

STATE OF KANSAS
BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

IN THE MATTER OF *
*
The Petition Filed by the City of Hays *
for Amendment to the Existing Appropriate *
Unit of Policemen, *
*
vs. *
*
National Union of Police Officers, Local *
806 *
*
*

CASE NO: 75-UCA-2-1981

ORDER

Comes now on this ____ day of _____, 1981, the above captioned matter for consideration by the Public Employee Relations Board.

APPEARANCES

Petitioner appears by and through its counsel, Mr. John T. Bird, Attorney for the city of Hays, Kansas.

Respondent appears by and through its counsel, Mr. Richard D. Coffelt, Attorney for the National Union of Police Officers #806, Hays, Kansas.

PROCEEDINGS BEFORE THE BOARD

1. By City Ordinance Number 2405, dated May 24, 1972, the governing body of the city of Hays, Kansas, elected to come under the provisions of K.S.A. 75-4321 et seq.
2. A joint letter dated March 9, 1973, signed by Mr. Larry Roach, Hays City Manager, and Mr. Laverne Schumacher, President of N.U.P.O. Local 806, was received by the Board on March 14, 1973; the letter is a description of the unit of Police Department employees in Hays, Kansas, as agreed to by the signators.
3. A unit certification election was conducted by the Board on April 2, 1973 and the unit was certified on April 2, 1973. Certification and Order to Meet and Confer were signed by the Board on April 9, 1973 and sent to the parties.
4. A petition for clarification or amendment of appropriate unit was filed by Mr. Curt Wood in behalf of the city of Hays, Kansas on July 18, 1980.
5. Petition was sent to employee organization for answer on July 21, 1980.
6. Answer received from employee organization on July 28, 1980, in which they deny the allegations in the petition.
7. Respondent's answer was sent to petitioner on July 31, 1980, accompanied by a request from the Board for a copy of the current memorandum of agreement between the parties.

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8. The requested memorandum of agreement was received by the Board on August 5, 1980.

9. On August 6, 1980, the Board staff sent to the petitioner a review of the case and informed petitioner that the staff intended to recommend that the Board dismiss the petition for the reason of untimely filing.

10. In the August 6, 1980, letter the Board staff outlined its reasoning for recommendation of dismissal and advised petitioner of the date, time, and location of the Board meeting and the petitioner's right to appear before the Board to orally argue the matter.

11. On October 31, 1980, counsel for petitioner and counsel for respondent appeared before the Board to orally argue the matter.

12. On October 31, 1980, the Board considered the above captioned case and, after due consideration of oral presentations by the parties, directed the Board staff to proceed with the case sometime after the month of January, 1981.

13. On February 27, 1981, a pre-hearing conference was had by the Board staff with both parties in attendance in Hays, Kansas.

14. All parties being first properly notified, a hearing in the matter was conducted before Jerry Powell on March 30, 1981, at the Hays City offices in Hays, Kansas.

15. Transcripts of the hearing were forwarded to the parties by agreement and a deadline for briefs in the matter was set.

16. Petitioner's brief received by the Public Employee Relations Board on June 30, 1981.

17. Respondent's brief received by the Public Employee Relations Board on July 27, 1981.

FINDINGS OF FACT

1. That the city of Hays, Kansas is an appropriate public employer within the meaning of K.S.A. 75-4321 et seq. and that N.U.P.O. 806 is the certified representative of certain Police Department employees in Hays, Kansas.

2. That the Public Employee Relations Board case number 75-UCA-2-1981 is properly before the Public Employee Relations Board.

