

2011 IL App (1st) 110144 - U  
No. 1-11-0144

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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METROPOLITAN ALLIANCE OF POLICE, STREAMWOOD SERGEANTS CHAPTER 217,	)	Petition for Review from the
	)	Illinois Labor Relations Board,
Petitioner-Appellant,	)	State Panel
	)	
v.	)	No. S RC 09 145
	)	
ILLINOIS LABOR RELATIONS BOARD, State Panel, and VILLAGE OF STREAMWOOD,	)	
	)	
Respondents-Appellees.	)	

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JUSTICE STERBA delivered the judgment of the court.  
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ 1 *HELD:* Sergeants employed by the Village of Streamwood are "supervisors" pursuant to section 3(r) of the Illinois Public Labor Relations Act (5 ILCS 315/3(r) (West 2008)) because: (1) their principal work is substantially different from that of their subordinate officers; (2) they have the authority to effectively recommend suspensions of subordinate officers and to reward subordinate officers; and (3) they consistently use independent judgment in recommending said suspensions and rewarding officers.

¶ 2 This appeal involves a dispute between petitioner, Metropolitan Alliance of Police, Streamwood Sergeants Chapter 217 (Union), and respondent, Village of Streamwood (Village),

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over whether sergeants employed by the Village's police department are "supervisors" within the meaning of section 3(r) of the Illinois Public Labor Relations Act (Act) (5 ILCS 315/3(r) (West 2008)). Following a fact-finding hearing, the administrative law judge (ALJ) issued a "Recommended Decision and Order" (RDO), in which she concluded that six sergeants employed by the Village are not supervisors or confidential employees under section 3(r) of the Act and that the Union should be certified as their collective representative. Respondent, Illinois Labor Relations Board (Board), adopted the ALJ's findings of fact, but reversed her conclusion that sergeants are not supervisors within the meaning of the Act and dismissed the Union's petition seeking certification to become the exclusive representative of a bargaining unit consisting solely of the Village's sergeants.

¶ 3 On appeal, the Union asserts that the Board was clearly erroneous by concluding that the sergeants: (1) are supervisors under section 3(r) of the Act; (2) recommend discipline within the meaning of section 3(r) of the Act; and (3) maintain the requisite independent judgment to discipline and reward subordinates pursuant to section 3(r) of the Act. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 On June 8, 2009, the Union filed a "Representation/Certification Petition" seeking its certification as the exclusive representative of a bargaining unit consisting of all full-time sworn peace officers holding the rank of sergeant employed by the Village. The Village responded to the Union's petition on June 24, 2009, objecting to the appropriateness of the bargaining unit on the basis that the Village's sergeants are supervisors as defined by section 3(r) of the Act.

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Specifically, the Village argued that its sergeants: (1) are engaged in principal work which is substantially different from that of sworn peace officers who are subordinate in rank to the sergeants; and (2) have the authority, in the interest of the Village, to perform one or more of the 11 criteria enumerated in section 3(r) sufficient to support a finding of supervisory status, including suspend, reward, discipline and direct subordinate employees.

¶ 6 On June 30, 2009, the Union sent correspondence to the ALJ stating that the Village's objections lacked specificity that would allow the Union to respond. The Union requested that the ALJ schedule a hearing on the matter.

¶ 7 The ALJ then sent correspondence to the parties on July 9, 2009, stating that she was unable to find any reason to convene a hearing because the Village failed to specify whether its sergeants perform at least one of the 11 enumerated supervisory indicia and whether its sergeants' principal work is substantially different from that of their subordinates. The ALJ directed the Village to show cause as to why its sergeants should not be certified for representation by the Union.

¶ 8 The Village submitted a response to notice to show cause on July 29, 2009. Thereafter, the ALJ entered a September 28, 2009 order setting the matter for hearing on November 18, 2009. The order also required the parties to submit a joint statement of uncontested material facts. In addition, the parties stipulated that the scope of the supervisory issue was limited to: (1) whether the principal work of the sergeants is substantially different than the work of their subordinates; (2) the sergeants' authority to direct subordinates; (3) the sergeants' authority to discipline or effectively recommend discipline; and (4) the sergeants' authority to reward or

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effectively reward their subordinates.

¶ 9 A hearing was conducted by the ALJ on November 18 and 19, 2010. The parties appeared and had the opportunity to participate, adduce relevant evidence, examine witnesses and argue orally. The joint statement of material facts, the testimony presented by the witnesses, pertinent portions of the police department's general orders and the labor agreement between the Village and unionized police officers are set forth as follows.

¶ 10 A. Organization of the Police Department

¶ 11 The Village's police department is a full-service law enforcement agency that consists of 61 sworn uniformed patrol personnel, traffic and tactical units, criminal investigators and crime prevention specialists. The police department also employs 15 civilians.

¶ 12 The police department includes two divisions: the field services division and the support services division. The field services division is divided into a patrol unit and a traffic unit. The support services division includes a special operations unit, a DARE unit and a police records unit. The special operations unit consists of a detective (general assignment) unit and a tactical unit. The department has two deputy chiefs, one for each division, who report directly to the chief of police. Three commanders are employed by the department, two of whom are assigned to the patrol unit and the third assigned to the detective unit.

¶ 13 Currently, six sergeants are actively deployed in the department. Four sergeants are assigned to the patrol unit. One sergeant is assigned to the tactical unit and one sergeant is assigned to the detective (general assignment) unit.

¶ 14 The Village currently employs 32 patrol officers, one of whom is designated as a traffic

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officer. In addition to the patrol officers, the Village employs nine detectives, five of whom are assigned to the detective unit and four of whom are assigned to the tactical unit. The Village also employs two DARE officers, three school resource officers and one K-9 officer. The K-9 officer reports to the patrol sergeant and the school resource officers are part of the detective unit.

¶ 15 The chief of police, two deputy chiefs and the detective commander work a weekday schedule from 8:00 a.m. to 5:00 p.m. None of these officers are on duty during nights or weekends.

¶ 16 The patrol division operates two shifts or, "watches," including a day watch from 6:00 a.m. to 6:00 p.m., and an evening watch from 6:00 p.m. to 6:00 a.m. One commander is assigned to the day watch while the other commander is assigned to the evening watch. The patrol commanders are assigned to opposing day-off groups, meaning, if the day watch commander is scheduled to work on a particular day, the evening commander is not scheduled to work that same night.

¶ 17 The day watch is divided into two teams, namely, "Team A" and "Team B." Seven patrol officers are assigned to each team. Two sergeants are assigned to the day watch, one to Team A and one to Team B. Team A works on an alternating schedule with Team B. In other words, when the sergeant and patrol officers on Team A are working, the sergeant and patrol officers on Team B are not working, and *vice-versa*.

¶ 18 The evening watch is also divided into two teams, Team A and Team B. One sergeant and eight patrol officers are assigned to each team. Similar to the day watch, Team A works an opposing schedule to Team B, in which the officers and sergeant assigned to Team A are off

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duty when the officers and sergeant assigned to Team B are on duty, and *vice-versa*.

¶ 19 The two watch commanders' scheduled days off are staggered with regard to the sergeants assigned to each watch. Thus, the day watch commander will be on duty approximately 50% of the time that the Team A sergeant is on duty and approximately 50% of the time that the Team B sergeant is on duty. As a result, on 50% of the evenings throughout the year, sergeants serve as the senior ranking officer on duty.

¶ 20 Alan V. Popp serves as chief of police for the Village and has held that position since his appointment on May 12, 2005. Chief Popp was first hired by the Village as a police officer on November 27, 1983 and has been continuously employed by the police department to the present date.

