

The department is composed, in part, of the chief, deputy chief, four captains, and seventeen firefighters.² The City Ordinance states the chief is the head of the department with the authority to direct the department's activities and to make departmental rules and regulations.

The department maintains a constant capability to respond to calls. To do so, the department uses four separate rotating 24-hour shifts, numbered one through four. Each shift is staffed by one captain and four firefighters. The default working hours during a 24-hour shift are 7:00 a.m. to 5:00 p.m., with after 5:00 p.m. considered downtime. The chief and deputy chief typically work Monday – Friday, from 7:00 a.m. to 3:00 p.m.

Status and Operations of Union

The Union represents two separate bargaining units within the department: The Captain Unit and the Firefighter Unit. Although the Union represents separate units, many of its functions are effectively consolidated. For example, the Union has a single executive board which presides over both units. Likewise, the Union maintains one grievance committee which decides whether to file grievances for employees from either bargaining unit. The Union also conducts combined meetings for both units at which there is no differentiation between the right of firefighters and captains to discuss or vote on subject matter. However, the Union and City do negotiate separate collective bargaining agreements for the Captain Unit and the Firefighter unit.

Chain of Command

Under the department's chain of command, firefighters report to the captains, who report to the deputy chief, who reports to the chief. Apart from the traditional chain of command, the department maintains a practice of recognizing the firefighter with the most seniority on any given shift as the "senior firefighter" for that shift. A less-senior, non-officer firefighter is expected to comply with direction provided by the senior firefighter.

One aspect of the chain of command is the role of the incident commander, i.e. the individual who directs the department's response at the scene of a call. Typically, the highest-ranking member of the department responding to the scene of the call, more commonly a captain rather than a firefighter, assumes the role of incident commander.³ However, that ranking member can make the decision to permit a lower-ranking individual to assume, or continue in, the capacity as incident commander, depending on the circumstances.⁴ The incident commander is responsible and held accountable for the department's actions at the scene of a call.

² Historically, the captain position did not exist at the department. Instead, the department staffed a position known as assistant chief. A number of years ago, the department began to replace assistant chiefs with captains as the assistant chief retired or left the department. The captain position is generally similar in function and number to the assistant chief, although at a lower salary scale.

³ The Fire Department's Standard Operating Guideline addressing Fire Ground Operations states that "Command is established by the first arriving officer unless a senior FD member arrives first and can assume that the officer will be prohibited from arriving within a reasonable timeframe (a few minutes or longer). That person will remain in command of the incident until: command is transferred [or] the incident is resolved." Additionally, the chief confirmed that a captain more commonly serves as incident commander, compared to a firefighter, due to a multitude of guidelines addressing firefighter conduct at a fire scene.

⁴ The Fire Department's written Rules and Regulations state that "[f]irefighters, when directed, shall assume command of routine and minor emergency situations and service calls" and that firefighters confronted with a situation requiring immediate action, in the absence of a ranking officer, shall take necessary action. In those

There are several exceptions to the default rank and seniority-based chain of command. These include instances of patient care where the decisions regarding the medical care of an individual would be made by the person with the highest level of medical certification, e.g. a paramedic would have patient-care authority over an EMT, regardless of rank.⁵ Likewise, on the City's joint-fire and police boat, the decision on what type of assistance to provide is made solely by the boat's designated operator, who may be outranked by the other passengers.

Role of Fire Captains

The four fire captains are each assigned to one of the department's four, 24-hour shifts. In this capacity, each captain is designated as the shift or duty officer for their shift. As the shift officer, the captain has the responsibility and authority to ensure the tasks and training assigned to the captain's shift are accomplished. As one fire captain witness stated at hearing, the shift officer's job is to "oversee the things that happen that day with his shift or her shift."⁶

According to the captain's position description, a captain's essential duties include the supervision of "shift crew as shift officer in their assigned duties as directed" as well as the "maintenance of departmental equipment, supplies, and facilities." The position description also states, in part, a captain "[a]s shift officer supervises all subordinates. In the absence of Fire Chief all personnel subject to his/her command." The same point is reiterated in the department's Rules and Regulations which provide, in part, "Firefighters shall be under the immediate direction of the Shift officer when on duty...."