3. That petitioner, city of Hays, and respondent, N.U.P.O. 806 (Hays Police Union), stipulate to the following inclusions and exclusions from the appropriate unit:

- INCLUDE: 1. Police Patrolman
2. Dispatcher-Clerk

3. Detective
4. Chief Dispatcher-Clerk
5. Community Relations Officer

EXCLUDE: 1. Chief of Police (T - 6-8)

4. That the classifications in dispute concerning their supervisory status are:

1. Police Captain (T - 6-8)
2. Police Lieutenant (Including Communications Lieutenant)
3. Police Sergeant

5. That there are twenty-seven (27) individuals in the Hays, Kansas, Police Department at the time of the hearing:

1. Sixteen (16) Patrolmen and/or Dispatchers
2. Two (2) Detectives
3. Three (3) Sergeants
4. Four (4) Lieutenants (Including one (1) Communications Lieutenant)
5. One (1) Captain
6. One (1) Chief (T - 9-10)

6. That the Captain's duties are primarily (75% of duty time) supervising four (4) Lieutenants, three (3) Sergeants, and two (2) Detectives. (T - 11, 31, 36, 58, 78, Petitioner's Exhibit #9, Respondent Exhibit #8).

7. That final authority to select all police employees is vested in the Chief of Police, is subject to the City Manager's approval, and hiring is based on:

- a. Results of entrance tests
- b. Background investigations
- c. Recommendations from an interview board (T - 13, 78, Petitioner's Exhibit #9)

8. That part of the Police Department's hiring procedure involves a written exam for candidates, sometimes given to the candidate by the Lieutenant. (T - 13, 78)

9. That the interview board consists of persons appointed by the Chief of Police and the board has included Lieutenants and Sergeants in the past. (T - 13, 14 71, 78, 84, 264)

10. That when Lieutenants and Sergeants have made recommendations as members of the interview board, the Chief of Police has taken their recommendations into his consideration. (T - 15, 78)

11. That transfers within the department are not normally made on the sole recommendations of Lieutenants and Sergeants; however, they both go to the Chief on occasion and give him their opinions or the Chief sometimes solicits their opinions. (T - 15, 73, 78)

12. That Lieutenants, as shift leaders, have the authority to suspend an officer on his shift for the tour of duty and until the Chief or Captain can review the suspension. (T - 16, 78, 101, 102, Petitioner's Exhibit #9)

13. That Sergeants have the authority to suspend a Patrolman for the tour of duty until the Chief can review the suspension; however, when a Lieutenant, as shift leader, is on duty, the Sergeant is subordinate to the Lieutenant. (T - 16, 78, 203)

14. That prior approval of the Chief or Captain is not necessary for a Lieutenant to suspend an officer and he may use his own discretion. (T - 16, 17, 78, 203)

15. That suspensions of Patrolmen made by a Sergeant are normally not made without the Lieutenant's prior knowledge or approval as shift leader. (T - 16, 17, 78, 255)

16. That work assignments are made by Lieutenants as shift leaders and by Sergeants as acting shift leader, both subject to guidance and direction by the Chief or at their own discretion as needs arise. (T - 17, 18, 78, 203, 266, 289)

17. That Lieutenants have the authority to orally reprimand Sergeants and Patrolmen; Sergeants have the authority to reprimand Patrolmen but are subordinate to the Lieutenant when the Lieutenant is on duty. (T - 18, 78, 203, 241, 286)

18. That Lieutenants, as shift leaders, have the authority to generally direct the actions of officers on their shift; Sergeants have the authority to direct Patrolmen on their shift but are subordinate to the Lieutenant when the Lieutenant is on duty. (T - 19, 78, 203, 265, 289)

19. That Lieutenants have the authority to adjust grievances of subordinates "on the spot" and at their own discretion; Sergeants have the authority to adjust grievances for Patrolmen "on the spot" but are subordinate to the Lieutenant when the Lieutenant is on duty. (T - 21, 24, 25, 78, 85, 86, 109, 110, 275)

20. That Lieutenants exercise their own independent judgment in adjusting grievances when the Captain or Chief are not available for consultation; Sergeants exercise their own judgment in grievance adjustment but are subordinate to the Lieutenant when the Lieutenant is on duty. (T - 21, 78, 85, 86, 240)

21. That in addition to the three (3) Lieutenants that are commonly referred to as "shift leaders", there is a Communications Lieutenant in charge of the Communications Division. (T - 19, 20, 78, 238)

22. That the Communications Lieutenant has the same authority as the other three (3) Lieutenants. (T - 20, 78, 238, 239, 240)

23. That in the normal operation of the department, there are two (2) days per week when the Lieutenant is off duty and the Sergeant on the shift assumes the

responsibilities of shift leader. (T - 22, 23, 55, 66, 78, 205, 250, Petitioner's Exhibits #8)