¶ 21 Chief Popp testified at the hearing before the ALJ that on 50% of the weekends, a commander is not working. According to Chief Popp, on nights, weekends and holidays when commanders are off duty, sergeants work with the full authority of the chief of police to make any operational decisions that need to be made. The authority is delegated to the sergeants through the police department's general orders and operating procedures. Chief Popp testified the authority is communicated to the sergeants through formal conversations with supervisors and supervisory meetings. Chief Popp stated that sergeants "have the authority to exercise independent judgment relative to their rank," and that sergeants make decisions without a commander on duty. Chief Popp also stated that there is a deputy chief on-call at all times.

¶ 22 Chief Popp testified that the tactical sergeant's hours of employment are from 6:00 p.m. until 2:30 a.m. on a six-days-on, three-days-off scheduled rotation. A commander is assigned to

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the special operations unit, who oversees both the detective and tactical units. That commander works on weekdays from 8:00 a.m. to 5:00 p.m. Because the commander of the detective and tactical units is off duty at 5:00 p.m. on weekdays, the tactical sergeant assumes command of the tactical unit and has operational responsibility for his unit when he comes on duty at 6:00 p.m.

¶ 23 With regard to the civilian personnel in the police department, Chief Popp testified that the watch sergeant has supervisory authority over the records unit. Chief Popp stated that the watch sergeant oversees the records personnel's operations, including data entry and whatever additional operational decisions that need to be made. According to Chief Popp, the Team A sergeant, whether working on the day shift or night shift, assumes responsibility for the records personnel working on a given day, and when Team B is on duty, the Team B sergeant assumes responsibility.

¶ 24 **B. Beat/Case Assignment and Patrol**

¶ 25 The Village is divided into four separate patrol areas, or "beats." Officers are not generally assigned to the same beat on a daily basis. The watch sergeant assigns the officers to their various beats each day. Patrol officers primarily initiate action in responding to a call for service.

¶ 26 Chief Popp testified that as calls come into the dispatch center by geographic location, the patrol officers are assigned to a particular beat. The patrol sergeant on duty conducts the daily or nightly roll call and gives the officers assigned under his command their areas of responsibility. The sergeant prepares the roll call sheet, the actual duty roster and, at the end of the tour of duty, approves the watch log. Chief Popp stated that if a patrol sergeant wants to

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keep a patrol officer assigned to a particular beat for two consecutive days, he has the authority to do so. Sergeants also assign special watches and/or equipment to be deployed. Patrol officers do not have the authority to assign various equipment, including less lethal shot guns, tasers and belt packs. In addition, sergeants assign special foot patrols when necessary. Patrol officers do not have the discretion to leave the beat assigned to them by their superior officer. A patrol sergeant, depending on the nature of a call or coverage of an assignment, has the authority to allow a patrol officer to switch or cross beats.

¶ 27 According to Chief Popp, sergeants are designated to a particular geographic beat for communication, reporting, management and resource deployment. The sergeant is responsible for a particular beat 24 hours a day, seven days a week, 365 days a year. The sergeant consults with the previous watch sergeant on duty to prepare for the next shift. Sergeants are permanently assigned to a beat throughout the year. Chief Popp testified that the sergeant determines what he is going to do while on duty on any given day based upon case load. A sergeant can remain in the police station to work on other matters instead of street patrol. A patrol officer does not have the discretion to determine whether he will remain at the station or be on patrol. Sergeants are assigned to drive sport-utility vehicles marked, "supervisor," while patrol officers are assigned to drive Chevrolet Impalas.

¶ 28 Constantino Heckermann was hired by the Village on October 4, 1991 and was promoted to the rank of sergeant on May 13, 2005. Sergeant Heckermann testified that patrol officers also are assigned to operate SUVs marked, "supervisor."

¶ 29 Sergeant Heckermann stated that he attends and conducts the roll call. In his absence, the

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roll call is conducted by either a corporal or a commander. According to Sergeant Heckermann, patrol officers are sometimes permitted to pick their own beats.

¶ 30 Paul Murray was hired by the Village on July 16, 1990 and was promoted to the rank of sergeant on May 13, 2005. Sergeant Murray testified that he currently serves as a tactical sergeant.

¶ 31 Sergeant Murray testified that his caseload is assigned to him by his commander. With regard to the detectives, the commander assigns their caseloads. Sergeant Murray stated that prior to July or August of 2009, he customarily had assigned cases to detectives, but since then, he has not assigned any cases to detectives. When Sergeant Murray organizes and prepares various operations, such as an undercover drug sting, he receives final approval to execute the operations from a commander.

¶ 32 C. Assigning Officers to Shifts

¶ 33 Chief Popp testified that sergeants approve a patrol officer's request for time off. Patrol officers do not have the authority to approve requests for time off. A patrol officer selects his or her desired prescheduled vacation days annually, which are reviewed by the sergeant. The patrol sergeant works with the patrol officer to determine any conflicts in the schedule. Once the schedule is determined by the sergeant, it is elevated through the chain of command. Likewise, tactical sergeants have the authority to change tactical officers' work schedules without seeking approval from a higher-ranking officer.

¶ 34 Chief Popp also testified that sergeants determine whether the police department will operate under the standard for the minimum number of officers on duty at any given time. Chief

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Popp stated that, in his review of police department documentation, he determined that there were 13 occasions between 2008 and 2009 when the sergeant on duty elected to work with less than the standard for the minimum number of officers per shift. On those 13 occasions, the sergeant's senior officers were also on duty. The sergeant also has the discretion to operate above the staffing guidelines for days and nights. Chief Popp testified that the sergeant does not need permission from a superior officer to have additional personnel called in to report for duty.

¶ 35 Deputy Chief James Keegan was first hired by the Village as a police officer on August 31, 1992. He was promoted to the rank of deputy chief on May 12, 2005. Deputy Chief Keegan also served as a sergeant prior to his promotion to deputy chief. Deputy Chief Keegan testified that sergeants are considered as manpower to be counted toward minimum staffing levels.

¶ 36 Sergeant Heckermann testified that he received an e-mail correspondence from Deputy Chief Keegan that provided minimum manpower directives. According to the e-mail correspondence, the minimum manpower for a day shift is five (five patrol officers plus a supervisor or sergeant) and the minimum manpower for a night shift is six (six patrol officers plus a supervisor or sergeant).

¶ 37 Sergeant Heckermann stated that his authority to add manpower at an overtime rate to his shift occurs when there are exigent circumstances within a 24-hour notice period. For example, if a police officer notifies the department he will be absent due to illness, Sergeant Heckermann has the authority to call another officer at an overtime rate to fill that shift. Barring an exigent circumstance, however, Sergeant Heckermann stated that he does not have the authority to call in officers at an overtime rate. Sergeant Heckermann also stated that he does not have the authority

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to work a shift with a manpower shortage. The amount of manpower a sergeant deploys for a particular shift is dictated by the command staff.

¶ 38 In addition, Sergeant Heckermann testified that he is authorized to allow subordinate officers vacation time and personal days. This authority is limited to a degree by the labor agreement. If more than two officers want to take the same vacation day, Sergeant Heckermann forwards the request up the chain of command for approval. He does not have the authority to allow more than two officers to take the same vacation day.

¶ 39 Sergeant Murray testified that in the detective division, time off requests were first reviewed by him and then sent to his commander for approval.

