

STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 13-UDA-01
Issued: November 29, 2012

FREEPORT POLICE BENEVOLENT)
ASSOCIATION,)
))
Appellant,)
))
and)
))
TOWN OF FREEPORT,)
))
Appellee.)

DECISION AND ORDER ON
UNIT DETERMINATION APPEAL

INTRODUCTION

The Freeport Police Benevolent Association ("Union") filed this unit appeal on July 5, 2012, pursuant to 26 M.R.S.A. § 968(4) of the Municipal Public Employees Labor Relations Law ("MPELRL") and Chapter 11, § 30 of the Rules of the Maine Labor Relations Board. The unit determination report, which is the subject of this appeal, was issued on June 19, 2012. The hearing addressed the unit determination petition filed by the Union seeking to add the sergeants of the Freeport Police Department to the patrol officers unit, for which the Union is the bargaining agent. The Town of Freeport ("Town") responded to the petition, stating that the sergeants should be excluded from the patrol officers unit and should, rather, form a separate supervisors bargaining unit. In his Unit Determination Report, the Executive Director agreed with the Town, concluding that the sergeants exercised a level of control over employment-related issues and would likely result in a conflict of interest with the patrolmen as defined in 26 M.R.S.A. § 966(1). On appeal, the Union argues that the sergeants do not exercise sufficient supervisory authority over the patrol officers, pursuant to 26 M.R.S.A. § 966(1), to be excluded from the patrol officers bargaining unit.

PROCEDURAL HISTORY

On April 12, 2012, Gino Bianchini, the President of the Union, filed a petition for unit determination with the Maine Labor Relations Board ("Board"). The petition sought a determination of whether the sergeants at the Freeport Police Department should be added to the existing bargaining unit consisting of the full-time patrol officers employed by the Freeport Police Department, for which the Union is the bargaining agent. The Town filed a timely response to the petition. The Town argued that the sergeants are supervisors within the meaning of 26 M.R.S.A. Sec. 966(1), and, therefore, should not be included in the same unit as the patrol officers they supervise. Instead, the Town suggested that the sergeants constitute an appropriate supervisors bargaining unit.

On May 21, 2012, a unit determination hearing notice was issued and was posted for the benefit of affected employees. A unit determination hearing was held in front of the Executive Director on May 31, 2012, at the Maine Labor Relations Board. The Union was represented by Jonathan Goodman, Esq., and the Town was represented by Matthew Tarasevich, Esq. The parties were afforded the full opportunity to examine and cross-examine witnesses, to present evidence, and to make argument. Sergeant John Perrino testified on behalf of the Union; Police Chief Gerald Schofield testified on behalf of the Town. At the conclusion of the hearing, each party presented oral argument. On June 19, 2012, the Executive Director issued a decision, in which he denied the petition for unit determination and, therefore, found that the sergeants should be a separate bargaining unit from the rest of the employees of the Town of Freeport, including the patrol officers. On July 5, 2012, the Union filed an appeal of the Executive Director's decision. Both parties submitted written arguments on the appeal. The Board deliberated this matter on October 19, 2012.

JURISDICTION

The Union is an aggrieved party within the meaning of 26 M.R.S.A. § 968(4). The jurisdiction of the Maine Labor Relations Board to hear this appeal and to render a decision lies in 26 M.R.S.A. § 968(4).

FINDINGS OF FACT

1. The Freeport Benevolent Association ("Union") 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 ("Town") is a public employer within the meaning of 26 M.R.S.A. § 962(2).

3. The current collective bargaining agreement between the Union and the Town expired on June 30, 2012. Therefore, the petition initiating this case was timely filed.

4. The Police Chief is the head of the Freeport Police Department. The rest of the department consists of thirteen 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 secretary report to the Police Chief.

6. The department operates 24 hours a 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 may stop by the department at any time. One sergeant and one patrol officer cover the 5:00 p.m. to 3:00 a.m. shift. There is no sergeant on duty from 3:00 a.m. to 7 a.m., but there is a sergeant on call during that time. On 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 patrol officers are "younger officers" who require more supervision than the more seasoned officers.

8. The sergeants provide verbal performance feedback to the patrol officers with whom they serve on an ongoing basis on their shifts.