In terms of supervisory training for captains, the department requires new captains to attend a "Stepping Up To Supervisor" course offered at the University of Southern Maine. Captains are also expected to participate in occasional tactical command refresher classes. Likewise, the captains, on a rotating basis, attend an annual Officer Development Class.

a. Management of Department Resources

Regarding scheduling, captains are generally responsible for managing the department's calendar, which includes maintaining both an electronic and paper record of the firefighters present or absent for a particular shift.⁷ Firefighters are typically expected to contact their shift officer if they will be unable to attend their scheduled shift on short notice.⁸ When that happens, the captain makes the necessary adjustments to the calendar and takes steps, including the

instances where an officer is absent but firefighters are required to take action, the Rules and Regulations indicate the senior firefighter will assume command until relieved by a ranking officer.

⁵ Both the captains and firefighters are required to maintain, at least, an Emergency Medical Technician (EMT) certification. Some fire department personnel are certified as paramedics, i.e. at a higher level of certification than EMTs.

⁶ A captain noted in an email to the chief "most of us [captains] are busy managing our shifts, emergency calls, and specific assignments." Edit supplied.

⁷ The department uses a software known as Emergency Record for its calendar. Through Emergency Record the department manages its daily schedule and tracks its compliance with mandatory training obligations.

⁸ The Fire Department's Rules and Regulations states that "Firefighters and Officers shall not absent themselves from duty or place of assignment without authorization of their shift officer. Firefighters shall promptly notify their shift Officer of any inability to report for duty or remain on duty...Firefighters and Officers unable to report for or perform work due to illness or other cause must report their expected absence to the shift Officer at least one (1) hour in advance of their shift."

facilitation of overtime,⁹ to ensure adequate staffing, as defined by the firefighters' collective bargaining agreement and certain departmental standard operating guidelines. Similarly, captains approve requests for vacation and holiday leave and shift swaps, subject to the terms of the firefighters' collective bargaining agreement. On their own, captains do not have the ability to initially determine whether a newer firefighter has enough experience such that they are eligible for overtime assignments – this type of determination is made by the chief. Captains also lack the authority to approve proposed accommodations related to Workers' Compensation or the Americans with Disabilities Act.¹⁰

As to the assignment of daily work, many established tasks are presumed necessary by the shift's firefighters and the shift officer does not have to specifically assign such tasks in detail during a shift. Instead, the shift officer will frequently consult with the senior firefighter regarding the general plan for the day and provide loose guidelines for the accomplishment of those tasks, including training.¹¹ The senior firefighter will usually then make the specific assignments to the shift's firefighters in order to accomplish the assigned tasks. Ultimately, it is the responsibility of the captain, as the shift officer, to ensure that all the assigned tasks and training were completed for a shift and it is the discretion of the captain as to how much freedom to provide subordinates in the completion of their assigned duties. At the end of a shift, a captain enters into the department's electronic calendar a list of everything accomplished that shift.

Each of the four captains is assigned their own department-wide area of responsibility. These are: EMS director, public education coordinator,¹² safety and equipment, and Quality Assurance/Quality Improvement (QA/QI) for EMS.¹³ In terms of tasks each captain performs related to their area of responsibility, examples include the EMS director developing policy, recommending training, and facilitating contractual agreements with mutual-aid towns. The captain responsible for safety and equipment maintains an inventory of firefighter gear and recommends to the chief replacement gear, and its expected cost. The QA/QI captain implemented a department-wide program that requires a supervisor to review each EMS response in order to identify issues or individuals that need improvement. The public education coordinator facilitates training for schools and elder-care facilities and can require firefighters to participate in training. The chief also testified that the captain serving as the public education coordinator also facilitates the repair and maintenance of the department's facilities.

On a quarterly basis, the captains meet with the chief and deputy chief. These meetings may involve the discussion of proposed changes to departmental policy and captains may be asked for

⁹ To facilitate overtime, a captain completes an overtime slip and brings it to the Union to determine if any firefighters will take the overtime on a voluntary basis. If there are no volunteers, the department implements a forced overtime which can be directed by the chief, deputy chief, or a captain.

¹⁰ In a dispute with a firefighter regarding an alleged lack of proper notification regarding extended medical leave, the City directed that "Going forward, all communications start with the Fire Chief."