¶ 40 D. Responding to Calls

¶ 41 Chief Popp testified that following roll call, the roll call roster is faxed to the dispatch center. When a call for service is made to the dispatch center, it is dispatched by both voice and computer to the beat unit. Patrol officers are the first responders for all law enforcement activities and calls for service within a given beat. After receiving a dispatch, the patrol officer patrolling a particular beat would then respond to the call.

¶ 42 Chief Popp stated that, sergeants, by job description, are not responsible for answering calls for service. Chief Popp testified that sergeants "go wherever they believe they need to be to conduct the supervisory or management functions of the job. They are not assigned as a backup officer." Sergeants can respond to calls upon their own discretion. If a sergeant elects to respond to a call, the sergeant need not do anything more than simply observe the patrol officer perform his duties.

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¶ 43 Chief Popp testified that sergeants have the authority to redirect the call to another officer. A patrol officer does not share that same authority, however, occasionally, a patrol officer may redirect a call to another patrol officer. Sergeants have the authority to prioritize the calls, stop the calls, hold the calls and do whatever is within their best judgment to serve the citizens. A patrol officer cannot refuse a dispatcher's call for service.

¶ 44 Chief Popp stated that sergeants deploy manpower and also have the authority to call additional resources from outside jurisdictions. Chief Popp stated that, "[s]ome of our mutual aid responses are the sergeants acting independently to call additional resources in." The sergeant need not receive approval from a superior prior to calling in additional resources from outside jurisdictions.

¶ 45 Chief Popp testified that, when responding to calls, sergeants conduct oversight and case management. Sergeants may provide direction or input into whatever is occurring at a particular moment, but the patrol officers assigned to the call are responsible for the case investigation and any ensuing follow-up.

¶ 46 In contrast, Sergeant Heckermann testified that he has been instructed by Deputy Chief Keegan on many occasions to write tickets, make arrests and be productive. If a police officer is absent from his beat, Sergeant Heckermann fills that absence and answers that officer's calls of service. Sergeant Heckermann testified that if a call is dispatched, he is expected to answer that call for the absent police officer. Sergeant Heckermann does not have the authority to refuse these calls for service. In addition, Sergeant Heckermann cannot refuse calls assigning him as a backup officer.

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¶ 47 Sergeant Heckermann testified that he does not have the discretion or authority to call additional resources from outside jurisdictions. Before he can call additional resources from outside jurisdictions, Sergeant Heckermann first notifies his commander or the deputy chief. The only time Sergeant Heckermann was assigned to a case that required additional resources, Deputy Chief Keegan contacted outside jurisdictions for assistance.

¶ 48 E. Reviewing Reports

¶ 49 Chief Popp testified that the detective sergeant's responsibilities include reviewing case reports for content, accuracy and thoroughness. If the detective sergeant disapproves of the content or accuracy of the report, the case is returned to the detective for corrections. The detective commander reviews the case reports following review by the detective sergeant. On days when the detective commander is off duty, the reports are reviewed by the detective sergeant and forwarded to the records department without review of the commander. Individual detectives do not have the authority or responsibility to review the reports of fellow detectives.

¶ 50 Similarly, patrol sergeants approve the patrol officers' incident reports. The sergeant reviews the report for content, thoroughness and accuracy, and then approves the report for further review by a commander. On days when the patrol commander is off duty, the reports are reviewed by the sergeant on duty and forwarded to the records department without review of the commander. Patrol officers do not review and approve other patrol officers' written reports.

¶ 51 Sergeant Heckermann testified that he reviews the reports of his subordinate officers. According to Sergeant Heckermann, corporals likewise review and approve police officers' reports. After Sergeant Heckermann reviews the reports, they are submitted through the chain of

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command. Sergeant Heckermann stated that he has had reports returned to him by his superior officers.

¶ 52

F. Records Management System Data

¶ 53 Chief Popp testified that the records management system (RMS) is a general data warehouse of police activities that occur. The RMS encompasses all of the police department's statistical information, including the number of calls for service to which an officer has responded, the number of citations written and the officer's activities throughout the assignment.

¶ 54 The parties stipulated that the RMS reports show that from January through July of 2009, the average number of calls for service for a police officer was 436, while the average number of calls for service for a sergeant was 162, or approximately 37% of the average amount of calls for a police officer. For that same time period, the average number of incident reports generated by a police officer was 87, while the average number of incident reports generated by a sergeant was 12, which is approximately 14% of the average amount of incident reports generated by a police officer. In addition, the RMS shows the average number of traffic citations issued by a police officer in 2008 was 123, while the average number of citations issued by a sergeant in the same time period was 32, or approximately 26% of the average amount of a police officer. In 2009, sergeants issued approximately 14% of the amount of traffic citations of a police officer.

¶ 55

G. Discipline

¶ 56 Chief Popp testified that sergeants can take corrective action against a police officer in the special operations unit or the patrol division who performs in a deficient manner. Chief Popp testified that section 11.2 of the collective bargaining agreement between the Village and sworn

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officers provides disciplinary measures for subordinate officers. Section 11.2 of the labor agreement states that disciplinary measures may include:

- "(1) Counseling, with appropriate documentation thereof placed into the employee's personnel file, with a copy to the employee and the Union;
- (2) Written reprimand and/or transfer (provided that where both penalties are imposed there is cause for each) with appropriate documentation thereof placed into the employee's personnel file, with a copy to the employee and the Union;
- (3) Suspension without pay and/or transfer (provided that where both penalties are imposed there is cause for each) with appropriate documentation thereof placed into the employee's personnel file, with a copy to the employee and the Union;
- (4) Discharge from service."

¶ 57 Also pertinent here, section 11.4 of the labor agreement, which is entitled, "Manner of Discipline," provides:

"Final Authority for discipline rests with the Chief of Police. The Chief of Police or his department designee are the only personnel with authority to suspend or discharge an employee covered by this Agreement, except for those emergency situations when a supervisor may suspend with pay an employee for one shift period only, when it is in the best interests of the Department. There shall be no suspension of the employee's benefits, other than direct and immediately [sic] loss

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of wages, for the period of any suspension, whether imposed by the supervisor or the Chief of Police or his department designee."

¶ 58 Chief Popp testified regarding the progressive levels of discipline used by the police department. First, a sergeant has the authority to counsel a subordinate verbally. A sergeant can also counsel the subordinate verbally and then record an entry into the supervisor's log. Chief Popp also stated that a sergeant can issue a "letter of direction," which is the next level of discipline. According to Chief Popp, a letter of direction is a formal documentation of a conversation that occurred between the sergeant and the subordinate. The letter of direction serves to put the subordinate police officer on notice of repeated counseling. Letters of direction are kept in a personnel file for a year and then moved to a separate discipline file. Chief Popp described an evidentiary exhibit, which consisted of a letter of direction issued by Sergeant Edward Valente to Officer David Hulet that was placed into the officer's personnel file in a separate section entitled, "discipline." Commanders and deputy chiefs also can issue letters of direction.

¶ 59 Chief Popp stated that sergeants cannot issue written reprimands to subordinate officers, but they can recommend to Chief Popp to take such action. Chief Popp issues suspensions without pay. Chief Popp receives written recommendations for suspension from the sergeant that advance through the chain of command prior to reaching the chief's office. Chief Popp does not conduct his own independent investigation prior to suspending a police officer. Chief Popp testified that he issued a suspension for each of the recommendations he received from the sergeants. He does not "rubber stamp" the suspension because he takes into account the

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background and/or mitigation of the officer prior to issuing the suspension. In other words, the sergeant may recommend a three-day suspension, but following mitigation by the police officer, Chief Popp may issue a shorter suspension. Chief Popp testified that there were two occasions where he reduced the recommended days of suspension. Chief Popp has the sole authority to terminate a police officer's employment.

