

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

Teamsters Automotive, Petroleum and)	
Allied Trades Local Union 50,)	
)	
Petitioner,)	
)	
and)	Case No. S-RC-14-058
)	
County of Jefferson and)	
Sheriff of Jefferson County,)	
)	
Employer.)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On May 20, 2014, Teamsters Automotive, Petroleum and Allied Trades Local Union 50 (Petitioner or Union) filed a majority interest petition in Case No. S-RC-14-058 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) as amended (Act), and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). The Petitioner seeks to represent all full-time and part-time correctional leaders in the rank of lieutenant employed by the County of Jefferson and Sheriff of Jefferson County (Employer).¹

A hearing was held on September 8, 2014 in Chicago, Illinois before Administrative Law Judge Anna Hamburg-Gal.² At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Both parties timely filed briefs.

¹ The Union initially sought to represent both the ranks of captain and lieutenant. At the hearing, the Union requested to amend the petition to exclude the captain position, to which the Employer agreed. Consequently, only the lieutenants’ supervisory status is at issue in this case.

² The case was subsequently assigned to me for recommended decision and order.

After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate, and I find as follows:

1. At all times material, the Employer has been a public employer within the meaning of Section 3(o) of the Act;
2. At all times material, the Employer has been a unit of local government subject to the Act pursuant to Section 20(b) of the Act;
3. At all times material, the Employer has been subject to the jurisdiction of the State Panel of the Board pursuant to Section 5 of the Act; and
4. At all times material, Petitioner has been a labor organization within the meaning of Section 3(i) of the Act.

II. ISSUES AND CONTENTIONS

The issue to be resolved is whether the position of lieutenant is supervisory within the meaning of Section 3(r) of the Act. The Employer argues that the position is supervisory and thus excluded from the Act's coverage. The Employer also believes that this issue is settled because it previously entered into a stipulation with the Fraternal Order of Police Labor Council (FOP) stating as much. Alternatively, the Employer argues that if the lieutenants are not supervisors, that they should be included in the existing bargaining unit comprised of corrections officers and represented by the FOP. The Petitioner disputes each of these contentions.

III. FINDINGS OF FACT

There are five lieutenant positions in the Corrections Division of the Jefferson County Sheriff's Office. One, Lieutenant Craig Mansker, is a First Lieutenant and Assistant Jail

Administrator. The other four positions are Second Lieutenants. One Second Lieutenant position is currently vacant; therefore, only three Second Lieutenants are employed by the Corrections Division.

The lieutenants report to Captain Randy Pollard, Major Scott Burge, and Sheriff Roger Mulch, and the lieutenants are superior to the correctional officers at the jail. There was little testimony about the exact duties of a correctional officer, but it appears that they mainly man various posts and move inmates throughout the jail facility. The correctional officers are represented by the FOP. That union is not a party to this proceeding.

In 2007, the FOP withdrew a unit clarification petition for the position of “Corrections Shift Supervisor,” stipulating with the Employer that the position was supervisory. This position appears to have become the current lieutenant title at some point. It is unclear from the record when this change occurred. It is also unclear whether the job duties of the “Corrections Shift Supervisor” are the same as those of the current lieutenants, although the Employer states so in its brief.

A. Job Duties

Lieutenant Mansker primarily works with Spillman, the jail management software system. He runs reports and maintains the software and the records contained on it. He also maintains the fingerprint scanner, the Livescan machine. He is the primary contact for any IT issues that arise at the jail. Lieutenant Mansker creates spreadsheets, writes reports, is the contact for any FOIA requests from the jail, performs data entry, and creates instructional videos to teach officers how to use software. He will sometimes fill in for correctional officers and perform their duties alongside them. However, the other lieutenants spend a far greater amount of their employment time working alongside subordinates in corrections posts.

Lieutenant Jeremy Miller spends a large amount of his work time manning corrections posts and moving inmates with the correctional officers. He is also involved in aspects of the “Inside Out” class for inmates. Lieutenant Miller performs all types of maintenance around the facility and on vehicles. Additionally, he does inventory, security inspections, and emergency response and documentation.

Lieutenant Craig McDaniel performs many of the same duties as Lieutenant Miller. Lieutenant McDaniel spends the majority of his work time filling correctional posts and relieving officers. He also assists with vehicle maintenance, distributing commissary, the inmate work program, detainee classification, security inspections, inventory, and reporting.

