

**STATE OF SOUTH DAKOTA  
DEPARTMENT OF LABOR AND REGULATION  
DIVISION OF LABOR AND MANAGEMENT**

**VERMILLION POLICE OFFICERS  
ASSOCIATION FRATERNAL ORDER OF  
POLICE #19,**

**HF No. 6E, 2015/16**

**Petitioner,**

**v.**

**DECISION**

**CITY OF VERMILLION,**

**Respondent.**

Petitioner filed a Petition for Election on October 6, 2015, pursuant to ARSD 47:02:02:02 and Respondent filed an Answer with objections to the make-up of the proposed unit. The Department provided a Hearing under ARSD 47:02:02:17 that was held on December 15, 2015 at the Clay County Courthouse. Petitioner was represented by Mr. Thomas K. Wilka, with the law firm of Hagen, Wilka & Archer. The Respondent was represented by Mr. James E. McCulloch, the Vermillion City Attorney. Each of the parties had an opportunity to present their case to the Department through evidence and witnesses. Witnesses testifying at hearing were: Ben Nelson, Ryan Hough, Jon Cole, and Matthew Betzen. The parties filed post-hearing briefs with the Department. The Department having fully advised in the premises makes this Decision and Order.

**ISSUE**

Whether the City of Vermillion police sergeants should be included in the same proposed bargaining unit as the City of Vermillion police officers?

**FACTS**

In 2015, members of Teamsters Local 120 consisting of police officers and police detectives of the Vermillion Police Department and Communications Center employees voted to withdraw from Teamster Local 120. Members of the Vermillion Police Department formed a new group, the Vermillion Police Officers Association under Fraternal Order of Police Lodge 19. The communications center employees affiliated with AFSCME.

On October 6, 2015, the Vermillion Police Officers Association Fraternal Order of Police #19 (Petitioner) petitioned for formal recognition and certification as the

bargaining representatives for the police officers and sergeants for the Police Department for the City of Vermillion, South Dakota.

The City answered the petition and makes no objection to Fraternal Order of Police Lodge 19 being recognized as bargaining unit representative for the Vermillion Police Officers, but objected to inclusion of the police sergeants in the bargaining unit with the police officers.

Petitioner's proposed unit is defined as "sworn employees of the Vermillion Police Department having rank of Police Officer, Detectives, and Police Sergeants employed by the City of Vermillion, with sworn employees of the Vermillion Police Department having the rank of Lieutenant and above being excluded."

The Vermillion Police Department consists of one (1) police chief, one (1) captain, two (2) police lieutenants, three (3) police sergeants, eleven (11) police officers, and two (2) civilian (non-police certified) employees.

The patrol lieutenant is responsible for assigning all eligible officers (sergeants and patrol officers) to patrol shifts for day, evening, and night shifts.

The chain of command for sworn members of the Department in descending order is Chief of Police, Captain, Lieutenants, Sergeant, Detective, and Officer.

The patrol officers and sergeants work the same shifts, are paid hourly and overtime wages, are each compensated for emergency call-in, and are treated equally regarding vacation and overtime scheduling.

Sergeants are superior in rank to patrol officers. Sergeants and patrol officers don't work every shift together. During the shift that sergeants and officers do work together the sergeant is the shift superior.

Sergeants and patrol officers have identical notice and reporting obligations for certain on-shift incidents specified in the policy manual.

Sergeants can impose discipline upon officers "on-the-spot" for uniform deficiency, corrections to their report, or for minor policy violations. Sergeants can give positive discipline, corrective discipline in the form of training and instruction, and punitive discipline such as verbal reprimand, written reprimand, and suspension for one workday. A sergeant or higher level supervisor is delegated the authority to immediately relieve an employee from duty for the balance of one workday if the retention of such employee will cause or continue a disruption of the work force. Major conduct issues are reported to a lieutenant.

Sergeants can give rewards in their sole discretion to officers for excellent performance. The rewards are symbolized and commemorated by the giving of a coin. The coin has value to the recipient in the form of compensatory time off. Sergeants can also recommend officers for other rewards in accordance with chapter 3, section 5 of the policy manual.