¶ 60 Deputy Chief Keegan testified that he considers counseling to be a disciplinary measure. Deputy Chief Keegan stated that when he counsels subordinate officers, he tells them that future incidents can result in progressive discipline.

¶ 61 Deputy Chief Keegan testified regarding a letter of direction issued to Officer Sabiher Khan by Sergeant Heckermann. Deputy Chief Keegan sent an e-mail correspondence to Sergeant Heckermann directing him to issue a letter of direction to Officer Khan that stated, "This cannot come from my office so it is not construed as discipline." Deputy Chief Keegan explained that he sometimes serves as chief of police when Chief Popp is absent. Deputy Chief Keegan stated that he has full authority and power to act as a decision maker in Chief Popp's absence and that he did not want the letter of direction to be construed as formal discipline from the chief. Deputy Keegan testified that he wants his sergeants to serve as the barometer of discipline.

¶ 62 As to letters of direction in general, Deputy Chief Keegan testified that there is no department rule, regulation or general order that defines a "letter of direction." Deputy Chief Keegan testified that, in his 17 years with the department, the letter of direction has been an understood form of discipline and that "[e]verybody from the bottom rank to the top rank knows

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that [it's] a step, and that's what we call it." According to Deputy Chief Keegan, a letter of direction is a form of discipline even though none of the letters reviewed by Deputy Chief Keegan mentioned the word "discipline." On occasion, Deputy Chief Keegan has corrected letters of direction issued by the sergeants.

¶ 63 Commander Daniel Barnes was first hired by the Village as a patrol officer on January 2, 1985 and was promoted to commander on June 1, 2003. He held the rank of sergeant from 1992 until he received his promotion to commander.

¶ 64 Commander Barnes testified that, while he served as a sergeant, he had the authority to discipline subordinate officers. He could counsel, issue letters of direction and impose emergency suspensions. He also stated that he could recommend suspensions.

¶ 65 Edward Valente was hired by the Village as a patrol officer on January 15, 1990. He was promoted to the rank of sergeant on January 1, 1997.

¶ 66 Sergeant Valente testified that in his current assignment he serves as a patrol sergeant during the day shift. He testified regarding letters of direction that he issued to subordinate officers. Sergeant Valente had counseled Officer Hulet and Officer Shawn Cookson by undocumented, short, informal conversations prior to issuing them a letter of direction. Sergeant Valente stated that he did not speak to a higher ranking officer prior to issuing the letters of direction. He also stated that, with regard to disciplining subordinate police officers, he has the authority to counsel, issue letters of direction and impose suspensions in emergency situations. Sergeant Valente testified that he possesses the authority to issue emergency suspensions through direction from the chief and written orders.

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¶ 67 In addition, Sergeant Valente recommends suspensions of subordinate officers when warranted. He testified that it was his independent decision to recommend a suspension of Officer Louis Argyrakis and that he did not consult with any superior officer prior to making that determination. Sergeant Valente recommended between five and ten suspensions over the course of the previous 13 years he has served as a sergeant. Sergeant Valente testified that each of his recommendations for suspension were approved, although some the suspensions were reduced to fewer days by the chief.

¶ 68 Sergeant Heckermann testified that his understanding of his authority to discipline subordinate officers is limited to reporting his observation of an incident or occurrence in a memorandum that is then reviewed by a higher authority in the chain of command. Sergeant Heckermann stated he has been instructed by his superior officers that, when he observes misconduct by a subordinate officer, he has the obligation and authority to counsel the officer and issue a letter of direction. Sergeant Heckermann testified that he does not consider informal communications with subordinate officers as formal discipline.

¶ 69 Sergeant Heckermann testified that he is authorized to impose an emergency suspension. He stated that he imposed an emergency suspension twice. He testified that, prior to imposing the emergency suspension, he first spoke with Deputy Chief Keegan, who authorized the suspensions. In the memorandums Sergeant Heckermann prepared regarding the emergency suspensions, he did not include a statement that he contacted Deputy Chief Keegan to obtain authorization for the suspensions.

¶ 70 Sergeant Heckermann also testified that he does not issue letters of direction as a result of

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his independent authority. Deputy Chief Keegan and other commanding officers have recommended that Sergeant Heckermann issue the letters of direction. Sergeant Heckermann testified that the letters of direction do not advise the subordinate officer that the letter constitutes a formal disciplinary step or that the letter would be placed in the officer's personnel file.

¶ 71 In addition, Sergeant Heckermann stated that he has the authority to recommend training for a particular officer based on his observations of that officer's performance. Sergeant Heckermann testified that his recommendations for training have been approved by his commanding officers.

¶ 72 Sergeant Murray testified that he issued three letters of direction within a five-year period. He did not issue the letters pursuant to his own authority, but under the authority of the commander. Sergeant Murray does not consider letters of direction as discipline. He testified that, in the first letter of direction, the commander specifically directed him to include a statement that the letter was not a form of discipline. Sergeant Murray's understanding of his role with regard to discipline is to observe the officer, document the incident and forward the documentation up the chain of command.

¶ 73 Paul Petrick was hired by the Village on May 5, 1995 and was promoted to the rank of sergeant on May 20, 2008. He is currently assigned as a tactical sergeant, but also has served as a patrol sergeant.

¶ 74 Sergeant Petrick testified that his understanding of his obligations and duties upon observing police officer misconduct are to document the incident and forward it up the chain of

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command. Sergeant Petrick recalled an incident in which he was directed by e-mail correspondence from Deputy Chief Keegan to counsel Officer Cookson, who had missed his court date. Sergeant Petrick was directed by Deputy Chief Keegan to either enter a notation in the supervisor's log or to prepare a letter of direction. Officer Cookson initially told Sergeant Petrick that he missed court because he overslept. Officer Cookson later told Sergeant Petrick that he simply forgot to attend court. At that point, Sergeant Petrick told Officer Cookson that he was going to document the incident in a memorandum and send it to Deputy Chief Keegan. Sergeant Petrick testified that his only role in this incident was to document it and forward it up the chain of command. Sergeant Petrick did not follow Deputy Chief Keegan's directive to either enter a notation in the supervisor's log or to prepare a letter of direction for this incident. Sergeant Petrick also testified that counseling is not a recognized form of discipline in the department.

¶ 75

#### H. Performance Appraisals

¶ 76 Chief Popp testified that police officers are evaluated annually. The sergeant is responsible for evaluating his or her personnel by evaluation form scored by a point system totaling 100 points. In the first section of the evaluation form, the sergeant is responsible for objectively assigning a total of 50 points for the police officer's performance. In the third section of the evaluation form, the sergeant subjectively scores the officer's performance. The sergeant can award between 0 to 15 points while the commander has the authority to award between 0 to 10 points. In other words, the sergeant controls 65 of the 100 points that can be awarded in the evaluation form. The sergeant is not required to obtain approval from his commander before

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awarding evaluation points. Chief Popp testified that the commander reviews the sergeant's completed evaluation and, if the commander disagrees with a portion of the evaluation, the commander would be expected to discuss the evaluation with the sergeant who completed the scoring.

¶ 77 According to Chief Popp, the scores on the performance evaluations impact the compensation received by police officers and detectives. Chief Popp explained that there is a merit longevity component and that, based upon the statistical score received on the evaluation, the police officer or detective can receive a designated monetary value that is awarded for overall performance. For example, under the current labor agreement between the Village and sworn police officers, a police officer having served in excess of 11 years that receives a cumulative score between 61 to 75 points on his evaluation would be awarded \$625. A police officer with less than 11 years of service would not be eligible to receive additional compensation.

