
FREEPORT POLICE)
 BENEVOLENT ASSOCIATION,)
)
 Petitioner,)
)
 and)
)
 TOWN OF FREEPORT,)
)
 Respondent.)

UNIT DETERMINATION REPORT

PROCEDURAL HISTORY

This unit determination proceeding was initiated on April 12, 2012, when Gino Bianchini, President of the Freeport Police Benevolent Association (hereinafter referred to as the "FPBA"), filed a petition for unit determination with the Maine Labor Relations Board ("Board"). The petition sought a determination whether the Sergeants at the Freeport Police Department should be added to an existing bargaining unit consisting of all full-time Patrol Officers employed by the Freeport Police Department for which FPBA is the bargaining agent. The Town of Freeport ("Town" or "employer") filed a timely response to the petition, arguing that since the Sergeants are supervisors, within the meaning of 26 M.R.S.A. § 966(1), they should not be included in the same unit as the employees they supervise; but, rather, together constitute an appropriate police supervisors' bargaining unit.

A unit determination hearing notice was issued on May 21, 2012, and was posted for the benefit of affected employees. The hearing was conducted on May 31, 2012. The FPBA was represented by Jonathan Goodman, Esq. The Town was represented by Matthew Tarasevich, Esq. The parties were afforded full opportunity to examine and cross-examine witnesses, to present evidence and to make argument. Sergeant John Perrino testified on behalf of the FPBA and Police Chief Gerald Schofield

testified on behalf of the town. The only issue raised by this case is whether the position of Sergeant should be included in the Patrol Officers bargaining unit or should the Sergeants constitute a separate police supervisors bargaining unit. The parties presented oral argument at the conclusion of the hearing.

JURISDICTION

The jurisdiction of the executive director to hear this matter and to make an appropriate unit determination lies in 26 M.R.S.A. § 966.

EXHIBITS

The following exhibits were admitted into the record without objection:

- Joint No. 1 Freeport Police Department organizational chart
- Joint No. 2 July 1, 2010 – June 30, 2012 collective bargaining agreement between The Town of Freeport and The Freeport Police Benevolent Association
- Joint No. 3 Job description, Sergeant
- Joint No. 4 Job description, Patrolman
- Joint No. 5 Freeport P.D. Standard Operating Procedure No. 1-10, Complaint Against Law Enforcement Agency Personnel
- Joint No. 6 Freeport P.D. Standard Operating Procedure No. 1-11, Employee Discipline

FINDINGS OF FACT

1. The Freeport Police Benevolent Association (“FPBA”) is the petitioner and is the bargaining agent for the Freeport Patrol Officers bargaining unit, within the meaning of 26 M.R.S.A. § 962(2).

2. The Town of Freeport is a public employer, within the meaning of 26 M.R.S.A. § 962(7).

3. The current collective bargaining agreement for the Freeport Patrol Officers bargaining unit expires on June 30, 2012; therefore, the instant petition was timely filed

within the statutory window period.

4. The head of the Freeport Police Department is the Police Chief. The remainder of the department consists of 13 employees: one Lieutenant, two Sergeants, eight Patrol Officers, one Detective (Patrol Officer), and one Secretary.

5. The chain of command at the Freeport Police Department is as follows: the Patrol Officers and the Detective report to the Sergeants; the Sergeants report to the Lieutenant; and the Lieutenant and the Secretary report to the Police Chief.

6. The department operates 24 hours per day, on a three-shift per day system. The Police Chief and the Lieutenant work during the day, Monday through Friday, although the Police Chief might stop by the department at any time. The 5:00 P.M. to 3:00 A.M. shift consists of one Sergeant and one Patrol Officer. There is no Sergeant on-duty from 3:00 A.M. to 7:00 A.M.; however, a Sergeant is on-call during that time. Weekend days there is no supervisor or administrative officer on-duty. The Patrol Officers work shifts, on a regularly-scheduled, rotating basis.

7. Three or four of the eight Patrol Officers are “younger officers,” who require more supervision than do more seasoned veterans.

8. On an on-going basis, the Sergeants provide verbal performance improvement feed-back to the Patrol Officer with whom they serve on a given shift.

9. Sgt. Perrino testified that he has given “quite a few” direct orders to the Patrol Officers whom he supervises, although such orders are usually informal in nature.

10. About 15% of the Sergeants’ work time is spent on performing supervisory duties. The remaining 85% of the time, the Sergeants perform the same work as do the Patrol Officers, patrolling the town in a cruiser and responding to calls.

11. Pursuant to the police department’s standard operating procedure (“SOP”) employee discipline procedure, the Sergeants are empowered to give oral or written discipline to the Patrol Officers.

12. The discipline SOP further authorizes Sergeants to relieve Patrol Officers from duty, where the former “ha[ve] a reasonable basis to question an employee’s physical or psychological fitness for duty,” for serious violations of departmental policy, or for refusal to obey a lawful direct order. Relief from duty decisions are subject to review by the Police Chief.