Lieutenant Bonnie May is the Commissary Officer at the jail. She spends a significant amount of her time at work performing the functions of the Commissary Officer. She also covers correctional officer posts. Lieutenant May performs accountant-type functions and runs accounting reports. She performs inventory for weapons, cleaning chemicals, gloves, and other jail supplies, and places orders for needed items. Finally, Lieutenant May does Spillman data entry, moves detainees, performs maintenance and security inspections, files detainee paperwork, and is involved with ensuring detainees receive any required medication.³

Three lieutenants are shift supervisors, including Lieutenant Mansker. A shift supervisor assigns officers to their posts at the beginning of the shift. Throughout the shift, shift supervisors make sure the jail is operating in accordance with Illinois County Jail standards and the Sheriff’s

³ The Employer disputes the veracity of Lieutenant May’s and Lieutenant Miller’s preponderance statements. While I do not find them to be as offensive as the Employer, I also give more weight to Lieutenant Mansker’s sworn testimony regarding the other lieutenants and their duties than I do these statements. I do, however, find them to be helpful in understanding the daily activities of the lieutenants, and they are adequately supported by Lieutenant Mansker’s testimony.

policies and procedures. If a shift supervisor determines something is not being performed according to standard, he must report to Major Burge or the Captain.

B. Assigning Work

At the beginning of their shifts, lieutenants who are shift supervisors will assign correctional officers to posts. There is insufficient evidence in the record to demonstrate how a correctional officer comes to be scheduled on a certain shift. However, the total required number of personnel for each shift is determined by the correctional officers' collective bargaining agreement (CBA).

The record reflects that when a lieutenant sets the correctional officers' schedules, he is only determining where each officer will begin his or her shift rotation. Correctional officers rotate posts throughout the shifts. A rotating schedule exists "so the officers work all the different posts throughout the shift, they don't work the same post throughout the shift." (Mansker Tr. 18). Some posts are less desirable than others, and the rotation ensures no officer spends his entire shift at one such post. Unless an officer is on light duty, correctional officers can and will be assigned to all posts in the jail.

If a correctional officer calls off sick, the FOP runs the turn sheet that designates which officer to call in. However, if an officer goes home sick in the middle of his shift, it would be up to the shift supervisor to determine how to cover that post. Lieutenant Mansker testified that such a decision would be only to cover a "routine assignment," and he therefore would not need to receive approval from the Sheriff or Major Burge.

C. Evaluations

Lieutenants perform evaluations of their subordinates twice a year. This evaluation process has been in effect for about two years and was implemented by Major Burge. A

lieutenant rates specific qualities and qualifications of a correctional officer on a scale of one to five. For example, “physical fitness” is one of the factors evaluated. The lieutenant will decide, based on his or her observations, whether that officer’s physical fitness is: (1) unsatisfactory; (2) below average; (3) satisfactory; (4) above average; or (5) excellent. A lieutenant may also state that he or she has not observed the factor in question, as Lieutenant May did for four criteria on Officer Burrell’s evaluation. The ratings from each category are then totaled and the officer is given a numerical score.

The performance evaluation forms were created by Major Burke. The captain and lieutenants (except for Lieutenant Mansker) fill out the evaluation forms. The evaluations are used as a “self-check” for correctional officers to inform them of where they are proficient and in what areas they can improve. Major Burke testified that it is possible that uncorrected negative behavior previously reported on an evaluation could lead to discipline, but no specific example of any such occurrence was given.

Major Burke has the final authority to review performance evaluations. He testified that he does so only to ensure consistency. However, on at least one occasion Major Burke has amended an evaluation done by a lieutenant. Burke testified that he did so because discipline against the reviewed employee was not properly taken into account by the reviewing lieutenant.

D. Instruction

Lieutenants instruct their subordinates by passing along directives from Major Burke and the Sheriff. Lieutenants do train subordinate employees, but correctional officers also instruct their colleagues in correctly performing job duties. Lieutenant Mansker specifically trains employees on the various types of computer software the jail uses.

E. Reward

Lieutenants may suggest that an employee be rewarded. For a correctional officer to receive an award, a lieutenant must recommend to the Sheriff or Major Burge that the officer has earned special recognition. The final decision of whether to award anything belongs to the Sheriff or Major Burge. The only type of rewards contained in the record are the paper certificate Lieutenant Mansker attempted to have presented to the correctional officers and a certificate given to whomever logs the most activities at the jail each month.

F. Discipline

As is the case with rewards, lieutenants also may begin the chain of events which can lead to discipline. Major Burge testified that lieutenants can issue discipline without his permission, but he also stated that he reviews all discipline. Lieutenant Mansker testified that a lieutenant who witnesses an incident warranting discipline must first report the infraction to Major Burge or the Sheriff.

Lieutenants determine whether or not an infraction has occurred by comparing the incident with set policies and procedures. If the violation is minor, the lieutenant may be told to simply write up a "counseling form" based upon what he previously related to his superior. The counseling form is then signed by whichever lieutenant is present when the form is delivered to the disciplined employee.

A more serious infraction may require a lieutenant to issue a verbal or written reprimand. However, this form of discipline is also done only at the behest of Major Burge or the Sheriff. Lieutenant Mansker is the only lieutenant in the record who has made either a verbal or written reprimand. Finally, there was scant testimony regarding any discipline more severe than a reprimand.