¶ 78 Commander Barnes testified that when he served as a sergeant, he participated in the evaluation of subordinate officers. He stated that he exercised his discretion when subjectively scoring the evaluations. At no time did a superior officer direct Commander Barnes to change his scores. In his current rank, Commander Barnes has neither directed nor suggested to a sergeant to change the evaluation scores of a subordinate officer.

¶ 79 Sergeant Valente testified that he prepares the evaluations of subordinate officers and that he is not required to review points awarded with his commanding officer prior to completing the evaluation. Sergeant Valente stated that a commander has never directed him to change his

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scores in an evaluation of a subordinate officer. Sergeant Valente awards points based on his subjective evaluation of the officer's performance.

¶ 80 Sergeant Heckermann testified that he prepares evaluations of subordinate officers upon the direction of his commanding officers. Sergeant Heckermann testified regarding an e-mail communication from the chief addressed to Officer Courtney Stoiber. Sergeant Heckermann was copied on the e-mail correspondence, which stated that the chief had reviewed Sergeant Heckermann's evaluation of Officer Stoiber and could not support Sergeant Heckermann's request to have Officer Stoiber assigned as a field training officer. Sergeant Heckermann also testified that Commander Barnes, on one occasion, adjusted his evaluation of an officer from "above average" to "satisfactory." Commander Barnes told Sergeant Heckermann to change the evaluation because the officer's statistics were "horrible." Sergeant Heckermann further testified that Commander Barnes also directed him to change other evaluations because the point values were too high. As a result, Sergeant Heckermann lowered the scores on the evaluation. Sergeant Heckermann stated that Commander Barnes lied when he testified that he never directed a sergeant to change an evaluation score. Sergeant Heckermann was never directed by a superior officer to raise a subordinate officer's evaluation score. It is Sergeant Heckermann's understanding that his evaluations can be changed by his superior officers.

¶ 81 Sergeant Murray testified that he performs evaluations of subordinate officers. Sergeant Murray stated that his evaluations have been changed by his commander. Sergeant Murray testified that the commander determined the scores given by Sergeant Murray were too low and raised the scores. On another occasion, the commander lowered an evaluation score completed

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by Sergeant Murray.

¶ 82 Following the testimony of Village's witnesses, Deputy Chief Keegan testified again in rebuttal. He stated that on the two occasions in which Sergeant Heckermann imposed emergency suspensions, he did not direct Sergeant Heckermann to impose those suspensions. In one of the incidents, Sergeant Heckermann contacted Deputy Chief Keegan by telephone to notify him that he elected to impose an emergency suspension. Sergeant Heckermann had already told the officer that he had been relieved from duty. At that point, Deputy Chief Keegan reminded Sergeant Heckermann to prepare the necessary documentation and forward it to his office.

¶ 83 In the second incident, Deputy Chief Keegan testified that it was his understanding Sergeant Heckermann had already imposed the emergency suspension prior to contacting him.

¶ 84 Sergeant Heckermann testified again following Deputy Chief Keegan's rebuttal testimony. He stated that he sought authority from Deputy Chief Keegan prior to imposing the emergency suspensions. In Sergeant Heckermann's report for one of the incidents, he wrote, "On May 18<sup>th</sup> at approximately 2100 hours, I informed Officer Woolsey he was relieved of duty and to report to Chief Popp's office on Wednesday, May 21<sup>st</sup> at 0900 hours. I told Officer Woolsey that it was his choice to arrive with the Union representative." Sergeant Heckermann testified that he relieved Officer Woolsey from duty only after speaking to Deputy Chief Keegan.

¶ 85 I. Supervisory Meetings

¶ 86 Chief Popp testified that the police department has quarterly supervisory meetings. The chief, deputy chiefs, commanders and sergeants attend those meetings. The sergeants provide

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beat reports based upon their permanent assignments.

¶ 87 Sergeant Heckermann testified that, at the quarterly staff meetings, sergeants are not able to suggest the implementation of department policies. Sergeant Heckermann stated that the department has additional staff meetings attended by commanders, deputy chiefs and, occasionally, the chief.

¶ 88 J. Decisions of the ALJ and the Board

¶ 89 On April 26, 2010, the ALJ issued her RDO, finding that the sergeants were not supervisors within the meaning of section 3(r) of the Act. The ALJ found that the sergeants' work was substantially different from that of their subordinates under both the "visibly and obviously different test" (see *City of Freeport v. Illinois State Labor Relations Board*, 135 Ill. 2d 499, 513 (1990)) and the more nuanced test of whether the "nature and essence" of the work is different (see *Id.* at 515). As to the indicia of supervisory authority, the ALJ found that most of the sergeants' assignments were routine and clerical in nature and that the command staff closely monitors any directing that is executed by the sergeant. The ALJ found that sergeants were not actively involved in checking, correcting or giving instructions to subordinates. As to discipline, the ALJ concluded that the command staff regularly intervened to both determine whether discipline should have been issued and the amount or type of discipline to be meted out. With regard to reward, the ALJ found that a sergeant is unable to control who is eligible for the reward because, pursuant to the labor agreement, the number of years of service determines eligibility to receive merit/longevity pay. The ALJ also noted that annual evaluation scores issued by the

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sergeants are reviewed by the commanders and are subject to being altered.

¶ 90 The ALJ determined that the Union should be certified as the exclusive representative of all sworn police officers in the rank of sergeant employed by the Village. The ALJ concluded that the sergeants do not execute their duties with the requisite independent judgment as required in the Act.

¶ 91 On May 13, 2010, the Village filed its exceptions to the ALJ's RDO. The Union filed its response to the Village's exceptions and the Village then filed its cross-response.

¶ 92 On December 16, 2010, the Board adopted the ALJ's findings of fact, but concluded that sergeants are supervisors within the meaning of section 3(r) of the Act. In its decision, the Board narrowed the determination of the issues to whether sergeants have supervisory authority to: (1) discipline or effectively discipline their subordinates by issuing letters of direction; (2) effectively recommend a suspension; and (3) reward their subordinates when they complete annual evaluations.

¶ 93 First, the Board found that sergeants have the ability to issue letters of direction and that those letters constitute supervisory authority to discipline. The Board stated that the letters "reduce to writing a sergeant's counseling session with a subordinate, are placed in an officer's personnel file for a period of one year, and are then moved to a separate discipline file," and that the letters "are used to determine progressive discipline, meaning they may form the basis for further disciplinary action." The Board specifically noted the testimony of Sergeant Valente, who, at his sole discretion, issued letters of direction to subordinate officers on two occasions to address performance issues. The Board also noted that Chief Popp testified Sergeant

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Heckermann issued a letter of direction to an officer without consulting him. In addition, the Board found that sergeants are required to independently decide whether an incident warrants a letter of direction versus only issuing a verbal warning to be entered into the supervisor's log. The Board stated, "[b]ecause sergeants must choose between at least two significant courses of action, they exercise independent judgment when they make the determination to issue a letter of direction rather than a verbal warning, and do so without specific direction or review from their superiors."

¶ 94 Next, the Board found that sergeants have the authority to effectively recommend a suspension. The Board stated in support of its decision that sergeants recommend suspensions and those recommendations are adopted as a matter of course without further investigation or review.