13. Pursuant to the police department's standard operating procedure for complaints against law enforcement agency personnel, the Police Chief may assign the Sergeants to handle relatively minor complaints informally. All other such complaints are handled by the Lieutenant.

14. When the Police Chief determines that an internal investigation is required, the Chief will assign an officer to conduct the investigation. Usually, the Lieutenant is the officer assigned; however, Sgt. Perrino has conducted 3 such investigations.

15. The Sergeants write the yearly performance evaluations for the Patrol Officers.

16. The wages article of the Patrol Officers' collective bargaining agreement provides a seven-step wage scale and states that "[a]dvancement on steps shall occur on anniversary dates based on an average or better evaluation."

17. The police department work schedule is determined by the Lieutenant, without input from the Sergeants. The Sergeants can approve shift swaps and, if an officer calls in sick, the Sergeant will find a replacement officer to fill the shift.

18. The grievance article of the Patrol Officers' collective bargaining agreement provides that the Police Chief is the decision-maker on behalf of the employer at the first step of the grievance process. If the grievance is not resolved at step 1, it moves to the Town Manager and, if it remains unresolved, it then proceeds to arbitration, which is final and binding on the parties.

19. The Police Chief and the Lieutenant formulate the department's standard operating procedures. While the Sergeants have no formal role in that process, they may make suggestions for consideration by the decision-makers.

20. In addition to their supervisory and patrol responsibilities, the Sergeants perform assigned departmental responsibilities that include firearms and self-defense training, preparing the monthly State inmate population report, serving as the crash administrator (accident report review), and reviewing offense and incident reports. Patrol Officers also perform some of these functions; e.g., a Patrol Officer serves as the backup crash administrator and another is a firearms training officer.

21. Sergeants and Patrol Officers have served on interview panels to screen candidates for employment with the police department. The interviewers make

recommendations to the Police Chief, who is the sole decision-maker in the hiring process.

22. The Patrol Officers, the Detective, and the Sergeants are compensated on an hourly basis and are all on a pay scale, with the Sergeants' scale being higher than for the other two classifications. All these employees have a 40-hour standard work week.

23. The Patrol Officers and the Sergeants have similar employment benefits; in particular they have the same health insurance coverage.

24. The minimum educational qualification for both Patrol Officers and Sergeants is graduation from high school or the equivalent; however, Sergeants are expected to have at least 5-years' experience as a police officer; but, a two-year degree in law enforcement or training in "modern police supervision" may be substituted in meeting the experience requirement.

25. The Sergeants each work with a Patrol Officer staffing a ten-hour shift and the Patrol Officers cycle through the shifts on a rotating basis.

26. All of the police department employees work out of a single station.

27. The Patrol Officers' bargaining unit formerly included dispatchers; however, that is no longer the case.

28. Sergeant Perrino expressed a desire to be included in the Patrol Officers' bargaining unit and the bargaining agent for that unit is the petitioner in this matter.

DISCUSSION

The sole issue presented by this case is whether the Sergeant position exercises sufficient supervisory authority, as defined in 26 M.R.S.A. § 966(1), over the Patrol Officers that the Sergeants should be excluded from a bargaining unit consisting of the Patrol Officers.

Unlike the National Labor Relations Act, the Municipal Public Employees Labor Relations Law ("MPELRL") grants supervisors collective bargaining rights and permits the inclusion of supervisors in bargaining units of subordinate employees in certain

circumstances. In *Penobscot Valley Hospital and Maine Federation of Nurses and Health Care Professionals*, No. 85-A-01, slip op. at 8 (MLRB Feb. 6, 1985), the Board stated:

Section 966(1) does not require the exclusion of supervisory employees from bargaining units composed of the employees whom they supervise but relegates the decision of the supervisory employee's unit status to the sound discretion of the hearing examiner. *MSAD No. 14 and East Grand Teachers Association*, MLRB No. 83-A-09, at 12 (Aug. 24, 1983). Except in instances where the resulting one- or two-member supervisory unit would contravene our policy of discouraging the proliferation, through fragmentation, of small bargaining units, we have approved the creation of such separate supervisory units. . . . The purpose of creating separate supervisory employee bargaining units is to minimize potential conflicts of interest within bargaining units, between supervisors and their subordinate employees, as well as to lessen conflicts of loyalty for supervisors between duty to their employer and allegiance to fellow unit employees.

Section 966(1) gives guidance to the hearing examiner in identifying situations where conflicting interests and loyalties may arise. The relevant portion of § 966(1) states:

In determining whether a supervisory position should be excluded from the proposed bargaining unit, the executive director or his designee shall consider, among other criteria, if the principal functions of the position are characterized by performing such management control duties as scheduling, assigning or overseeing and reviewing the work of subordinate employees, or performing such duties as are distinct and dissimilar from those performed by the employees supervised, or exercising judgment in adjusting grievances, applying other established personnel policies and procedures and in enforcing a collective bargaining agreement or establishing or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement those standards.

The focus of this three-part test is to determine whether the supervisor exercises a level of control over employment-related issues that would likely result in a conflict of interest.