9. Sergeant John Perrino testified that he has given "quite a few" direct orders to the patrol officers whom he supervises, although those orders are usually informal in nature.

10. Approximately 15 percent of the sergeants' work time is spent on performing supervisory duties. The remaining 85 percent of the time, the sergeants perform the same work as the patrol officers by patrolling the town in a cruiser and responding to calls.

11. According to the Police Department's standard operating procedure ("SOP") employee discipline procedure, the sergeants have the authority to discipline the patrol officers verbally or in writing.

12. The discipline SOP further authorizes sergeants to relieve patrol officers from duty when sergeants "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. A sergeant's decision to relieve a patrol officer from duty is subject to review by the Police Chief.

13. According to the Police Department's SOP for complaints against law enforcement agency personnel, the Police Chief may assign 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 assigns an officer to conduct the investigation. Usually, the lieutenant is the

officer assigned; however, Sergeant Perrino has conducted three such investigations.

15. The sergeants write the yearly performance evaluations of 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. Sergeants can approve shift swaps and, if an officer calls in sick, the sergeants 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 Town at the first step of the grievance process. If the grievance is not resolved at step 1, it moves to the town manager. If it is still unresolved, it 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. Although 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, detective, and sergeants are compensated on an hourly basis and all are on a pay scale, with the sergeants' scale being higher than for the two other classifications. These employees all have a standard 40-hour work week.

23. The patrol officers and sergeants have similar employment benefits, including the same health care coverage.

24. The minimum education qualification for both patrol officers and sergeants is graduation from high school or the equivalent. However, sergeants are expected to have at least five years of experience as a police officer, although a two-year degree in law enforcement or training in "modern police supervision" may be substituted for the experience requirement.

25. The sergeants each work with a patrol officer for 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, but this is no longer the case.

28. At hearing, Sergeant Perrino expressed a desire to be included in the patrol officers' bargaining unit.

DISCUSSION

The Executive Director of the Maine Labor Relations Board ("Executive Director") reviewed the documentary and testimonial evidence presented and concluded that the sergeants exercise substantial authority over the patrol officers. Because the sergeants exercise such authority, and to avoid the conflict that may flow from that authority, the Executive Director determined that the sergeants should be assigned to a separate bargaining

unit from the patrol officers.

The standard of review for the MLRB of bargaining unit decisions is well-established:

We will overturn a hearing examiner's rulings and determinations if they are "unlawful, unreasonable, or lacking in any rational factual basis." *Council 74, AFSCME and Teamsters Local 48*, MLRB No. 84-A-04 at 10 (April 25, 1984), quoting *Teamsters Local 48 and City of Portland*, 78-A-10 at 6 (Feb. 20, 1979). It thus is not proper for us to substitute our judgment for the hearing examiner's; our function is to review the facts to determine whether the hearing examiner's decisions are logical and are rationally supported by the evidence.

MSAD #43 and SAD #43 Teachers Assoc., No. 84-A-05 at 3 (May 30, 1984, affirming No. 84-UC-05. See also, *Topsham and Local S/89 District Lodge #4 IAMAW*, No. 02-UCA-01 (Aug. 29, 2002, affirming No. 02-UC-01, aff'd. No. AP-02-68, Ken. Cty. Sup. Ct. (March 20, 2003). The issue on appeal is whether the Executive Director's decision that Freeport's police sergeants exercise sufficient authority over the patrol officers, as defined in 26 M.R.S.A. § 966(1), to exclude them from the patrol officers' bargaining unit was unlawful, unreasonable, or lacking in any factual basis.

The relevant portion of 26 M.R.S.A. § 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, 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 Board must determine whether the Executive Director properly applied this three-part test, the purpose of which is to determine whether the supervisors have a level of control over employment-related issues that would likely result in a conflict of interest with the patrol officers.

The first portion of the test set forth in § 966(1) measures whether the principal functions of the sergeants involve scheduling, assigning, overseeing, or reviewing the work of patrol officers. The Executive Director reviewed the evidence presented and determined that the sergeants assign, oversee, and evaluate the work of the patrol officers with whom they serve on the evening and overnight shifts. He determined that the sergeants oversee the work of the patrol officers through an ongoing, verbal positive feedback process and through the formal performance evaluation process, which in turn controls whether or not the patrol officers are granted pay step increases. He also determined that even though 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. Further, he found that although work assignments may be informal (i.e., alternating responses to calls during slow times), the sergeants determine who responds to the calls by issuing direct orders to the patrol officers.