¶ 95 Third, with regard to the ability to reward, the Board concluded that, while sergeants do not have authority to reward all high-performing officers pursuant to the labor agreement, "they have such authority with respect to *eligible* officers," and "[t]he fact that not all officers are eligible does not itself divest the sergeants of the authority to reward subordinates by giving favorable performance evaluations under the proper circumstances." (Emphasis in original.) The Board disagreed with the ALJ's determination that the sergeants did not exercise independent judgment in completing evaluations because the scores awarded by the sergeants were reviewed by commanders and could be altered. The Board noted the record did not indicate that the sergeants' evaluations routinely undergo vigorous review and alteration, but instead supports that the ratings are rarely altered. The Board determined that "the sergeants'

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evaluations are accepted and play a significant role in the determination of whether an eligible officer receives merit/longevity pay." The Board found that the sergeants possess supervisory authority to reward their subordinates.

¶ 96 The Union timely appeals.

¶ 97 II. ANALYSIS

¶ 98 On appeal, the Union argues the Board's decision that the sergeants are supervisors pursuant to section 3(r) of the Act is clearly erroneous. The Union asserts that sergeants do not possess the authority to effectively recommend discipline within the meaning of the Act. According to the Union, letters of direction do not qualify as a formal disciplinary measure and, even if they were considered as such, the sergeants do not use independent judgment when issuing those letters. The Union also contends that the sergeants' recommendations for suspension are not adopted as a matter of course and, therefore, they do not exercise independent authority when issuing such recommendations. In addition, the Union argues that the completion of performance evaluations is not considered supervisory absent evidence that the alleged supervisor possesses significant discretion. The Union asserts that the sergeants lack significant discretion because their evaluations are not adopted as a matter of course. The Union contends that the sergeants do not have the requisite authority and independent judgment to reward eligible police officers longevity and merit pay.

¶ 99 The Village responds the Board properly determined that the sergeants are supervisors. The Village argues it is uncontested that the principal work of the sergeants is substantially different from the work of their subordinates. The Village asserts that the Board correctly

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determined the sergeants have supervisory authority to discipline their subordinates using independent judgment. The Village contends that letters of direction are known throughout the department as the first measure of discipline under the labor agreement because it constitutes written documentation following counseling. The Village argues that sergeants have independent authority to recommend suspensions, which are not subject to review by the chief of police. Finally, the Village avers that the sergeants exercise the supervisory function of rewarding their subordinate officers by completing most of the substantive portions of the performance evaluations, which can determine whether a subordinate officer receives a merit/longevity stipend.

¶ 100

A. Standard of Review

¶ 101 The Administrative Review Law (5 ILCS 315/11(e) (West 2008)) governs our review of the Board's decision. "The scope of our review extends to all questions of law and fact presented by the record." *Village of Broadview v. Illinois Labor Relations Board*, 402 Ill. App. 3d 503, 505 (2010) (citing 735 ILCS 5/3-110 (West 2008)). "The applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law." *American Federation of State, County and Municipal Employees, Council 31 v. Illinois State Labor Relations Board*, 216 Ill. 2d 569, 577 (2005).

¶ 102 The Board's findings of fact are "held to be prima facie true and correct" (735 ILCS 5/3-110 (West 2008)) "and will be disturbed on review only if they are against the manifest weight of the evidence." *Village of Broadview*, 402 Ill. App. 3d at 505 (citing *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998)). The Board's findings of fact

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are against the manifest weight of the evidence only if the opposite conclusion is clearly evident.

*Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008)

(citing *City of Belvidere*, 181 Ill. 2d at 204).

¶ 103 The Board's conclusions of law are reviewed *de novo*. *Cinkus*, 228 Ill. 2d at 210-11. An agency's decision on a question of law is not binding on the reviewing court and, thus, the court's review is independent and not deferential. *Id.* at 210.

¶ 104 Cases that involve mixed questions of law and fact are subject to a clearly erroneous standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 392 (2001). A mixed question of law and fact typically arises when "the historical facts are not in dispute and the issue is whether the established facts satisfy the statutory standard." *Village of Hazel Crest v. Illinois Labor Relations Board*, 385 Ill. App. 3d 109, 113 (2008). An agency's decision is clearly erroneous "only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.'" *AFM Messenger*, 198 Ill. 2d at 395 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948)).

¶ 105 B. The Board's Determination that Sergeants are Supervisors Pursuant to Section 3(r) of the Act

¶ 106 The Act provides a comprehensive system of collective bargaining for those public employees and employers who fall within its scope. *City of Freeport v. Illinois State Labor Relations Board*, 135 Ill. 2d 499, 505 (1990). The Act specifies that a bargaining unit determined by the Board may not include both supervisors and nonsupervisors. 5 ILCS 315/3(s)(1) (West 2008). Our supreme court has explained the underlying rationale for this rule

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as follows:

"Supervisors are excluded from bargaining units under the Act to avoid the conflict of interest which arises when supervisors, who must apply the employer's policies to subordinates, are subject to control by the same union representing those subordinates." *City of Freeport*, 135 Ill. 2d at 517.

¶ 107 The term, "supervisor," is defined in section 3(r) of the Act as follows:

"[A]n employee whose principal work is substantially different than that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. Except with respect to police employment, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising that authority." 5 ILCS 315/3(r) (West 2008).

¶ 108 Section 3(r) includes a three-part test for determining whether police department employees are supervisors. "[P]olice employees qualify as supervisors within the meaning of the Act only if they: (1) perform principal work substantially different than their subordinates; (2) have authority in the interest of the employer to perform on or more of the 11 enumerated supervisory functions, or to effectively recommend such action; and (3) consistently use

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independent judgment in performing or recommending the enumerated actions." *City of Freeport*, 135 Ill. 2d at 512. "A police department employee will be deemed a supervisor and excluded from a bargaining unit only if he meets all three parts of the test." *Village of Broadview*, 402 Ill. App. 3d at 506 (citing *City of Freeport*, 135 Ill. 2d at 512). The Village, as the party seeking to exclude its police sergeants from a bargaining unit, has the burden of proving by a preponderance of the evidence that the sergeants are supervisors within the meaning of section 3(r) of the Act. *Village of Broadview*, 402 Ill. App. 3d at 506 (citing *Illinois Department of Central Management Services v. Illinois Labor Relations Board*, 382 Ill. App. 3d 208, 220-21 (2008)).

¶ 109 1. Whether the Sergeants' Principal Work is Substantially Different From Their Subordinates

¶ 110 In this case, the ALJ found that the sergeants' principal work is substantially different from their subordinate officers under both the "obvious and visible" test and the "nature and essence" test. The Board made no specific finding with regard to this prong of the three-part test under section 3(r) of the Act. The Board only adopted the ALJ's findings of fact and limited its review to whether the sergeants have supervisory authority to: (1) discipline or effectively discipline their subordinates by using letters of direction; (2) effectively recommend suspension; and (3) reward their subordinates when they complete annual evaluations.

¶ 111 The Village contends it is uncontested that the principal work of the sergeants is substantially different from the work of their subordinates. The Union did not contest this issue in its opening brief, but asserted in its reply brief that the issue is not properly before this court because the Board did not adopt the ALJ's decision regarding the principal work requirement.

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¶ 112 Supreme Court Rule 341(h)(7) (eff. July 1, 2008) states that "[p]oints not argued are waived and shall not be raised in the reply brief." "This rule has been enforced by the reviewing courts of our State." *In re Estate of Jacobs*, 189 Ill. App. 3d 625, 628 (1989).

¶ 113 Based on Supreme Court Rule 341(h)(7), the Union has waived its argument of this issue. Regardless of waiver, we are required to address this issue because all three parts of the test enumerated under section 3(r) must be satisfied for a police department employee to be deemed a supervisor. *Village of Broadview*, 402 Ill. App. 3d at 506.