¹¹ According to the Department's Rules and Regulations, the duty officer "shall complete the assignment of vehicles and duties at the beginning of shift."

¹² The captain serving as the public education coordinator also volunteered to facilitate the department's in-house training because no one was serving in that capacity. Accordingly, he facilitates the scheduling of refresher or educational training for the department. Recently, he arranged for training on using a Rapid Intervention Team, i.e. a team of firefighters focused on the rescue of firefighters. He makes budget recommendations to the chief to allow for training opportunities.

¹³ The QA/QI role is required to exist through the State of Maine's oversight of EMS services.

their input regarding the changes. A review of the minutes from four of these meetings indicates discussion of a variety of department-related issues and several references to captains being assigned responsibility for developing or researching adjustments to forms and policies.¹⁴

Captains may also be directed to draft departmental policies, so much that one captain has drafted approximately half of the department's myriad, existing policies. While a firefighter would not typically draft a policy, there are occasions where a firefighter participates in the development of a policy if the firefighter has related expertise or is serving on a related committee. Ultimately, only the chief has the authority to impose or rescind a policy.

On a monthly basis, captains are required to provide the chief a report reviewing their shift's activities during the preceding month. A review of several of these reports indicates their focus on summarizing the specific repairs, maintenance, and training that took place. Firefighters are not required to submit a similar-style report.

Captains conduct investigations and produce related reports for incidents involving damage to department equipment or property.¹⁵ Such reports include a specific section addressing how the incident could have been prevented. Captains are also responsible for submitting work-related injury reports which include a review of corrective action taken. Additionally, captains are responsible for recording what took place on each fire call during their shift as well as for those EMS calls where they oversaw patient care. Firefighters do not conduct investigations or prepare reports for fire calls or damage or injury issues; however, firefighters do prepare reports for EMS calls if they oversaw patient care.

At least several of the captains are provided a budget, set by the chief, which they can use to purchase equipment for the department. In a July 2019 memorandum to all department personnel, the chief indicated that all purchases made on behalf of the department need to be approved by the chief, deputy chief or shift officer. Captains may also make budget recommendations to the chief regarding potential allocations of the department's budget.

With regard to reviewing subordinates' work, captains are responsible for formally evaluating the performance of the firefighters on their shift. The evaluation process consists of the captain and firefighter meeting for a mid-year review and a final end-of-year meeting. Ultimately, the captain produces a written evaluation that includes the captain's numerical ratings for the

¹⁴ Subjects discussed at previous quarterly meetings include: captains' discretion to use the foam on a fire engine; upcoming electronic availability of requisition forms (captain will work with deputy chief on details and training); proper inventory of spare gear (captain will make adjustments to inspection form); use of particular vehicle when responding to a mutual aid call; department's potential failure to comply with EMS QA/QI policy (two captains will validate policy); rotation of personnel on ambulances to avoid burn-out (two captains were assigned to discuss the issue and present recommendations to the chief); number of personnel to take on mutual aid calls; transports from nursing homes; safety equipment (one captain was to provide quotes for obtaining P100 soft masks); department recognition dinner; ambulance calls on one shift (one captain was directed to develop a standard operating guideline); clarification of uniform policy (two captains were assigned to work on suggestions to present to the chief); reminder to not use personal phones for patient care photos; whether chief should participate in incident command in order to free up more firefighters for operations; gear inspections should be overseen by the duty officer.

¹⁵ While captains do perform investigations, the deputy chief may also conduct the investigation if the deputy chief is on duty at the time or the incident involved a captain.

firefighter's performance on a total of nine criteria.¹⁶ A fire captain witness acknowledged that captains are in the best position to evaluate firefighter performance because the captains see the firefighters on a day-to-day basis. The evaluation form includes signatory lines for the subject employee and the officer conducting the evaluation. Once completed, the chief reviews each evaluation and may add his own comments or questions prior to signing-off on the evaluation, although the form does not include a signatory line for the chief.