The sergeant's keep a file of documents relating to coaching and counseling sessions, both positive and negative, on the patrol officers in the sergeant's office. The file is maintained as a reference to assist the sergeants when filling out evaluations.

Sergeants perform quarterly and annual evaluations of patrol officers. Officers do a self-evaluation, and then turn it into the sergeant whom they are assigned to, the sergeant then completes an evaluation taking the officers self-evaluation into consideration. The sergeants then meet with the lieutenants, captain, and chief of police to go over the evaluation rating the sergeant assigned. The ratings are adjusted on occasion. After all adjustments are made the evaluation is sent to the chief of police for finalization.

## **ANALYSIS AND DECISION**

Administrative rules have been promulgated by the secretary of labor, pursuant to SDCL 3-18-6, that give requirements for filing a petition for bargaining unit determination or redetermination. SDCL §3-18-1 defines "public employees." That statute provides:

The words "public employees" as used in this chapter shall mean any person holding a position by appointment or employment in the government of the State of South Dakota or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or in the service of any authority, commission, or board, or any other branch of the public service. The term does not include ... (2) Administrators except elementary and secondary school administrators, administrative officers, directors, or chief executive officers of a public employer or major divisions thereof as well as chief deputies, first assistants, and any other public employees having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or to effectively recommend such action, 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.

SDCL 3-18-1 (emphasis added). This statute has a federal counterpart at Section 2(11) of the National Labor Relations Act (NLRA). The NLRA excludes supervisors from the bargaining units protected by the NLRA Section 2(11) defines 'supervisor' as:

Any individual 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 recommend such action, 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

NLRA, Section 2(11).

The similarity between the statutes is unmistakable and the National Labor Relations Board (NLRB) and the federal courts have interpreted the federal statute on numerous occasions. As such, they can provide valuable guidance when interpreting the state statute. The statute for defining an appropriate unit is SDCL 3-18-4, which states:

When a governmental agency declines to grant formal recognition or when a question concerning the designation of a representation unit is raised by the governmental agency, labor or employee organization, or employees, the department of labor or any person designated by it shall, at the request of any of the parties, investigate such question and, after a hearing if requested by any party, rule on the definition of the **appropriate representation unit**. The department shall certify to the parties in writing the proper definition of the unit. *In defining the unit, the department shall take into consideration, along with other relevant factors, the principles of efficient administration of government, the principles and the coverage of uniform comprehensive position classification and compensation plans in the governmental agency, the history and extent of organization, occupational classification, administrative and supervisory levels of authority, geographical location, and the recommendations of the parties.*

SDCL § 3-18-4 (emphasis added).

In addition, the South Dakota Supreme Court stated in Stricker v. Swift Bros., 1977 SD 88, 260 NW2d 500 (SD that “[a] large body of decisional law has been established by the National Labor Relations Board and the federal courts recognize the Board’s expertise in the field of labor law.” Accordingly, the Court has followed the president of the NLRB in numerous cases.

### ***Supervisors:***

It is well established that the employer, as the party contending that supervisory status exists, bears the burden of proving such status. Tucson Gas & Electric Company, 241 NLRB 181 (1979); Midland Transportation Co., 304 NLRB 4 (1991).

While discussing the definition of supervisor, The Second Circuit Court of Appeals has found that the first portion of Section 2(11) is stated in the disjunctive; thus, an employee’s possession of any one of the enumerated powers may signify supervisory status. Superior Baking, Inc. v. NLRB, 893 F.2d 493, 496 (2<sup>nd</sup> Cir. 1990). Accordingly, employees are supervisors if: “(1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.” Kentucky River, 532 U.S. at 713, 121 S.Ct. 1861.