IV. DISCUSSION AND ANALYSIS

A. Estoppel

As an initial matter, I must address the Employer's estoppel argument. The Employer argues that the stipulation it entered into with the FOP in 2007 should estop the Petitioner from seeking to represent the lieutenants. I disagree. The Employer and the FOP, a wholly distinct entity from the Petitioner, were the parties to this stipulation. "It goes without saying that a contract cannot bind a nonparty." Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204 ¶¶55, 976 N.E.2d 344, 359, quoting E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 293, 122 S. Ct. 754, 764 (2002). In other words, an agreement such as the stipulation at issue cannot be imposed and binding upon an uninvolved party.⁴

The Employer cites to Chicago Transit Authority, 19 PERI ¶14 (IL LRB-LP 2003), to support its assertion that the stipulation entered into by the FOP should prohibit the Petitioner from representing the lieutenants. In that case, the union sought to represent employees who had previously been excluded from the bargaining unit. These employees had been stipulated as supervisors in a 1990 arbitration award and were also the subject of a September 2001 agreement between the employer and union stating they were supervisory. In November 2001, that same union petitioned for the previously-excluded employees to be included in the bargaining unit. The Board determined that the union was estopped from seeking to represent these employees because the union had already agreed with the employer that they were supervisors.

Chicago Transit Authority is inapplicable to the instant case. The Petitioner in this proceeding was not the union that entered into the stipulation with the Employer stating that the lieutenants (then known as corrections shifts supervisors) were supervisors. Had the Petitioner

⁴ This statement does not include instances of third-party beneficiaries or other ways to bind non-contracting parties, none of which are present in this case.

previously agreed that the lieutenants were supervisors, under Board precedent it would indeed have been estopped from seeking to represent them. However, it was not a party to the previous stipulation. Therefore, the Petitioner is not estopped from seeking to represent the lieutenants because of the stipulation between the Employer and the FOP.

The issue of whether the stipulation is binding on the Petitioner in this case can be disposed of with the above analysis. However, both parties make reference to collateral estoppel and res judicata being applicable in this case. I will therefore proceed to analyze the stipulation under these doctrines, even though it does not lend itself to a perfect analysis under either res judicata or collateral estoppel.

The doctrine of res judicata prevents the same two parties (or parties in privity with them) from relitigating the same cause of action after a final judgment on the merits has been entered. County of Cook v. Illinois Local Labor Relations Bd., 214 Ill. App. 3d 979, 985, 574 N.E.2d 754, 758 (1st Dist. 1991). In this case, res judicata fails whether it is found that the withdrawal and stipulation was a “final adjudication” (as the Employer’s brief seems to suggest it was) or was simply a withdrawal of a claim (as the Union alleges).

If the stipulation is considered to be a final adjudication of a claim, res judicata still requires that the current parties be the same or in privity with the initial parties. Here, the FOP and the Employer were the parties involved with the 2007 unit clarification petition regarding the lieutenants. The Petitioner had no part in it. Neither was the Petitioner then or now in privity with the FOP.

Even if the parties were the same, res judicata still does not apply. As the Union similarly stated in its brief, I can find no authority holding that a withdrawal of a unit clarification petition would constitute a final judgment on the merits. See Bernhardt v. Fritzshall, 9 Ill. App. 3d 1041,

1047, 293 N.E.2d 650, 655 (1st Dist. 1973) (“A withdrawal means only that the petition is withdrawn from the court’s consideration, and certainly connotes nothing more than a voluntary dismissal which is not a bar to further proceedings.”) As the same parties are not involved and there was never a final judgment on the merits regarding the FOP’s unit clarification petition, res judicata does not apply.

The related doctrine of collateral estoppel also does not apply in this case. Collateral estoppel prevents a controlling issue successfully litigated against a party in one case from being subsequently litigated against the same party in a different case. County of Cook, 214 Ill. App. 3d at 985, 574 N.E.2d at 758. The party asserting the affirmative defense of collateral estoppel must be the party against whom the issue was decided, or in privity with that party. Nowak v. St. Rita High School, 197 Ill. 2d 381, 390, 757 N.E.2d 471, 478 (2001).

As in the analysis of res judicata, it is irrelevant whether the outcome of the FOP’s unit clarification petition constitutes a final judgment or a withdrawal. If the issue was simply withdrawn, then it cannot be said to have been successfully litigated against a party. If the issue was settled in the stipulation, (therefore constituting a final judgment,) the issue of supervisory status was “decided against” the FOP, not the Employer. Therefore, only the FOP, if it were a party to this proceeding, could assert collateral estoppel.

B. Supervisory Status

Having disposed of the Employer’s estoppel argument, I will now address whether the lieutenants must be denied union representation because they are supervisors under the Act. Under Section 2 of the Act, public employees are granted the full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours, and other terms and conditions of employment or other mutual aid and

protection. Supervisors are excluded from the Act's definition of public employee (contained in Section 3(n) of the Act). The exclusion of supervisors is necessary to avoid the conflict of interest which can arise when a supervisor, whose job it is to apply to the employer's policies to subordinates, is represented by the same union as those subordinates. City of Freeport v. Illinois State Labor Relations Bd., 135 Ill. 2d 499, 517, 554 N.E.2d 155, 164 (1990).