The department's current employee evaluation policy, implemented in August 2016, states that employee performance evaluations will be considered as a component of the promotional process.¹⁷ In a January 2016 grievance regarding the department's implementation of previous a mandatory evaluation process, the Union stated it took "issue with the employer using bargaining unit members to evaluate other bargaining unit members for the purpose of disciplinary action or promotion if that is the intention." The City responded to the grievance by asserting, in part, the captains are in a separate bargaining unit from the firefighters "precisely because they are shift supervisors and need to be unencumbered when performing their supervisory duties, which include evaluations."

b. Comparison of Captain and Firefighter Work Duties

In general, the four captains perform much of the same work as their subordinate firefighters, in a near-identical environment to the firefighters. They live and eat in the same quarters as the firefighters and are subject to the same general rules and conditions while on duty at the fire station. Apart from the distinctions described above, e.g. status as shift officer or incident commander, captains are expected to respond to fire calls in the same manner as firefighters, including potentially driving fire department vehicles and using identical firefighting equipment. Like firefighters, they operate hoses and enter structures as need be.

In some contrast, captains are not required to respond to every EMS call, and, overall, they have a substantively lower rate of participation on ambulance calls in comparison to the average firefighter. One witness indicated the chief has directed captains to be the "last one out the door" when responding to EMS calls, unless the captain is a paramedic and is needed on a call requiring elevated medical care. The chief confirmed his general expectation that captains stay behind on EMS calls because the captains' assignment is to oversee the station until there are no other available firefighters.

When asked to quantify the amount of time spent on a typical shift performing supervisory tasks, a fire captain witness responded that it was about two to four hours per shift. Similarly, the monthly reports prepared by another captain summarizing, in part, his performance of what he characterized as his "Captain's Duties" indicated the captain spent as little as 11.25 hours performing these tasks in one month.¹⁸

¹⁶ The criteria are: (1) Knowledge of Job Functions, City Ordinances and Facilities, (2) Operates safely and within SOGs, (3) Leadership and Teamwork, (4) Work Ethic, (5) Attitude and Professional Communication Skills, (6) Preparedness for duty, (7) Commitment to professional development, (8) Self-Motivation, and (9) Customer Service.

¹⁷ While the Union previously grieved the implementation of mandatory performance evaluations, the current policy was developed by a committee that included a firefighter and the Union agreed to its implementation.

¹⁸ Two points of consideration regarding this captain's monthly reports: (1) the reports do not appear to take into account the likely routine performance of other captain duties including the morning discussion of work assignments, the preparation of fire call reports, and the completion of various tasks related to the management of

Regarding participation in the department's hiring process, both captains and firefighters serve on the candidate interview board, but neither position has the authority to hire a new employee.

c. Personnel Matters

As to the contractual grievance process, the captains do not take part in the firefighters' grievance procedure. Instead, the chief is the first management representative to address a grievance, subject to appeal to the city manager.

Captains do not have the authority to issue formal disciplinary action. At most, captains can make a recommendation to the chief or deputy chief that a specific issue involving a firefighter should be elevated or remedial training be considered. Similarly, the chief or deputy chief may consult with a captain to obtain the captain's perspective on proposed discipline at which point the captain can advocate for potential alternative courses of action, if appropriate. For example, the chief was close to recommending the termination of a firefighter but changed his mind after a captain advocated a course of remedial training. Apart from formal discipline, captains have the authority to correct a firefighter during a shift if the firefighter is doing something contrary to departmental policy. If a firefighter observed another firefighter doing something wrong, the observing firefighter would be expected to report their observations to their captain.

III. Analysis and Conclusions

The Municipal Public Employees Labor Relations Law (the Law) provides separate bargaining units the right to petition for merger if they work at a common employer and are represented by a common bargaining agent, i.e. union. See 26 M.R.S.A. § 966(4). Here, there is no question that the Firefighter Unit and the Captain Unit share a common employer, the City, as well as a common bargaining agent, the Union. What is at issue is the Law's express prohibition on a unit composed of supervisors from merging with any other bargaining unit. *Id.* The City contends that the fire captains are supervisors; the Union disagrees. In order to determine the status of the fire captains, and ultimately whether the merger petition is viable, I must address (1) the appropriate standard to apply when determining who constitutes a supervisor under the Law, and (2) whether the fire captains should be considered supervisors under such a standard.

1. The supervisory criteria set forth in § 966(1) of the Law represent the most applicable standard to determine whether employees are supervisors.