Any authority the sergeant’s exercise is in the “interest of the employer” as required by the NLRA. The responsibility of remaining true to the ethics of the law enforcement profession and providing the highest level of police protection and service to the public furthers the interests of the employer, because public safety is the business of the Vermillion Police Department. Attention then must be focused on the two questions of:

(1) whether the sergeants have the authority to engage in one of section 2(11)'s listed activities and (2) whether the exercise of that authority requires the use of independent judgment. The City argues that the sergeants have the authority to engage in six of the twelve activities listed in section 2(11), making them supervisors or otherwise excluded. Specifically, the City argues that sergeants: (1) “assign” work to patrol officers, (2) “responsibly direct” patrol officers during shifts, (3) “adjust grievances” for patrol officers, (4) “discipline” patrol officers, (5) “reward” patrol officers through the giving of a coin, and (6) make “effective recommendations” during the evaluation and promotion process. We will address each of these functions in turn, and consider whether the exercise of authority in these activities requires the use of independent judgment.

***Assign and Responsibly Direct:***

The City argues that sergeants make duty assignments during the course of shifts and have the responsibility to direct the work of police officers. The patrol lieutenant is responsible for assigning all eligible officers to patrol shifts for day, evening, and night shifts. Sergeants no longer handle vacation and overtime scheduling. When sergeants and officers are assigned to work the same patrol shift, the sergeant is the shift supervisor and is responsible for assigning subordinates to patrol areas. When a shift occurs without a sergeant on duty, the senior patrol officer on duty performs those same assignments.

Assignment of work to employees does not indicate supervisory status, “when that assignment is based upon a schedule given to, rather than set by, that employee.” *Cooper T. Smith, Inc. v. NLRB*, 177 F.2d 1259, 1264 (11<sup>th</sup> Cir. 1999). The exercise of assignment authority requires the use of independent judgment. If a person on the shop floor has “men under him” and if that person decides “what job shall be undertaken next or who shall do it, “that person is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment. *Oakwood Healthcare, Inc. and Int’l Union, United Automobile, Aerospace and Agricultural Implement Works of America (UAW)*, 348 NLRB No. 37 (Sept. 29, 2006). For direction to be “responsible,” the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. *Id.*

In this matter, the City has not shown that sergeants make assignments based on the skills and experiences of the patrol officers, but rather only on the schedule provided by the lieutenant. Sergeants may direct the work of police officers and take corrective action if necessary. However, there is no indication that sergeants are subject to discipline or lower evaluations if a sergeant’s direction is not adequately followed. The sergeants thus do not exercise independent judgment when assigning duties during the course of a shift, nor are they held accountable for the performance/actions of officers they direct. The City has failed to carry its burden of proving that sergeants assign and responsibly direct officers within the meaning of Section 2(11).

***Adjust Grievances:***

Employer argues that the grievance procedures contained in the policy manual refer to “supervisor” as the initial, informal step in the grievance process, so depending on the nature of the grievance it could be initiated by an officer with a police sergeant. Petitioner argues that reporting disciplinary matters to supervisors is not adjusting grievances. Because of the serious consequences of an erroneous determination of supervisory status, caution is warranted before concluding that a worker is a supervisor despite the fact that the purported supervisory authority has not been exercised. *Beverly Enterprises-Massachusetts Inc. V. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999). Grievances are rare in the Vermillion Police Department. The last grievance the department had was regarding overtime scheduling and was initiated with a lieutenant instead of a sergeant, because lieutenants make the schedules. During testimony no one could recall an instance in which a grievance had been initiated by an officer with a sergeant. However, the failure to exercise supervisory authority may indicate only that circumstances have not warranted such exercise. In this matter, the City has failed to show that sergeants can adjust a grievance within the meaning of Section 2(11).