Section 3(r) of the Act generally sets forth four factors to determine whether an employee is a supervisor. Under the Act, employees are supervisors if they (1) perform principal work substantially different from their subordinates; (2) have authority it in the interest of the employer to perform one or more of the 11 enumerated supervisory indicia contained in the Act, or to effectively recommend such action; (3) consistently use independent judgment in performing or recommending the enumerated indicia; and (4) devote a preponderance of their employment time exercising supervisory authority.⁵ City of Freeport 135 Ill. 2d at 505, 554 N.E.2d at 159. The party seeking to exclude the petitioned-for employees as supervisory must prove, by a preponderance of the evidence, that the employees meet all four factors. County of Boone and Sheriff of Boone County, 19 PERI ¶74 (IL LRB-SP 2002).

At the outset, I must note that the Employer in its brief focuses on the hierarchical structure of the Corrections Division, concluding that because the lieutenants are superior to the correctional officers, they must therefore be supervisors. A lieutenant is not a supervisor under the Act merely because he ranks higher than other employees. Nor does language in his subordinate's CBA labeling him as a supervisor make it so. He must fulfill all four statutory requirements to be a statutory supervisor excluded from collective bargaining. See Chief Judge

⁵ While the fourth factor, the preponderance of employment time, does not apply to police employment, correctional officers are not considered peace officers. Instead, they are security employees within the meaning of Section 3(p) of the Act. County of Cook, 14 PERI ¶3003 (IL LLRB 1997), aff'd by unpub. order, Docket No. 1-99-1183 (1999).

of the Circuit Court of Cook County, 26 PERI ¶117 (IL LRB-SP 2010) (job title “Supervisor of Juvenile Temporary Detention Center Caseworkers” was not excluded under the Act as supervisory, despite the title, because the employer did not prove all four factors.)

1. Principal Work

To be classified as a supervisor under the Act, an employee’s principal work must be substantially different from that of his subordinates. This element is easily satisfied if the petitioned-for employee’s work is “obviously and visibly different” from the subordinates. City of Freeport 135 Ill. 2d at 514, 554 N.E.2d at 162. If his work is facially similar to that of his subordinates, the analysis becomes one of determining the “nature and essence” of the alleged supervisor’s work, and whether it is substantially different from his subordinates’ functions. Village of Alsip, 2 PERI ¶2038 (IL SLRB 1986).

The Union alleges that because the lieutenants, mainly May, Miller, and McDaniel, fill in and man corrections posts, their work is substantially similar to that of their subordinates, the correctional officers. The Employer makes no real effort to rebut this argument. In fact, the Employer seems to agree that at least as to May, Miller, and McDaniel, no significant difference exists between the lieutenants’ job duties and the correctional officers’.

More important, though, is the fact that the Employer failed to make a compelling argument that the lieutenants’ job duties differ significantly from their subordinates’. While job descriptions for the lieutenant and captain were provided and entered into evidence, no similar description was offered regarding the correctional officers. Insufficient testimony was also given regarding the correctional officers’ job duties. I am therefore unable to compare the job duties of a lieutenant with those of his subordinates.

Furthermore, the Employer did not address the principal work requirement in its brief, save for in its “Closing Statement.” There, the Employer merely lists the requirement that a supervisor must “[p]erform principal work substantially different from subordinates,” followed by “yes,” as in, the lieutenants satisfy this prong. This statement, with nothing more, is merely conclusory and fails to satisfy the burden imposed on the challenging party. See State of Illinois, Department of Central Management Services, 24 PERI ¶112 (IL LRB-SP 2008) (noting that it is a “long-standing, settled” area of the law that the challenging party does not meet its burden of proof by producing vague, generalized statements regarding the disputed individual’s job functions).

2. Supervisory Indicia and Independent Judgment

Even if the Employer did satisfy the principal work requirement of the Act, it still must demonstrate that the lieutenants perform one or more of the enumerated supervisory indicia and do so with independent judgment. To be considered a supervisor, the party seeking to exclude the allegedly-supervisory employee must show that the employee has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, discipline, or adjust the grievances of his subordinates on behalf of the employer. Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, 153 Ill. 2d 508, 515, 607 N.E.2d 182, 185 (1992). Additionally, if the alleged supervisor can effectively recommend such action to the employer, this requirement will be deemed fulfilled. An effective recommendation is one that is adopted by the alleged supervisor’s superiors as a matter of course with very little, if any, independent review. City of Peru v. Illinois State Labor Relations Bd., 167 Ill. App. 3d 284, 289, 521 N.E.2d 108, 112 (3rd Dist. 1988); State of Illinois, Department of Central Management Services, 26 PERI ¶116 (IL LRB-SP 2010).