The Executive Director concluded that the sergeants exercise the supervisory authority cited in 966(1), which in turn may lead to conflicts between the sergeants and the patrol officers. That conclusion was based on the evidence and was not unlawful or unreasonable, and we affirm the Executive Director's conclusion.

In order to determine whether the supervisory duties are the principal function of the Freeport sergeants, the Executive Director relied on whether the sergeants are actively engaged in

assigning and overseeing the work of the patrol officers rather than measuring the percentage of time performing specific supervisory duties. He reasoned that the more opportunity the sergeants have to assign and oversee the work of the patrol officers, the greater opportunity there is for conflicts to arise. The Executive Director distinguished this situation from the one in *Rockport Police Officers Association and Town of Rockport*, No. 02-UD-05, slip op. at 11-12 (June 12, 2002), where the patrol sergeants contact with the patrolmen was limited to shift changes, and whose supervision was limited to reviewing reports and cruiser dashboard videos. In *Rockport*, the hearing examiner found that the sergeant operated more as a "working foreman," and, therefore, she declined to exclude that sergeant from the patrolmen bargaining unit. Unlike the sergeants in *Rockport*, however, the sergeants here have extended daily contact with the patrol officer on their shifts and they supervise those patrolmen continuously. The Executive Director found that even though the sergeants spend most of their time functioning as law enforcement officers, that fact does not diminish the importance of their continuous exercise of supervisory authority. We agree with the Executive Director that the level of supervisory authority held by the Freeport sergeants, combined with the sergeants' formal evaluations of the patrol officers' performance, leads to the conclusion that supervisory duties are the principal function of these sergeants within the meaning of § 966(1).

The second portion of the test set forth in Section 966(1) requires us to review the Executive Director's examination of whether the sergeants perform duties that are "distinct and dissimilar" from those performed by the patrol officers. The "distinct and "dissimilar" requirement has been described as follows:

[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). Here, the sergeants' only applicable activity is their participation in hiring interviews. However, patrol officers have participated in hiring interviews as well. All authority in hiring matters, as well as the authority to suspend or discharge employees, is held solely by the Police Chief. We agree with the Executive Director that the sergeants do not perform duties that are distinct and dissimilar from the patrol officers.

The third and final portion of the Section 966(1) test requires us to examine whether the Executive Director correctly found that the sergeants have no role in adjusting grievances or establishing performance standards. Although the sergeants do take corrective measures to implement performance standards, it is the Police Chief who sets those standards. The sergeants have the authority to issue verbal and written reprimands, and, in limited circumstances, may relieve patrol officers from duty subject to review by the Police Chief. Sergeant Perrino testified that he has not sent a patrol officer home in the eleven years he has been a sergeant. For these reasons, we find that the Executive Director's determination that the sergeants have no role in establishing performance standards or adjusting grievances to be lawful, and reasonable, and supported by evidence in the record. *MSAD #43 and SAD #43 at 3.*

In sum, the Executive Director's determination that the sergeants exercise substantial supervisory authority over the patrol officers that could place the two groups in conflict is supported by ample evidence in the record and is neither unlawful nor unreasonable. We, therefore, affirm the Executive Director's

decision to deny the petition for unit determination filed on April 12, 2012.

ORDER

On the basis of the foregoing discussion and pursuant to the authority granted to the Maine Labor Relations Board pursuant to 26 M.R.S.A. § 968(4), it is ORDERED:

That the appeal of Freeport Police Benevolent Association filed on July 5, 2012, is dismissed.

Dated at Augusta, Maine, this 29th day of November, 2012.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right to seek review of this decision and order the Superior Court by filing a complaint pursuant to 26 M.R.S.A. Sec. 968(4) and in accordance with Rule 80C of the Maine Rules of Civil Procedure within 15 days of the date of this decision.

/s/ _____
Susan L. Higgins
Chair

/s/ _____
Richard L. Hornbeck
Employer Representative

/s/ _____
Wayne W. Whitney
Employee Representative