As noted above, § 966(4)(E) of the Law prohibits the merger of bargaining units if a majority of one unit is composed of supervisors. The Law does not explicitly define the term supervisor as used in the context of merger, or elsewhere for that matter. However, § 966(1) of the Law sets forth numerous criteria to determine if a supervisory position should be placed in a separate unit from subordinate employees. E.g. *Freeport Police Benevolent Ass'n and Town of Freeport*, No. 13-UDA-01, slip op. at 8-10 (November 29, 2012) (*Freeport*). The Board has observed that the "purpose of creating separate supervisory employee bargaining units is to minimize potential conflicts of interest within bargaining units, between supervisors and their subordinate

the department's calendar, i.e. approval of leave requests and facilitation of overtime, and (2) in at least one month, the captain spent five days attending a conference as part of his "Captain's Duties."

employees, as well as to lessen conflicts of loyalty for supervisors between duty to their employer and allegiance to fellow unit employees.” *Penobscot Valley Hospital*, No. 85-A-01, slip op. at 8 (February 6, 1985). Presumably, the legislature had a similar concern in mind in 1990 when it first codified the right for bargaining units to merge through § 966(4), but expressly prohibited merger with a unit made up of supervisors.¹⁹

Given the substantial similarity between § 966(1) and § 966(4)(E) in the treatment of supervisors, i.e. providing separate units for supervisors to avoid conflicts of interest, it is most practical to also apply the § 966(1) criteria when determining under § 966(4)(E) whether a bargaining unit is composed of supervisors and must not merge with a unit composed of subordinates. Applying the existing supervisory criteria to the question of merger facilitates a consistent approach within the Law for determining whether supervisors should be placed, or kept, in separate bargaining units.

2. The fire captains are supervisors and are not eligible to merge with the firefighters.

The Law sets forth a three-part test to determine if a supervisory position should be excluded from a bargaining unit. The test examines: (1) whether the principal functions of the position involve scheduling, assigning, overseeing, or reviewing the work of subordinates, (2) whether a supervisory position performs distinct and dissimilar duties from subordinates, and (3) whether the supervisor participates in adjusting grievances or establishing and enforcing performance standards. *Freeport* at 8-10; see also 26 M.R.S.A. § 966(1).

The record supports a conclusion that the principal functions of the captains involve scheduling, assigning, overseeing, and reviewing the work of the firefighters. The captains, as shift officers, are responsible for managing their shift schedules and ensuring proper staffing by approving routine leave requests, facilitating overtime coverage, and maintaining an electronic and paper record of shift attendance. *Freeport* at 8. As to assignment of work, although the senior firefighter often serves as the direct conduit for assigning specific work tasks, the captain provides the senior firefighter the initial guidance on what must be accomplished that shift. The choice to delegate an aspect of the assignment process does not alter the fact that it is the captain who retains the responsibility and authority to ensure that all assigned tasks and training are completed for the shift and a record is kept.

Regarding oversight, the record does not indicate the captains necessarily provide firefighters constant, intense monitoring throughout the course of the work day. However, where the captains live and work alongside the firefighters during a 24-hour shift and have the authority to correct mistakes as need be, there presumably exists consistent oversight as to what is taking place during the shift. *Freeport* at 9. Likewise, captains confirm the tasks and training accomplished by the firefighters on their shift as reflected in a captain’s recording of a shift’s activities at the close of the shift as well as at the end of the month. The captains’ oversight authority is further reinforced in the department’s rules and regulations which state, in part, that a firefighter is under the “immediate direction” of the shift officer while on duty.

¹⁹ A review of the legislative history of 26 M.R.S.A. § 966(4) did not reveal any express legislative intent for including the prohibition on merger for supervisor units. The prohibition was included in the original draft legislation and maintained in the amended legislation that was ultimately enacted.

Captains are not only responsible for their shift's performance of assigned duties and training, but also actively participate in department-wide oversight. Examples include each captain's responsibility for an area of department operations and their participation in quarterly officer meetings, both of which involve reviewing issues facing the department and drafting department-wide policies and forms or recommending certain courses of action.

It is worth recognizing the status of the captain, as shift officer, in the absence of the chief and deputy chief. Both the chief and deputy chief work concurrent, Monday through Friday, 40-hour work weeks, and are likely present for a smaller percentage of the department's continuous operating hours in comparison to the shift officers, i.e. captains who work 24-hour shifts alongside the firefighters. The absence of the chief and deputy chief leaves the shift officer as the ranking member for a not insignificant amount of time during which they have the most immediate responsibility and authority of any officer to oversee the department's operations, a responsibility exacerbated by the inherent nature of fire departments where an emergency call may come in at any time.

