicia, including the sergeants' title, higher pay / salary, office space, vehicles driven, distinctive uniforms and emblems, approving time off, attending monthly meetings, and completing performance appraisals, demonstrate supervisory status.

The sergeants share an office on the first floor, just outside of the dispatch area, which essentially is a designated open space. There is one computer located in that space. Police officers also use the area when there are not enough available computers elsewhere. Occasionally a civilian will use the office; some testimony indicated that transportation personnel play video games on the computer. In contrast, command staff have their own individual offices on another floor.

Sergeants drive a variety of vehicles including unmarked SUVs and sedans. One SUV is marked "Supervisor." One sergeant usually drives an unmarked police cruiser with no insignia, while another sergeant takes the SUV or the motorcycle. Police officers drive marked police cruisers, but sometimes they drive an unmarked car if one is available. Another sergeant testified that each officer selects his/her mode of transportation. It was not established that the type of vehicle driven by sergeants sets them significantly apart from the officers.

The sergeants have uniforms with different colored and patterned stripes and piping on their pants and different colored badges than bargaining unit officers and detectives. The distinction between the officers' pay of \$56/hour, and the sergeants' salary between the mid-\$60,000s to upper \$70,000s is not very great, if officers' overtime is factored in. Also, pay appears to be more a function of seniority than supervisory status.

The Employer has issued several General Orders that touch on supervisory status of sergeants. General Order 13.7 provides that sergeants are supervisors. Order 13.7 was reissued in December 2012, but remained unchanged since April 5, 2011, before the addition of the lieutenant classification. Thus, Order 13.7 does not accurately reflect the command structure: it refers to a "police commander" where now there are lieutenants and captains at that level (classifications not mentioned in the General Order). General Order 13.5 provides that sergeants can issue discipline; however, Order 13.5 is outdated in referring to a patrol commander and captain when there are now lieutenants. Further, General Order 13.2, Job Description of the Deputy Director of Public Safety, states that the Deputy Chief handles all grievance procedures at the first level, thus contradicting the Employer's assertion that this is the role of the sergeant.

General Order 13.7, promulgated by the Employer, states that sergeants exercise supervisory authority. However, the record does not establish that the sergeants in fact perform such functions for the Employer within the meaning of Section 2(11) of the Act. The General Order constitutes a mere paper conveyance of supervisory authority that does not impart actual supervisory authority. *Golden Crest Healthcare Center*, supra at 731, citing *Training School at*

*Vineland*, 332 NLRB 1412, 1416 (2000); *Loyalhanna Health Care Associates* 352 NLRB 863, 864 (2008); *Chevron U.S.A., Inc.*, supra at 62 (1992) (job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority).

The Employer urges that the sergeants working during the evening and midnight shifts can be the highest ranking officer, and as a result possess supervisory authority. However, the absence of supervisors on a shift does not prove that sergeants must be supervisors. The record evidence does not establish that any sergeants spend a regular and substantial portion of their work time filling in for admitted supervisors on these occasions. Nothing in the statutory definition of supervisor suggests that service as the highest-ranking worker on site alone requires a supervisory finding. *Loyalhanna Health Care Associates*, supra at 865; *Spirit Construction Services, Inc.*, 351 NLRB 1042, fn. 2 (2007); *Training School at Vineland*, supra at 1412 fn. 3. In the instant case, lieutenants are present or available by phone. See *Loyalhanna Health Care Associates*, supra at 865, citing *Golden Crest*, supra at 730 (finding that service as highest-ranking employee on duty was “even less probative where management is available after hours”).

Finally, if the sergeants were to be deemed supervisors, there would be 15 supervisors for 46 officers and dispatchers -- which would constitute an unusually high 1-3 ratio of supervisors to officers. See *Frenchtown Acquisition*, supra at 316.

Accordingly, “secondary indicia of supervisory status are not dispositive in the absence of evidence indicating the existence of any one of the primary indicia of such status.” *McClatchy Newspapers*, 307 NLRB 773 (1992); *Billows Electric Supply*, 311 NLRB 878, fn.2 (1993). Because the Employer has failed to meet its burden with respect the primary indicia, the secondary indicia do not alter the finding that the sergeants are not supervisors within the meaning of the Act.

### **CONCLUSIONS AND FINDINGS**

Based on the foregoing discussion and on the entire record,<sup>14</sup> I find and conclude as follows:

1. The hearing officer’s rulings are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.

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<sup>14</sup> The parties timely filed post-hearing briefs, which were carefully considered.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full time and part time sergeants employed by the Employer at its university and medical campuses in Boston, Massachusetts; but excluding all other full time and regular part time employees, managers, guards and supervisors as defined by the Act.

Dated at Detroit, Michigan, this 11<sup>th</sup> day of March 2014.

*/s/ Terry Morgan*

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Terry Morgan, Acting Regional Director  
National Labor Relations Board, Region 1  
Thomas P. O'Neill, Jr. Federal Building  
10 Causeway Street, Room 601  
Boston, Massachusetts 02222

## **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **AMERICAN COALITION OF PUBLIC SAFETY (ACOPS)**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on

the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **March 18, 2014**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>15</sup> by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Posting of Election Notices**

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

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<sup>15</sup> To file the eligibility list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **March 25, 2014**. The request may be filed electronically through the Agency's website, **www.nlrb.gov**,<sup>16</sup> but may **not** be filed by facsimile.

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<sup>16</sup> To file a Request for Review electronically, go to the Agency's website at **www.nlrb.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.