A supervisor must perform the supervisory indicia with independent judgment. This means that the exercise of supervisory authority cannot be routine or clerical in nature, nor can decisions be made merely on the basis of the alleged supervisor's superior skill, experience, or knowledge. Village of Justice, 17 PERI ¶2007 (IL SLRB 2000). Independent judgment involves a consistent choice between two or more significant courses of action. It is not required in carrying out routine or ministerial tasks. Illinois Department of Central Management Services (Department of Professional Regulation), 11 PERI ¶2029 (IL SLRB 1995). Furthermore, the occasional use of discretion on the part of the employee is insufficient to satisfy this factor. City of Freeport 135 Ill. 2d at 521, 554 N.E.2d at 166.

Only three of the indicia are truly at issue in this case: direct, reward, and discipline. However, the Employer also alleges that the lieutenants have the authority to transfer their subordinates. The Employer misapplies this term as it is meant in the Act. The authority to transfer subordinates is the authority to move employees from one department to another. County of Boone and Sheriff of Boone County, 19 PERI ¶74; Peoria Housing Authority, 10 PERI ¶2020 (IL SLRB 1994), aff'd by unpub. order, Docket No. 3-94-0317 (1995). Transfer does not mean, as the Employer contends, assigning an officer to a different task in the jail. It is a type of lateral move, and there is insufficient evidence on the record to show that the lieutenants have any authority to effectuate such a change. See Village of Hazel Crest, 23 PERI ¶130 (IL LRB-SP 2007) ("transfer" was a lateral move between the patrol division and the support services division or detective bureau.)

a. Direct

The authority to direct encompasses several distinct but related functions. In general, an employee has authority to direct if, as the person responsible for his subordinates' work, he has

the authority to make operational decisions affecting those subordinates in the areas of assigning and reviewing work, granting time off or vacation requests, evaluating subordinates, (if the rating or evaluation affects their employment status,) and instructing on the performance of work. Chief Judge of the Circuit Court of Cook County, 153 Ill. 2d at 518, 607 N.E.2d at 187; Chief Judge of the Circuit Court of Cook County, 26 PERI ¶117; Illinois Department of Central Management Services (Department of Professional Regulation), 11 PERI ¶2029. “Direction,” as the term is meant under the Act, therefore requires more than merely observing or monitoring subordinates or being responsible for a shift. Illinois Department of Central Management Services (Department of Professional Regulation), 11 PERI ¶2029.

Absent evidence that the alleged supervisor possesses significant discretion to affect his subordinates’ employment in areas likely to fall within the scope of union representation, such as discipline, transfer, promotion, or hire, direction by a superior will not be deemed supervisory. State of Illinois, Department of Central Management Services, 25 PERI ¶5 (IL LRB-SP 2009); County of Lake, 16 PERI ¶2036 (IL SLRB 2000). It is this significant discretionary authority to affect his subordinates’ terms and conditions of employment that distinguishes the meaning of the term “direct” under the Act from its common usage. State of Illinois, Department of Central Management Services, 25 PERI ¶68 (IL LRB-SP 2009).

The record reflects that while the lieutenants may appear to direct the correctional officers, they do not do so with the required discretion. At the beginning of a shift, a lieutenant will create a schedule, assigning correctional officers to posts. However, it does not appear that they are selected for a specific post based on factors such as knowledge of the individuals involved, the nature of the task to be performed, the employees’ relative levels of experience and skill, and the employer’s operational needs. County of Cook, 15 PERI ¶3022 (IL LLRB 1999).

Each correctional officer is expected to be able to work at any post, and the officers normally rotate among the posts throughout their shifts. The evidence does not show that the lieutenants place correctional officers at posts using independent judgment. Instead, a correctional officer's assigned post appears to simply be where he begins his rotation for the day. Being assigned to specific posts does not affect the pay or working hours of a correctional officer. Additionally, the only time a correctional officer would be placed at a specific post is if he was on light duty. A lieutenant would not determine that an employee required a light duty post; instead, he would be instructed as such.

The duties that the correctional officers perform are outlined within a policy and are commonly called "post orders." The shift supervisors assign officers to posts, and the post orders dictate the duties to be performed at each post. The lieutenants have no say over the specific duties performed at each post. While the post orders were established by Captain Pollard with Lieutenant Mansker's input, they ultimately had to be approved by the Sheriff and are outlined in the Sheriff's policies. The Sheriff can also issue verbal directives to his subordinates regarding specific duties that must be performed at a certain post. Additionally, various job duties for Major Burge, the lieutenants, and the correctional officers are set by state and federal law. The lieutenants have no real discretion in determining correctional officers' assignments and cannot be said to "assign" work in a supervisory manner.

Neither do the lieutenants evaluate the correctional officers in a manner which would indicate direction under the Act. The responsibility for formally evaluating work performance is evidence of the authority to direct when the evaluation is used to affect the evaluated employees' pay or employment status. See City of Naperville, 8 PERI ¶2016 (IL SLRB 1992); Illinois Department of Central Management Services (Division of Police), 4 PERI ¶2013 (IL SLRB

1988). Major Burge testified that the evaluations are meant to identify “officers that need to be recognized for doing outstanding jobs” as well as “employees who may not be conforming to the standards that are set forth.” However, he did not give examples of what the ramifications of such evaluations might be.