24. That during the operation of the night shift, the shift leader is responsible for the efficient operation of the entire department. (T - 199)

25. That the evaluation procedure is used by the department to identify personnel with potential for promotion or special projects, to establish reference data for personnel decisions. Recommendations from Lieutenants and Sergeants to the Chief are made in evaluations and are often incorporated into the Chief's recommendations to the City Manager. (T - 62, 63, 117, 108, 208, 209)

26. That when the Sergeant is acting shift leader and a disagreement occurs that will not disrupt the efficient operation of the shift, the matter is usually deferred until the Lieutenant on the shift returns to duty. (T - 254, 255, 277, 279)

27. That although a Lieutenant may rarely exercise his direct authority to assign, reprimand, suspend, or discipline a subordinate, a Lieutenant has the authority and duty to recommend in matters of suspension, discipline and promotion. (T - 62, 63, 213, 229, 230, 231)

28. That a Lieutenant can recommend by favorable evaluation a Sergeant or Patrolman for reward, and that dispute settlements or grievance adjustments can be made independently while in command. (T - 216, 217, 218, 219)

29. That when a Patrolman or a Sergeant wants time off, the Lieutenant in command of the shift makes the determination. (T - 288, 289)

30. That the Chief and Captain are not able to directly observe the performance of duties by department personnel. Indications of personnel performance are made by Lieutenants in the form of evaluations and matters brought to the attention of the Captain or Chief. (T - 282, 283, 284)

CONCLUSIONS OF LAW - DISCUSSION

This case comes before the Board as a result of the Petitioner's contention that the original 1973 unit determination, as agreed to by the parties, is impractical at this time due to its inclusion of alleged "supervisors" in the unit. Respondent contends that the original unit description was appropriate in 1973 and still is today.

The Board, in this order, will not attempt to determine whether or not the original unit description was correct in its inclusion of the positions now in dispute. It is the examiner's opinion that the Legislature intended the parties to meet in harmony and, among other things, to determine the scope of appropriate units within the guidelines of the statute. Substantiation for this opinion is readily apparent at K.S.A. 75-4322(b) wherein the parties are granted the means to substitute a definition of a supervisor which need not be in accord with the statute.

The Board was not asked to review the agreement of the parties regarding the scope of the unit when it was jointly entered into in 1973. Classifications and the employees' duties may change or the employer or employee organization may have other reasons to believe that the scope of the unit is no longer appropriate.

The mechanisms for the "redetermination" of a unit exist by statute and rule and regulation which require the Board to consider the question of the scope of a unit if it is raised by either party.

In this case, it is the city of Hays which perceives difficulty in the practical workings of governmental administration by virtue of its allegation that certain employees, heretofore included in the unit, are "supervisory employees" within the meaning of the Public Employer-Employee Relations Act. The city asks that the unit be examined by the Board to answer the above question.

It is recognized as entirely possible that the positions in question were supervisory in 1973 but were included in the appropriate unit at that time in error. It is important to note that no unit determination is "sacred" and as conditions change or as errors are identified, both parties are granted avenues to remedy those problems. The same will hold true of this order when issued. At some future point in time, conditions may change and it, too, may become unworkable and require a "fresh look".

The primary question in this case is the level at which the line should be drawn between "public employees" and "supervisors" as defined in the Public Employer-Employee Relations Act. This question has been brought before the Public Employee Relations Board in at least one similar case (75-UDC-10-1979) where the hearing examiner's discussion addresses the question in detail. In that case, a unit determination was accomplished by the Board, upon joint petition by the city of Topeka and I.A.F.F. Local 83. Although the case involved a unit of firefighters, it is analogous in this examiner's opinion to the instant case in its discussion of legislative intent to guarantee both efficient governmental administration and protect the rights of public employees. In that case, the hearing examiner states:

"Each time the Public Employee Relations Board is called upon to resolve a question regarding the scope of an appropriate bargaining unit, there are several guidelines which must be considered. Furthermore, it is the duty of the Public Employee Relations Board to attempt to resolve, rather than create, problems. A unit which is too broad either denies management an adequate effective supervisory staff or could allow included supervisory employees to become an interference in employee organization business. A unit which is too narrow denies those excluded public employees a right to which they are entitled. For these reasons the Public Employee Relations Board gives careful consideration to each and every classification in question and attempts to arrive at the most appropriate, workable unit possible. It is never an easy job to draw the line between supervisory and non-supervisory personnel especially in view of the paramilitary nature of a fire department. The concept of 'chain of command' dictates that decisions flow down through the ranks and that input to the decision making process flows upward until reaching

the proper decision making level. Within the Topeka Fire Department (or any para-military organization) an ultimate decision maker has been identified by the city code but that decision maker relies upon the recommendations of his subordinates in order to make those decisions and further relies upon his subordinates to take directive action in his absence. The task of the hearing examiner is to determine the level at which supervisory decisions are made and thus define the line between 'supervisory employees' and 'public employees' for purposes of the Act."

In case #75-UD-1-1979, the hearing examiner also addressed the question of where to draw the line between "supervisors" and "public employees":

"The instant case raises what seems at first blush a relatively simple question. Are Lieutenants and Captains on the Sedgwick County Fire Department supervisors within the meaning of K.S.A. 75-4322 (b). This simple task becomes quite difficult when one considers both parties perception of an employees specific authority. The employers perception of the authority granted the employee usually does not coincide with the employees view of reality. The task of determining supervisory status is further complicated when such questions are raised in a police or fire department. The para-military structure tends to spread the decision making authority over a much broader base than in other public employment. Suggestions and recommendations flow upward from every level through the chain of command to the decision making authority. Those decisions then flow back downward through the chain of command until all are informed. The simple passage of information from one level down to the next is not viewed by the examiner as a supervisory function. One must rather determine if the actual duties assigned to the position meet the supervisory criteria as set out in the law. Perhaps the importance of supervisory determinations can more easily be understood when one considers why such determinations are necessary. When the supervisory line is drawn too high and those who actually supervise are placed in units with those they supervise problems are created for the employer and the employee organization. The supervisors either fail to effectively supervise or such supervisors will dominate the employee organization. When the supervisory line is drawn too low, those employees that should have the right to organize are denied that right. Therefore, it is essential to both labor and management that true 'supervisors' be excluded from the appropriate unit, and true 'public employees' be included."

In this case, it is the city of Hays which contends that the Police Department Captain, Lieutenants (including Communications Lieutenant) and Sergeants are "supervisors" within the meaning of the act. Notwithstanding the original (UE-3-1973) unit determination that included Lieutenants and Sergeants within the unit of public employees, the city contends that Lieutenants and Sergeants perform supervisory duties.

The employee organization argues that the original unit determination is still appropriate today and that the duties of Lieutenants and Sergeants have not substantially changed since 1973.

In order to determine whether an employee is a "public employee" or a "supervisory employee" within the meaning of the Public Employer-Employee Relations Act, the examiner must refer to the statutory definitions of each. The definition of a "public employee" is found at K.S.A. 75-4322 (a), which states:

"(a) 'Public employee' means any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees."

K.S.A. 75-4322(b) then defines "supervisory employee":

"(b) 'Supervisory employee' means any individual who normally performs different work from his subordinates having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. A memorandum of agreement may provide for a definition of "supervisory employees" as an alternative to the definition herein."

The examiner's responsibility is to examine the present day duties of the positions and apply the tests of the statutory definitions to those positions.

In considering the testimony and evidence obtained at the hearing on March 30, 1981, the positions and duties of (1) Police Captain, (2) Police Lieutenant (including Communications Lieutenant), and (3) Police Sergeant will be addressed in the sequence as they appear above.

(1) Police Captain: Although petitioner asked that the examiner determine the appropriate inclusion or exclusion for only Police Lieutenant and Police Sergeant, respondent requested at page eight (8) of the transcript to "hear something with reference to the Captain".