¶ 114 A two-step inquiry is required to determine whether the employee's principal work is substantially different from that of his subordinates. *City of Freeport*, 135 Ill. 2d at 514. The first test is whether the employee's work is "obviously and visibly different" from that of his subordinates. *Id.* If the employee's work is considered to be "facially similar to those of the rank and file," the issue then becomes whether "the nature and essence" of his work is substantially different. *Id.* The nature and essence test is "a qualitative, rather than quantitative analysis," because it is the "*existence* of the supervisory authority, and the *ability* to exercise it to impact a subordinate's employment *at any time*," which changes the nature of the relationship between the sergeants and officers to the extent that renders the nature of their functions very different despite their facial similarity. (Emphasis in original.) *Id.* at 518. "Thus, if the employee's work is obviously or visibly different from that of his subordinates, or is substantially different in nature and essence from their work, then part one of the definition [of supervisor] is satisfied." *Metropolitan Alliance of Police v. Illinois Labor Relations Board*, 362 Ill. App. 3d 469, 476 (2005).

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¶ 115 In this case, the ALJ found that the patrol sergeants perform roll call, assign beats and equipment and approve vacation requests. The ALJ also found that the sergeants monitor the work of their subordinate officers. Sergeants also issue letters of direction, complete the majority of an officer's annual performance evaluation and review the evaluation with the officer. The ALJ concluded that the work performed by the sergeants was visibly different from that performed by rank-and-file officers.

¶ 116 Under the "nature and essence" test, the ALJ considered three factors: (1) whether the sergeants engage in patrols in a different manner than the rank-and-file; (2) the rank and supervisory hierarchy; and (3) the extent to which the alleged supervisor exercises supervisory authority over the subordinates. The ALJ initially noted that the sergeants patrol less frequently than other officers and that sergeants are not assigned to a specific beat each shift. Sergeants are expected to complete certain paperwork in connection with acting as a shift supervisor. While patrolling, sergeants are expected to be "productive" by making arrests and writing citations. The production rates of sergeants, however, are dramatically lower than those of the patrol officers. As a result, the ALJ concluded that patrol sergeants are patrolling in a different manner than the rank-and-file. The ALJ also determined that under the hierarchy of the chain of command in the department, sergeants have the authority to conduct roll call, assign beats, assign equipment, process and schedule vacation days, determine staffing needs, authorize overtime pay and issue emergency suspensions, all of which a patrol officer cannot do. In addition, sergeants are expected to provide direction and guidance to their subordinate officers to ensure that they are following proper police procedures and department directives.

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¶ 117 We agree with the ALJ's determination that the sergeants' principal work is substantially different from that of their subordinates. The record evidence supports this conclusion.

Although some of the sergeants, particularly the tactical and patrol sergeants, perform many of the same tasks as officers, the sergeants have many duties that officers do not have, as noted specifically by the ALJ. See also *Metropolitan Alliance of Police*, 362 Ill. App. 3d at 476-77 (finding that nature and essence of sergeants' work was substantially different where sergeants assigned beats, performed evaluations, resolved grievances, approved requests for vacation and overtime, addressed violations of the rules of conduct and played a role in the fashioning of departmental budgets and policy). Significantly, sergeants, not officers, are the highest ranking officers on duty for 50% of nights and weekends when the chief, deputy chiefs and commanders are not on duty. See *Id.* at 477 (citing *City of Freeport*, 135 Ill. 2d at 519). In total, the supervisory and administrative aspects of the sergeants' work is distinguishable both under the "obvious and visible" test and the "nature and essence" test. We conclude that the principal work of the Village's sergeants is substantially different from that of their subordinates and, therefore, the first part of the definition of "supervisor" is satisfied. *Metropolitan Alliance of Police*, 362 Ill. App. 3d at 477.

¶ 118 2. Indicia of Supervisory Authority

¶ 119 We next determine whether the sergeants perform at least 1 of the 11 duties enumerated in section 3(r) and whether they do so with the "independent judgment" required by the three-part test for determining whether police department employees are supervisors. "The presence of even one indicium of supervisory authority by independent judgment is sufficient to support a

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finding of supervisory status." *Department of Central Management Services v. Illinois State Labor Relations Board*, 278 Ill. App. 3d 79, 83 (1996). In this case, the issues of whether the sergeants have supervisory authority to effectively recommend a suspension and to reward their subordinates are dispositive.

¶ 120 a. Supervisory Authority and Independent Judgment to Effectively Recommend Suspension

¶ 121 The Board in *City of Sandwich v. Illinois Labor Relations Board*, 406 Ill. App. 3d 1006, 1012 (2011) found that sergeants were not supervisors because they did not "have the authority to suspend or terminate subordinates, but recommend suspension or termination," and that "sergeants' disciplinary recommendations [were] not always followed." The court in *City of Sandwich* noted that, while the Board's determinations were true, they missed the point of the policy underlying the Act. *Id.* The court stated that evidence included various instances where the chief imposed disciplinary measures that were different, "sometimes harsher, sometimes more lenient," from those recommended by the sergeant. There was evidence showing one instance where the chief imposed the discipline that had been recommended by the sergeant.

¶ 122 The court in *City of Sandwich* held that the Board's decision was clearly erroneous, reasoning that:

"[T]he very fact that the sergeants are required to investigate complaints against patrol officers and submit reports to the chief shows the type of conflict of interest between sergeants and patrol officers that section 3(s)(1) of the Act seeks to prevent. Even if the sergeant does not ultimately impose the disciplinary action

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on a patrol officer, it is the sergeant who is required to bring the issue to the attention of the chief, who does impose the discipline." *Id.*

¶ 123 The court also stated that a sergeant's independent judgment as to recommended discipline, as well as whether to even report an incident, "might as well be affected by bonds formed by common union brotherhood." *Id.* at 1013 (citing *City of Freeport*, 135 Ill. 2d at 519). The court concluded the sergeants were supervisors such that including them in the same bargaining unit as the patrol officers violated section 3(s)(1) of the Act. *City of Sandwich*, 406 Ill. App. 3d at 1013.

¶ 124 Significantly, for purposes of this case, "a recommendation need not be rubber-stamped to constitute discipline within the meaning of section 3(r) of the Act." *Village of Hazel Crest*, 385 Ill. App. 3d at 117. This court has previously explained that the term, "recommendation":

" 'implies some form of review by the person to whom the recommendation is made. \*\*\* [I]n the paramilitary-style police environment, with its emphasis upon a structured chain of command, it would be highly unlikely that a disciplinary recommendation would not be subject to review by a higher authority.' " *Id.* at 117-18 (quoting *City of Peru v. Illinois State Labor Relations Board*, 167 Ill. App. 3d 284, 290 (1988)).

¶ 125 In *Village of Hazel Crest*, the court concluded that the ALJ erred, as a matter of law, by finding the sergeants did not use independent judgment when disciplining their subordinates, where evidence was presented that the sergeants' recommendations for discipline were acted upon, albeit in only one documented instance. *Village of Hazel Crest*, 385 Ill. App. 3d at 118.

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The court reversed the Board's decision because the Village demonstrated its sergeants were supervisors within the meaning of the Act where: (1) they had the authority to issue verbal reprimands and recommend more severe disciplinary action; and (2) in the course of making such recommendations, they used independent judgment. *Id.* at 118-19. Notably, there was no evidence the chief's directive requiring sergeants to document all instances of wrongdoing affected the sergeants' discretion to choose between issuing a verbal reprimand and recommending greater disciplinary action based on the particular circumstances of the infraction. *Id.* at 118.