Major Burge and Lieutenant Mansker both testified that discipline may not result from a poor evaluation. Nor does the evidence show that a bonus, raise, or other type of reward can come from a positive review. These evaluations appear only to be a one-on-one time where a lieutenant may give feedback to a correctional officer based on his performance. Additionally, Major Burge does have the authority to amend a lieutenant’s evaluation of a corrections officer, although according to the record he has only done so once.

Furthermore, the evaluation forms were created by Major Burge. He also determined the criteria which the lieutenants use to complete their assessment of correctional officers. The record shows that when performing evaluations, the lieutenants rate the correctional officers on a scale from one to five for each of the pre-determined criteria. Although the scores are based on the lieutenant’s personal observations of the correctional officer, the evaluation process is not sufficiently subjective for the lieutenant to be said to perform evaluations with significant discretion. See Illinois Secretary of State, 20 PERI ¶11 (IL LRB-SP 2003); Illinois Department of Central Management Services (Department of Professional Regulation), 11 PERI ¶2029. There appears to be no possible effect on the wages, hours or terms and conditions of the corrections officers’ employment. Therefore, the lieutenants’ evaluations of subordinates cannot be evidence of the authority to direct.

The record also reflects that while lieutenants do instruct the correctional officers, they do not do so with significant discretion. When a lieutenant gives instructions to a correctional

officer, the lieutenant is either following procedures established by the federal or state government or the Sheriff, or he is relaying an order from the Sheriff, Major Burge, or Captain Pollard. Major Burge testified that if a lieutenant witnesses a correctional officer doing something incorrectly, the lieutenant can instruct the correctional officer to “stop doing it that way.” However, this situation is not an example of a supervisor “directing.” The lieutenant in that situation does not determine with his own independent judgment how a correctional officer must perform his job. Instead, he is applying jail policies to instruct the correctional officer. This is not evidence of the authority to direct.

The Employer has failed to demonstrate by a preponderance of the evidence that the lieutenants’ direction can affect the wages, hours, or terms and conditions of the correctional officers’ employment. I therefore cannot find that the lieutenants “direct” as that term is meant under the Act.

b. Reward

Under the Act, an employee is rewarded when he receives a tangible benefit or his employment is impacted. Illinois Department of Central Management Services and Corrections, 11 PERI ¶2011 (IL SLRB 1994), rev’d on other grounds, 278 Ill. App. 3d 79, 662 N.E.2d 131, (4th Dist. 1996); Village of Elk Grove, 8 PERI ¶2015 (IL SLRB 1992), aff’d, 245 Ill. App. 3d 109, 613 N.E.2d 311 (2nd Dist. 1993). As is true with the other supervisory indicia, the authority to reward requires that a supervisor do so with independent judgment. State of Illinois, Department of Central Management Services, 25 PERI ¶68 (IL LRB-SP 2009). The Employer contends that because a lieutenant may recommend an award and thereby begin the process by which a correctional officer may be rewarded, the lieutenants have the authority to reward.

Merely beginning the process by which a subordinate may be rewarded is not sufficient to prove that a petitioned-for employee rewards his subordinates with supervisory authority. See County of Knox and Knox County Sheriff, 7 PERI ¶2002 (IL SLRB 1990) (determining that no authority to reward existed when the petitioned-for employees could only recommend a subordinate for the “Deputy of the Month” award, when such recommendation would be followed by a group vote.) A supervisor may be said to reward his subordinates merely by recommending an award when that recommendation is adopted as a matter of course, with minimal, if any, independent review by the alleged supervisor’s superiors. State of Illinois, Department of Central Management Services, 25 PERI ¶184 (IL LRB-SP 2009). There is insufficient evidence in the record to demonstrate that the lieutenants’ recommendations for rewards are ever adopted as a matter of course.

The only evidence in the record about awards was Lieutenant Mansker’s testimony regarding the certificates he suggested the correctional officers receive. Lieutenant Mansker testified that he did not have the authority to create and hand out the certificates without approval from his superiors. When approval was refused, no certificates were awarded. This is clearly indicative of the fact that lieutenants do not have the authority to reward their subordinates. This incident also illustrates that the lieutenants’ reward recommendations are not regularly adopted with little to no review by their superiors.

Additionally, a certificate is not the type of “tangible benefit” that constitutes a reward under the Act. Under Board precedent, a non-monetary commendation does not constitute a reward within the meaning of the Act. Village of Broadview, 25 PERI ¶63 (IL LRB-SP 2009), aff’d, 402 Ill. App. 3d 503 932 N.E.2d 25 (1st Dist. 2010); County of McHenry, 15 PERI ¶2014

(IL SLRB 1999). Even if Lieutenant Mansker did have the authority to award certificates, he still would not have the authority to reward as that term is meant in the Act.