See *Richmond Employees Ass'n and Town of Richmond*, No. 94-UD-09, slip op. at 30 (MLRB Apr. 26, 1994).

Under the first portion of the test outlined in § 966(1), I must consider whether the principal functions of the Sergeant classification involve scheduling, assigning, overseeing or reviewing the work of the Patrol Officers. While the Sergeants have little to do with setting the duty schedule, they do approve shift-swapping and covering vacant shifts during vacations and sick time. On the other hand, the Sergeants assign, oversee and evaluate the work of the Patrol Officer with whom they serve on the 10-hour evening/overnight shift. While work assignments might be as informal as alternating responding to calls during slow periods, the Sergeants determine the response to calls and direct the Patrol Officers through issuing direct orders. The Sergeants oversee the work of the Patrol Officers through frequent direct observation and they review such work through the on-going oral positive feed-back process. In addition, the Sergeants evaluate the Patrol Officers through the formal performance evaluation process, which controls the granting of pay step increases.

The Sergeants exercise the supervisory authority cited in the first tine of § 966(1), all of which may lead to conflicts between the Sergeants and the Patrol Officers. The issue here is whether the supervisory duties constitute the ***principal*** function of the Sergeant position. As the hearing officer discussed in *Rockport Police Officers Association and Town of Rockport*, No. 02-UD-05, slip op. at 11-12 (June 12, 2002), the percentage of time an employee spends performing specific supervisory duties is only one factor in determining the primary function; the more telling question is whether the alleged supervisor is actively engaged in assigning and overseeing the work of the subordinate employees. The more opportunity a supervisor has to assign and oversee work, the greater the potential for conflicts to arise. Unlike the patrol sergeant in Rockport, whose contact with the patrolmen was limited to shift changes and whose supervision consisted of reviewing reports and cruiser dashboard video, the Sergeants here have extended daily contact with the Patrol Officer on their shift and they are supervising those patrolmen continuously. Given the size and organizational structure of the police department, it is not surprising that the Sergeants spend most of their time functioning as law enforcement officers; however, that does not diminish the importance

of their exercise of supervisory authority. The level of this activity combined with the Sergeants' formal annual evaluation of the Patrol Officers' performance, persuades me to conclude that the supervisory duties are the principal function of the Sergeants, within the meaning of the § 966(1) test.

The second line of the test in § 966(1) requires an examination of whether the Sergeants perform duties that are "distinct and dissimilar" from the duties performed by the employees that they supervise. This requirement has been described as:

[D]uties contemplated by the 'distinct and dissimilar' criterion include those in connection with hiring (or making recommendations), transfers, layoffs and recalls, and promotions - duties that substantially align the interests of the supervisor with the interests of the employer and cause conflicts of interest [with other employees].

State of Maine and MSEA, No. 91-UC-04, slip op. at 15 (MLRB Apr. 17, 1991). The Sergeants' only relevant activity is their participation in hiring interviews; however, Patrol Officers have participated in this as well. All authority in these areas, as well as the authority to suspend, or discharge employees, is held by the Police Chief.

Turning to the third line of the § 966(1) test, the Sergeants have no role in adjusting grievances or establishing performance standards. The Sergeants do take corrective measures to implement the performance standards set by the Police Chief. The Sergeants may issue both oral and written reprimands and, in certain limited circumstances, may relieve Patrol Officers from duty, subject to prompt review by the Police Chief. The Sergeant who testified at the hearing has never sent an employee home during his 11 years' service as a Sergeant.

Evaluation of the criteria in § 966(1) shows that the Sergeants exercise substantial supervisory authority that could place them in conflict with the Patrol Officers; therefore, the Sergeants will be assigned to a separate bargaining unit. The record established that the Sergeants share a clear and identifiable community of interest and together constitute an appropriate bargaining unit. In reaching this decision, I have

considered the Board's policy against the proliferation of small bargaining units, particularly the formation of one- and two-member supervisory units, as outlined in *Rockport, supra*, at 14-15. The Board policy must yield to the mandate of the Statute, particularly in situations like the present one where the exercise of supervisory duties is well-established, and the bargaining unit has been in existence for a substantial time, without the supervisors having been included.

CONCLUSION

On the basis of the foregoing facts and discussion and pursuant to the provisions of 26 M.R.S.A. § 966, the petition for unit determination filed on April 12, 2012, by Gino Bianchini, President of the Freeport Police Benevolent Association is denied. The following described unit is held to be appropriate for purposes of collective bargaining:

INCLUDED: Sergeant.

EXCLUDED: Police chief and all other employees of the Town of Freeport.

Dated at Augusta, Maine, this 19th day of June, 2012.

MAINE LABOR RELATIONS BOARD

Marc P. Ayotte
Executive Director

The parties are hereby advised of their right, pursuant to 26 M.R.S.A. § 968(4), to appeal this report to the Maine Labor Relations Board. To initiate such an appeal, the party seeking appellate review must file a notice of appeal with the Board within fifteen (15) days of the date of issuance of this report. See Chapter 10 and Chap. 11 § 30 of the Board Rules.