Subsequent questioning and testimony reveal very little about the Captain's specific authority, in the interest of the employer, to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend a preponderance of such actions...". However, the Captain's testimony, at transcript pages 31, 36, and 58 indicates that in his own estimate, the Captain is a "supervisor" or administrator whose duties are primarily supervising four (4) Lieutenants, three (3) Sergeants and two (2) Detectives. Testimony from the City Manager and Police Chief support the Police Captain's concept of his role as a supervisor and second in command of the department. The examiner finds no contradictory testimony from any witness to suggest that the Captain is not a supervisor. The evidence offered by the petitioner, marked as petitioner's Exhibit #9, Hays City Police Manual, indicates that the Captain is ranked second in the department, acts as Chief in the Chief's absence, and is responsible for the supervision of all city police activities as directed by the Chief. Further evidence, marked as Respondent's Exhibit #8, a position description filed out by the Captain, indicates that the Captain's official title is that of Assistant Police Chief and that seventy-five percent (75%) of his duty time is spent "supervise(ing) daily operation of patrol and detective divisions".

In the absence of specific testimony regarding the Captain's authority to perform the twelve (12) personnel actions cited in the statutory definition and

in light of the available evidence and testimony the examiner must conclude that the Captains duties are supervisory in nature.

Therefore, it is the examiner's recommendation that the Police Captain be excluded from the appropriate public employee bargaining unit.

(2) Police Lieutenant (including Communications Lieutenant) -- In referring again to the statutory definition of "supervisory employee", the record must be examined to determine if Police Lieutenants in Hays have the authority, in the interest of the employer, to either directly perform the twelve (12) personnel actions cited or effectively recommend a preponderance of those actions. In the area of personnel actions that are not necessarily reviewed by the Chief, City Manager, or City Commission, the record reflects at Findings of Facts #12, #13, and #14 that Lieutenants, as shift commanders, have the authority to suspend subordinates and may do so at their own discretion within the guidelines of the manual. Findings of Facts #16 and #18 indicate that work assignments and the direction of assignments are made by Lieutenants either at their own discretion or subject to guidance from the Captain or Chief.

In the area of discipline, testimony shows in Findings of Facts #14, #24, #26, and #27 that Lieutenants may take disciplinary action in the form of oral reprimands or suspensions and that such actions have not usually been reviewed by either the Captain or Chief. The record reflects in Findings of Facts #19 and #30 that Lieutenants have the authority as shift leaders to correct or adjust grievances "on the spot". When a candidate for Patrolman is being examined for possible employment, Findings of Facts #8, #9 and #10, indicate that the Lieutenant's role is that of occasionally giving a written exam to such candidates, sitting on an interview board which makes hiring recommendations, and making personal recommendations when solicited by the Chief. Transfers, as shown in Findings of Fact #11 are not normally accomplished by the Lieutenant's sole recommendations; however, on occasion, the Lieutenant will offer his recommendation for transfer of a subordinate to the Chief or the Chief will, on occasion, solicit the Lieutenant's recommendation.

Lay off and recall procedures are not specifically addressed in the record; however, it would seem logical to assume that were a reduction of force necessary, Lieutenants would be consulted or advised of the impending reduction and that such actions would be determined primarily by length of service, work record, evaluations of performance, thus not accomplished without some input by the Lieutenant. Promotions and rewards are shown at Findings of Facts #16, #25 and #28 to be procedures where the Lieutenant plays an active role, by sitting on the Review Board, making

recommendations by evaluation which the Chief incorporates into his recommendations to the City Manager, and by individual recommendation for reward or special project assignment or training.

In the discharge of a Police Department employee, the guidelines for dismissal appear in Petitioner's Exhibit #9. As stated in that exhibit (the Police Department Manual), the Chief has the authority, with the City Manager's approval, to dismiss an employee "for the good of the department". Again, logic dictates that such actions would normally occur after a suspension made by a Lieutenant, or at least not without the Chief consulting with the employee's shift commander, the Lieutenant. Suspensions made by a Sergeant acting in the absence of the Lieutenant, are usually deferred for review by the Lieutenant, as Finding of Fact #26 indicates.