In terms of reviewing work, the captains are the department officers most responsible for formally evaluating the work of the firefighters, which they accomplish through mid-term and final evaluations, and, as one captain explained, they are in the best position to do so because they see the firefighters every day. *Freeport* at 9. Although the chief reviews and signs-off on the evaluations, he is not listed as a signatory on the evaluation form and appears to provide more succinct comments or questions in comparison to the captains' comprehensive evaluations.

While at times the Board's hearing examiners have considered the amount of time a position spends on supervisory duties as material to whether the position's principal functions are supervisory, the fact that the captains perform supervisory functions for a minority of their working time is not dispositive here. Instead, the record, as reviewed above, indicates the paramount justification for the existence of a captain here, as compared to staffing another firefighter position, is to, as one captain put it, "oversee the things that happen that day with his shift or her shift." At its essence, that is the role of a supervisor, even if the supervisor spends most of their time working alongside subordinates. *Town of Searsport*, No. 17-UDA-01, slip op. at 10 (October 20, 2016); *Freeport* at 9.

To determine whether a supervisor performs distinct and dissimilar duties from subordinates, the Board focuses on duties related to hiring, transfers, layoffs and recalls, and promotions, i.e. "duties that substantially align the interests of the supervisor with the interests of the employer and cause conflicts of interest with other employees." *Freeport* at 9-10 quoting *State of Maine and MSEA*, No. 91-UC-04, slip op. at 15 (April 17, 1991). Here, the record, or lack thereof in part, indicates the captains, like the firefighters do not substantively participate in transfers, layoffs, or recalls. As to hiring, the captains are involved at the same level as firefighters, as members of the interview board, and neither captains nor firefighters possess hiring authority.

The role of the captains is distinct regarding promotions because captains are charged with the responsibility for formally evaluating firefighters, and evaluations are a component of the promotional process. It is not unreasonable to conclude that an evaluation which holds

implications for promotion could lead to a conflict of interest between a captain and a subordinate firefighter. Accordingly, it could be problematic for captains to be members of the same bargaining unit of the individuals whom they evaluate, a specific concern that the Union raised when it objected to the initial implementation of the formal evaluation process.

The captains' role in conducting investigations into and preparing related reports regarding damage to department property is also distinct from that of firefighters. Given the subject matter of these investigations, and the potential consequences for a firefighter, it is well within the realm of possibility that such an investigation could lead to a conflict of interest between the captain, representing the department, and the subject of the investigation who is accused of damaging department property.

Regarding the third factor to consider, whether the supervisor adjusts grievances or establishes and enforces performance standards, the record is clear that the captains do not participate in the firefighters' contractual grievance process. Similarly, the captains are not able to independently issue discipline, although the chief takes into consideration their recommendations as to whether, or what level, disciplinary or remedial action should be implemented. However, it is also clear, as discussed above, the captains are active in establishing certain department-wide standards through their substantive involvement in the discussion and drafting of procedures and policies.

In sum, the functions of the captains in overseeing, evaluating, and investigating their shifts, along with their active participation in oversight of department-wide issues, indicates they hold supervisory status which could present conflict of interest issues in a combined unit. *Freeport* at 9-10. It is understandable from the Union's perspective why merger would make sense given that the two bargaining units already practically function as one entity in terms of Union activity, both internal and external, excepting contract negotiations, and the captains and firefighters share certain working conditions. Nonetheless, the Law is clear that supervisors are prohibited from merger, and the record in this case indicates the most reasonable conclusion is that captains are supervisors. As a result, the Union's petition is subject to dismissal.

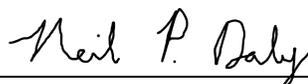
IV. Order

For the foregoing reasons, the undersigned hearing examiner ORDERS: The Union's merger petition is dismissed.

V. Right to Appeal

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 MLRB within fifteen (15) days of the date of the issuance of this report. See Chapter 10 and Chapter 11, § 30 of the MLRB Rules.

Dated this 6th day of May 2020



Neil P. Daly
Executive Director