***Discipline:***

The City next argues that the sergeants should be excluded from the bargaining unit because sergeants have the authority to discipline officers. However, the record does not establish that the sergeants have the authority to discipline an officer for major conduct issues. Chief of Police Betzen testified that sergeants are the ones that see policy violations. The sergeants give him a list of what happened and how it happened, but a lot of the times they deal with the violation themselves with coaching, correction and just notify the chief of police if it's the second or third offense. A sergeant or higher level supervisor is delegated the authority to immediately relieve an employee from duty for the balance of one workday if the retention of such employee will cause or continue a disruption of the work force. Sergeant Ryan Hough testified, he has the power to send a patrol officer home from one shift, but he has never exercised that power in 9 ½ years as a sergeant. As stated above, failure to exercise supervisory authority may only indicate that circumstances have not warranted such exercise. Aside from having the authority to issue a one day suspension, sergeants can issue corrective actions for minor infractions. These corrective actions can include counseling or instructing the officer, or the sergeant may recommend additional training. The sergeant must use independent judgment when issuing discipline to patrol officers. In this matter, the City has met its burden of proof in showing that a sergeant is a supervisor within the meaning of Section 2(11) as it applies to discipline.

***Reward:***

The City next argues that the sergeants should be excluded from the bargaining unit because sergeants can give a physical reward, a coin, in their sole discretion to officers for excellent performance. Chief of Police, Matthew Betzen, testified the sergeants are the ones that give coins in recognition of a good job. The sergeants don't need to get permission from anyone to give a reward to an officer, and in most cases the chief of police only finds out that a coin reward has been given during the final evaluation. The

coin has a value to the recipient in the form of compensatory time-off. Also, in accordance with chapter 3, section 5 of the policy manual, supervisors can recommend officers for outstanding performance and/or achievement. As such according to NLRA Section 2(11) and SDCL 3-18-1(2), sergeants in this instance are supervisors.

***Effective Recommendations:***

Evaluations of police officers are primarily prepared by the police sergeants quarterly and annually. Officers initially do a self-evaluation, and then the sergeant assigned to that patrol officer completes an evaluation of the officer. Comments can be included on the evaluation for by both the evaluator and evaluate. The evaluation process proceeds to a panel discussion with the leadership team. Included in the discussion are the sergeants, lieutenants, captain, and chief of police. Evaluations, recommendations and ratings are discussed, and ratings can be adjusted during this process. After adjustments are made, the final evaluation is sent to the chief of police for approval.

In *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143 (5th Cir.1967), we held that the authority to make recommendations alone does not indicate supervisory status. *Id.* at 148. Other circuits take the same position. See, e.g., *NLRB v. Adco Elec., Inc.*, 6 F.3d 1110, 1117 (5th Cir.1993) (holding that employee “recommend[ing] someone for hire and [bringing] problems with apprentice employees to the attention of [his superior] is nothing more than what [the employer] would expect from experienced employees”); *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410-11 (9th Cir.1985) (prudent employers seek advice of foremen in evaluating employees and this does not elevate foreman to supervisor status); *Beverly Enters. v. NLRB*, 661 F.2d 1095 1100-1101 (6th Cir.1981) (although nurses submitted evaluations and disciplinary reports, these did not rise to level of effective recommendations).

It is not supervision by a sergeant when a sergeant makes recommendations and advises the leadership team as to why he gave an officer the rating that he did. The sergeant is simply advising and awaiting a decision from the others. In this matter it appears that it is the chief of police who ultimately determines final evaluation ratings. The City has failed to carry its burden of proving that sergeants make “effective recommendations” during the evaluation and promotion process, within the meaning of Section 2(11).

**ORDER**

Based upon the facts presented by the Parties, the Vermillion Police Departments police sergeants are excluded from the term “public employees” by the language of SDCL 3-18-1(2) and NLRA Section 2(11). Therefore, Sergeants are precluded from membership in the police officer’s bargaining unit.

Counsel for Respondent shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 10 days of the receipt of this Decision, as well as any Proposed Findings of Fact and Conclusions of Law. Counsel for Petitioner may submit proposed Findings of Fact and Conclusions of Law within 10 days after receipt of Respondent’s submission. The parties may stipulate to a waiver of formal Findings of

Fact and Conclusions of Law. If they do so, counsel for Respondent shall submit such stipulation together with an Order consistent with this Decision.

Dated this 9<sup>th</sup> day of February, 2016.

SOUTH DAKOTA DEPARTMENT OF LABOR and REGULATION

/s/ Sarah E. Harris  
Sarah E. Harris  
Administrative Law Judge