The Board has held that positive performance appraisals which lead to wage increases are rewards. Village of Streamwood, 26 PERI ¶134 (IL LRB-SP 2010); City of Naperville, 8 PERI ¶2016. However, it has already been shown that the evaluations performed by lieutenants cannot lead to any positive or negative changes to the correctional officers' terms and conditions of employment. Without any additional evidence on the record relating to any type of tangible benefit as a reward, I cannot find that the Employer has proven by a preponderance of the evidence that lieutenants have the authority to reward.

c. Discipline

An alleged supervisor has the authority to discipline under the Act if, using independent judgment, he can discipline or effectively recommend discipline that affects the employee's job status or terms and conditions of employment. State of Illinois, Department of Central Management Services, 25 PERI ¶68; Village of Bolingbrook, 19 PERI ¶125 (IL LRB-SP 2003). Documented oral reprimands constitute supervisory authority to discipline if (1) the individual has the discretion or judgment to decide whether to issue such a reprimand; (2) the reprimand is documented; and (3) the reprimand can serve as the basis for future disciplinary action, that is, it functions as part of the progressive disciplinary system. Metropolitan Alliance of Police v. Illinois Labor Relations Bd., 362 Ill. App. 3d 469, 478, 839 N.E.2d 1073, 1082 (2005); State of Illinois, Department of Central Management Services, 25 PERI ¶184; Village of Hinsdale, 22 PERI ¶176 (IL LRB-SP 2006).

Lieutenant Mansker testified that a lieutenant who witnesses an infraction must report the event to one of his superiors (either Major Burge or the Sheriff). It is then that superior who

determines whether or not a counseling or further discipline is warranted. The Employer did not sufficiently rebut this assertion. Additionally, the lieutenants do not use independent judgment when determining what to report as a violation. The lieutenants base their determination of what constitutes a violation on the policies in place at the jail. From the entire record, it does not appear that the lieutenants use independent judgment when issuing counselings or any other type of discipline.⁶

3. Preponderance

The final element that must be proven by the Employer is that the employees sought to be excluded spend a preponderance of their work time engaged in supervisory activities. As interpreted by the Illinois Supreme Court in City of Freeport, the preponderance standard means that the most significant allotment of the employees' time is spent exercising supervisory functions. City of Freeport, 135 Ill. 2d at 532, 554 N.E.2d at 171. Stated another way, to be considered a supervisor under the Act, an employee must spend more time on supervisory functions than on any one nonsupervisory function. Id. at 533.

Two separate Fourth District Appellate Court panels have issued differing interpretations of the preponderance standard since City of Freeport. The first defines "preponderance" as requiring an employee to spend a majority, meaning more than 50%, of his time, engaged in supervisory duties. Department of Central Management Services v. Illinois State Labor Relations Bd., 249 Ill. App. 3d 740, 746, 619 N.E.2d 239, 244 (4th Dist. 1993). The second interpretation

⁶ There was conflicting testimony about whether the "counselings" that may be issued to corrections officers by lieutenants constitute part of the progressive discipline system outlined in the FOP contract. I believe the record is insufficient to determine whether or not counselings are the beginning of a corrections officer's progressive discipline or if they are a type of documented oral reprimands which can constitute discipline under the Act. However, I do not need to reach a determination on the nature of the counselings. Because the evidence shows that lieutenants may not issue them with independent judgment, they do not possess supervisory authority to issue or effectively recommend discipline under the Act.

looks to the “significance” of the supervisory functions the petitioned-for employee performs compared to his nonsupervisory functions. Department of Central Management Services v. Illinois State Labor Relations Bd., 278 Ill. App. 3d 79, 85, 663 N.E.2d 131, 135 (4th Dist. 1996).

As detailed above, the Employer did not prove by a preponderance of the evidence that the lieutenants transfer, direct, reward, or discipline under the Act. Furthermore, little to no evidence of the other seven supervisory indicia was presented or briefed by the Employer. Thus, the Employer has failed to meet its burden in proving the second and third factors. Therefore, as the lieutenants do not possess the authority to perform any of the 11 indicia, they cannot spend a preponderance of their work time exercising that authority. Village of North Riverside, 19 PERI ¶¶59 (IL LRB-SP G.C. 2003).

Even though it is unnecessary, the preponderance element may still be analyzed. According to the record, Lieutenant Mansker primarily spends his time performing IT functions. The three Second Lieutenants, (Miller, May and McDaniel,) each spend a significant amount of time filling in corrections posts. They also perform various other tasks around the jail, none of which involve supervising correctional officers. For example, the record indicates that Lieutenant May devotes one day a week, plus some time every other day that week, to her duties as Commissary Officer. Lieutenants Miller and McDaniel assist with maintenance, both on vehicles and in the building. The record indicates that none of the activities which the lieutenants spend the majority of their time performing are supervisory in nature.