¶ 126 "An employee exercises 'independent judgment' when he makes a choice between two or more significant courses of action without substantial review by superiors." *Metropolitan Alliance of Police*, 362 Ill. App. 3d at 477-78. "It is the authority to use independent judgment in imposing discipline, rather than how often such discipline is imposed, which is important." *City of Freeport*, 135 Ill. 2d at 521. Our supreme court elaborated further on the issue of independent judgment:

"Certain supervisory functions are routine or ministerial in nature and do not generally require the use of independent judgment. The fact that performance of such functions may occasionally require the ranking officer to use discretion or independent judgment is not sufficient to satisfy the third prong of the supervisory definition. For example, the ranking officers do not consistently use independent judgment when exercising their authority to suspend patrol officers for tardiness exceeding 30 minutes, because such suspensions are required by orders of the

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chief. On the other hand, when the ranking officers exercise their authority to issue written reprimands and to recommend disciplinary suspension, they ordinarily must choose between two or more significant courses of action. Accordingly, the ranking officers consistently use independent judgment when exercising their authority to discipline patrol officers." *Id.*

¶ 127 In the instant case, Sergeant Valente was the only sergeant that provided testimony regarding the authority to recommend suspensions. He stated that it was his independent decision to recommend the suspension of an officer and that he did not consult with any higher ranking officer prior to making that determination. Sergeant Valente testified that he recommended between five and ten suspensions over a period of 13 years and that each of his recommendations for suspension were approved, although some were reduced to fewer days by the chief. Chief Popp testified that he does not conduct his own independent investigation prior to suspending a police officer and that he issued a suspension for each of the recommendations he received from the sergeants. Chief Popp stated that he does not "rubber stamp" the suspension because he considers mitigating circumstances from the officer prior to issuing the suspension.

¶ 128 Based on the record evidence, we find that the Village's sergeants have supervisory authority to effectively recommend a suspension. Moreover, it is clear that the Village's sergeants must make a choice between two or more significant courses of action without substantial review by superiors. In this case, prior to recommending a suspension, a sergeant first must determine whether the conduct of a subordinate officer warrants discipline and then

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must decide which type of discipline should issue. No evidence was presented that sergeants need to consult with a superior officer prior to recommending a suspension. In addition, there are no departmental guidelines directing sergeants which disciplinary action to take. The fact that the sergeant's recommendation for suspension is subject to review by the chief for potential mitigation purposes does not undercut the exercise of independent judgment by the sergeant in issuing the recommendation. *Village of Hazel Crest*, 385 Ill. App. 3d at 117-18; *City of Peru*, 167 Ill. App. 3d at 290. Although Chief Popp's approval of every suspension recommended by the sergeants is afforded some weight, it is the authority to use independent judgment in recommending the suspension that is determinative. *City of Freeport*, 135 Ill. 2d at 521. We conclude that sergeants have the supervisory authority to use independent judgment to effectively recommend the suspension of officers. *Village of Hazel Crest*, 385 Ill. App. 3d at 117-18; *City of Peru*, 167 Ill. App. 3d at 290.

¶ 129 We find the Village has met its burden with regard to the second and third prongs of the test for determining whether police department employees are supervisors pursuant to section 3(r). Sergeants have the authority to effectively recommend suspensions of subordinate officers and they consistently use independent judgment in exercising such authority. *Village of Hazel Crest*, 385 Ill. App. 3d at 117-18; *City of Peru*, 167 Ill. App. 3d at 290.

¶ 130 b. Supervisory Authority and Independent Judgment to Reward Subordinate Officers

¶ 131 The Union asserts that the sergeants lack the authority and independent judgment to reward eligible officers longevity and merit pay. The Union argues that the evaluations are conducted on a consensus basis between the sergeants and commanders and, therefore, do not

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involve the requisite use of independent judgment to constitute supervisory authority under the Act. In addition, because the command staff, on occasion, changes the evaluation scores, sergeants do not exercise the requisite level of independent judgment. The Union also contends that the evaluations are not adopted as a matter of course.

¶ 132 The Village argues that sergeants exercise their supervisory authority to reward subordinate officers by completing the majority of the performance evaluations, which play a significant role in the determination of whether a subordinate officer receives merit/longevity pay. The Village asserts that the Board's decision was clearly supported by the evidence.

¶ 133 We agree with the Board's determination of this issue. Section 3(r) of the Act defines a supervisor as an employee who has the authority to reward. 5 ILCS 315/3(r) (West 2008). That authority also requires "the consistent use of independent judgment." *Id.* As previously stated, "[a]n employee exercises 'independent judgment' when he makes a choice between two or more significant courses of action without substantial review by superiors." *Metropolitan Alliance of Police*, 362 Ill. App. 3d at 477-78. Here, the determining factor is the authority to use independent judgment to reward, rather than how and whether the reward itself is distributed to the subordinate officer. *City of Freeport*, 135 Ill. 2d at 521.

¶ 134 The record in this case shows that sergeants can award up to 50 of 100 available points in the first section of the evaluation form for officers. The first section of the evaluation form consists of 10 questions with a maximum available score of five points for each question. Each question incorporates an evaluation of the essential functions required of the officer, including, for example, judgment/decision making, cooperation and attitude, leadership and

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communications. The sergeant awards a score and provides constructive, subjective comments for each of the available questions. The third section of the evaluation form allows the sergeant to award between 0 to 15 points subjectively.

¶ 135 Sergeant Valente testified that he is not required to review points awarded with a commanding officer prior to completing the evaluation. Sergeant Heckermann testified that he prepares evaluations of subordinate officers upon the direction of his commanding officers. He did not provide testimony, however, with regard to whether he consults with his commanding officers prior to awarding points. Instead, the testimony of Sergeants Heckermann and Murray shows that higher ranking officers, on occasion, directed the sergeants to change their evaluation scores *after* the points already were awarded.

¶ 136 The fact that sergeants were told on occasion to change their evaluation scores is of no moment in our determination of whether the sergeants exercised their supervisory authority to reward and whether they consistently used independent judgment to do so. First, the record supports the conclusion that sergeants have supervisory authority to reward. For example, a 2008 evaluation of Officer Argyrakis shows that he received a score of 71 on his annual evaluation, which qualified him to receive a \$500 merit bonus. In 2009, Officer Argyrakis received a score of 59 on his annual evaluation, which was two points below the score needed to qualify for a merit/longevity bonus. Second, the record demonstrates that the Village's sergeants must make a choice between two or more significant courses of action without substantial review by superiors when scoring officers' evaluations. A sergeant must first evaluate the performance of the officer throughout the course of the year and then must decide how many points to award

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on the annual evaluation. No evidence was presented that sergeants are required to consult with their commanding officers *prior* to awarding evaluation scores. In addition, there are no departmental guidelines directing sergeants how to award points to officers. The fact that the sergeants' evaluations are subject to review by higher ranking officers does not diminish the use of independent judgment by the sergeant in completing the evaluation. *Village of Hazel Crest*, 385 Ill. App. 3d at 117-18; *City of Peru*, 167 Ill. App. 3d at 290. We conclude that sergeants have the supervisory authority to reward and consistently use independent judgment in exercising such authority. *Id.*

¶ 137

### III. CONCLUSION

¶ 138 Based on the foregoing, we affirm the decision of the Illinois Labor Relations Board that sergeants employed by the Village of Streamwood are supervisors within the meaning of section 3(r) of the Act.

¶ 139 Affirmed.