In summary, the record reflects that in at least five personnel actions, the Lieutenant, as shift commander, has the direct authority to suspend, assign, discipline, direct, and adjust grievances for subordinates without prior approval of, or review by, the Captain or Chief. In other actions, the record reflects that the personnel action rarely, if ever, occurs without an effective recommendation by the Lieutenant. As indicated in Findings of Facts #21, #22, #24 and #30, both the shift commanding Lieutenant(s) and Communications Lieutenant effectively represent the City Manager, and the Police Chief in the performance of their duties.

It is the Examiner's opinion that by virtue of their duties and responsibilities for the efficient operation of the Police Department, in the presence or absence of the Captain, Chief, and City Manager, the Lieutenants (including the Communications Lieutenant) have either direct or indirect authority to affect the employee in the interest of the employer.

Therefore, it is the Examiner's recommendation that the Police Lieutenant (including Communications Lieutenant) is a "supervisory employee" within the meaning of the Act and should be excluded from the appropriate "public employee" bargaining unit.

(3) Police Sergeant - The record indicates in Findings of Facts #9, #10, #11, #13, #15, #16, #17, #18, #19, #20, #23, #24, #25 and #26 that Sergeants generally share some of the duties and responsibilities of the Lieutenant, with important qualifications and restrictions. The greatest restriction placed upon a Sergeant's authority is the amount of review, by a Lieutenant, of most actions taken by the Sergeant.

The record reflects at Findings of Facts #23 and #24 that the Sergeant assumes the Lieutenant's role of shift leader, only when the Lieutenant is absent. When the Lieutenant is present, the Sergeant assumes a role similar to that of a Senior

Patrolman and may assist the Lieutenant in carrying out the Lieutenant's assignments and directions. The examiner has no doubt that the amount of authority vested in the Sergeant while serving as a shift leader is somewhat comparable to that of the Lieutenant. It is important to remember, however, that the Sergeant assumes the role of Shift Commander on a limited basis. This arrangement would seem to suggest that as a result of both anticipated and unanticipated Lieutenant absences, someone must assume limited duties as "temporary" shift leader. The temporary leader then must be held accountable to the "regular", more permanent shift leader, the Lieutenant.

Findings of Facts #13, #15 and #26 suggest that the Sergeant, if he wishes to, usually defers a matter not immediately threatening to the efficient operation of the shift until the Lieutenant returns or contacts the Lieutenant, if possible, to gain direction from the Lieutenant. Although Sergeants participate in the evaluations of Patrolmen, they do not independently transmit those recommendations to the Captain or Chief until they have consulted with the Lieutenant.

In summary, direct authority to act on personnel matters is vested in the Sergeant in the areas of suspension, assignment, discipline, direction and grievance adjustment when the Lieutenant is absent. Such actions are still subject to the close scrutiny of the Lieutenant. Other actions require some input from the Sergeant but such input is first reviewed by consultation with the Lieutenant. The theory of delegated authority from the City Manager to Chief to Captain to Lieutenant and so on requires that somewhere, the direct authority to act or effectively recommend eventually reaches the point that there is a discernible amount of authority vested in management personnel and not vested in operations personnel.

The examiner finds that although the Sergeant possesses similar authority to that of the Lieutenant, it is restricted by the availability of the Lieutenant for consultation, it is restricted in number of hours per workweek in a minority time of responsibility as shift leader, and it is restricted in other personnel matters input by consultation and agreement with the Lieutenant. Therefore, it appears that while the Sergeant often makes recommendations which are followed by his superiors, such recommendations are subject to review which relegates them to a "routine and clerical" nature. This review of Sergeants' recommendations coupled with the type of work normally performed by Sergeants, leads the examiner to the following conclusion.

It is the examiner's opinion that Police Sergeants in the instant case are "public employees" within the meaning of the Act and it is his recommendation that Police Sergeants should be included in the appropriate bargaining unit. Therefore,

the appropriate unit would include:

- INCLUDE: Police Sergeant
- Detective
- Community Relations Officer
- Police Patrolman
- Chief Dispatcher-Clerk
- Dispatcher-Clerk

The appropriate unit would exclude:

- EXCLUDE: Police Chief
- Police Captain
- Police Lieutenant (Including Communications Lieutenant)
- All other employees not specifically included