The Employer concludes that because the lieutenants only perform correctional officer bargaining unit work some of the time, the rest of the time they must be engaged in supervisory activities. This is highly conclusory and ignores the fact that non-bargaining unit work may also be non-supervisory in nature, as is true in this case. I must also reiterate a point made earlier:

under the Act, an employee who is superior in rank to other employees is only a supervisor if the four elements of the Freeport test are met. Determining that the lieutenants are not supervisors under the meaning of the Act does not place them in an equal position with the correctional officers, as the Employer alleges. It simply means, in this scenario, that they may join a union if that is their desire.

As to their alleged supervisory duties, the lieutenants do not spend a preponderance of their time directing, disciplining, or rewarding their subordinates. Nor can their limited exercise of these functions be deemed “significant.” The Employer argues that because the lieutenants are part of the discipline and reward systems, and because these are important functions, the significance of this work is enough to satisfy the preponderance requirement. However, a supervisor under the Act is more than simply part of the discipline and reward systems. He must actually possess the authority to make independent judgments regarding discipline and rewards. While these can be significant functions performed on behalf of an employer, the lieutenants in this case do not possess this authority.

Nor can the lieutenants direct under the meaning of the Act. The lieutenants do perform biannual evaluations of the corrections officers. These evaluations, however, do not carry a significance adequate to satisfy the preponderance requirement.⁷ Also, the scheduling of the correctional officers and any instruction given to them does not require the use of independent judgment. These two other types of direction are similarly not significant as they relate to the preponderance requirement. The Employer therefore has not met its burden in proving the lieutenants spend either the majority of their time engaged in supervisory functions or that the supervisory functions they perform are significant.

⁷ As detailed earlier, the evaluations cannot affect terms and conditions of the corrections officers’ employment. They are a type of “self-check” and not a mechanism by which an officer may be promoted or demoted.

C. Appropriate Unit

Having concluded that the lieutenants are not supervisors under the Act, I turn now to the Employer's alternative contention that the Petitioner's bargained-for unit is inappropriate. In so arguing, the Employer puts forth a similarly conclusory argument in support of its position: if the lieutenants are not supervisors, then they must be completing bargaining unit work.

The evidence shows that while lieutenants may fill in for correctional officers, some more than others, they also perform other tasks that are neither supervisory nor bargaining unit work. Allowing the lieutenants to organize in a separate unit will not lead to fragmentation of an otherwise appropriate bargaining unit. And while fragmentation is an important consideration, it is only one factor to consider. State of Illinois, Department of Central Management Service, 24 PERI ¶112.

The Union is not required to petition for the "most appropriate" unit or even a "more appropriate" unit. Section 9(b) of the Act simply requires that a petitioned-for unit be "appropriate." Rend Lake Conservancy District, 14 PERI ¶2051 (ISLRB 1998). While the Board has expressed a preference for large, broad-based units, it has also stated that its duty is to strike a balance so as to avoid excessive fragmentation while still allowing public employees the rights granted to them under the Act. State of Illinois, Department of Central Management Services and Healthcare and Family Services, 23 PERI ¶173 (IL LRB-SP 2007). Here, the Union has sought to organize just the lieutenants in the corrections division. The lieutenants do not want to join the existing FOP unit made up of correctional officers, and the correctional officers do not want to add the lieutenants to their bargaining unit. It appears fragmentation is the only reason, besides its belief that the lieutenants are supervisors, that the Employer does not want the lieutenants

organized in their own unit. Fragmentation, by itself, is insufficient to deny the Union's petition.

Id.

Finally, it is inappropriate to place the lieutenants in the FOP bargaining unit. The FOP is not a party to this case, nor has it sought to represent the lieutenants. In State of Illinois, Department of Central Management Services and Healthcare and Family Services, 23 PERI ¶173, as an alternative to finding the petitioned-for employees managers, the employer suggested that it was more appropriate for the employees to join an existing unit represented by a different union. The Board held that it is "fundamentally at odds with the Act itself to place the petitioned-for employees' right to organize completely under the control of a third party" who was not seeking to represent them. As it was held in that case, so too in the present case is "the Employer's suggestion in this regard without merit." Id.

V. CONCLUSIONS OF LAW

I find that the lieutenants are not supervisory employees as defined by the Act, and that the petitioned-for unit is appropriate. I also find that the stipulation entered into between the Employer and FOP has no legal effect on the Union's petition in this case.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the following bargaining unit be certified:

Included: All full-time and part-time correctional leaders in the rank of lieutenant.

Excluded: All other employees employed with the County of Jefferson and Sheriff of Jefferson County.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, the parties may file exceptions no later than 14 days after service of this recommendation. Parties may file responses to any exceptions and briefs in support of the responses no later than 10 days after service of the

exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within five days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed, if at all, with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois, 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. Exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 15th day of December, 2014.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

Kate Vanek

**Katherine C. Vanek
Administrative Law Judge**