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required to use independent judgment in exercising such authority.

¶ 2 This appeal centers on a dispute between the Village of Richton Park (Village) and the Illinois Fraternal Order of Police Labor Council (Union) as to whether sergeants employed by the Village are "supervisors" as defined by section 3(r) of the Illinois Public Labor Relations Act (Act) (5 ILCS 315/3(r) (West 2008)). Following a hearing, the Illinois Labor Relations Board (Board) found the sergeants employed by the Village are not supervisory employees within the meaning of Section 3(r) of the Act because they did not have independent discretion outside of the department's progressive discipline policy to recommend or institute discipline of a subordinate. The Village appealed the Board's decision directly to this court under section 9(i) of the Act (5 ILCS 315/9(i) (West 2008)). For the reasons that follow, we reverse the Board's decision.

¶ 3 BACKGROUND

¶ 4 On January 7, 2010, the Illinois Fraternal Order of Police Labor Council (Union), filed a majority interest representation petition with the State Panel of the Board. The Union sought to represent a bargaining unit consisting of all full-time sworn officers in the rank of sergeant employed by the Village. The Village objected to the petition, contending that the petitioned-for employees held supervisory positions as defined by section

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3(r) of the Act because they had the authority and independent judgment to recommend discipline. The Village alleged that because the sergeant position within the Village police department is supervisory in nature, the sergeants are excluded from the Act's coverage.

¶ 5 A hearing was conducted before a Board Administrative Law Judge (ALJ) on July 8, 2010. The facts adduced during the hearing established that the Village's chief of police and deputy chief both work a normal 40-hour work week, with the chief of police working 9 a.m. to 5 p.m. Monday through Friday and the deputy chief working 8 a.m. to 4 p.m. Monday through Friday. The Village police department's sergeants are designated to work either the midnight, day, or afternoon shift. During shifts, the sergeant is the highest-ranking officer on duty for routine patrol operations. Occasionally there is no sergeant on duty during a midnight or day shift, and during those times a corporal or the most senior patrol officer would be in charge.

¶ 6 During the hearing, Village Police Chief Vito Mannino testified the Village Police Department's guidelines and procedures for handling discipline provides for a progressive form of discipline, including oral reprimands, written reprimands and suspensions for up to 5 days. Chief Mannino testified sergeants are also tasked with "counseling" patrol officers. He

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explained counseling is "just where one of the officers is talked to by the sergeant for maybe a minor infraction or something like that that just needs to be addressed." Situations where a sergeant might counsel an officer include where an officer is late for work. Sergeants are able to counsel an officer without conferring with a higher-ranked officer prior. The form used during counseling is kept in the officer's personnel file for at least one year. Chief Mannino explained, however, that:

"[c]ounseling is really, by our policy, counseling is not considered discipline. Discipline doesn't begin until at least the oral reprimand stage."

¶ 7 Chief Mannino testified sergeants have the authority to recommend discipline with respect to each of the progressive discipline levels under the policy. When asked under what circumstances a sergeant could recommend an oral reprimand, Chief Mannino explained in most cases an oral reprimand is recommended where there has been a "repeated pattern of tardiness." While the sergeant does not need permission to recommend an oral reprimand, Chief Mannino noted the final decision as to whether an oral reprimand will be issued to an officer lies with him after the sergeant prepares an investigation report recommending the discipline. A sergeant's recommendation for oral reprimand is documented and kept in the officer's personnel file.

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¶ 8 Chief Mannino explained he reviews each recommendation for discipline and meets with the offending officer in order to determine whether the recommendation is warranted. If an officer who has been issued an oral reprimand commits the same infraction again, the sergeant may then recommend a written reprimand under the progressive discipline policy. Chief Mannino testified he imposes the sergeant's recommended discipline the majority of the time, especially where tardiness is concerned because discipline in those instances is so "cut and dry."

¶ 9 The Village introduced into evidence two recommendations for written reprimand issued by Sergeant Stevens and Sergeant Nieukirk. Sergeant Stevens recommended a written reprimand after a probationary officer failed to report on time for an overtime shift. Upon review, Chief Mannino imposed an oral reprimand instead of the recommended written reprimand. Chief Mannino testified he could not recall why the lesser punishment was imposed. Sergeant Nieukirk recommended a written reprimand after an officer failed to report to work on time for an overtime shift. The same officer had previously been counseled for tardiness on a separate occasion and administered an oral reprimand for tardiness on a separate occasion. Chief Mannino reviewed Sergeant Nieukirk's recommendation, met with the officer, and then imposed the recommended discipline of a written

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reprimand.

¶ 10 The Village also introduced into evidence two recommendations for suspension of an officer issued by Sergeant Nieukirk. In December 2008, Sergeant Nieukirk recommended a one day suspension for an officer who was continuing to arrive late for his assigned shifts despite receiving counseling, an oral reprimand and a written reprimand. In June 2009, Sergeant Nieukirk recommended a two day suspension for an officer who was continuing to arrive late for his assigned shifts despite receiving counseling, an oral reprimand, a written reprimand and a one day suspension. Chief Mannino imposed the recommended suspension in both instances.

¶ 11 Chief Mannino explained that under the police department's progressive discipline policy for tardiness, the first time an officer is late the sergeant on duty is required to complete a counseling form. Every time the officer is late without excuse after that, the sergeant is "automatically required to take it to the next level" of discipline under the policy. With regards to attendance and tardiness issues, Chief Mannino testified sergeants have very little discretion in recommending discipline under the department's progressive discipline and attendance policies.

¶ 12 Sergeant Nieukirk testified during the hearing that he has

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not had to address other issues besides tardiness or attendance that might lead to a recommendation for discipline during his 15-year career as a sergeant. Sergeant Nieukirk testified that with regards to attendance issues, "[sergeants] are to basically follow the role of progressive discipline. So like I said, I can't take a step backwards and recommend a counseling session for somebody that's already had one, that I have to follow the next step in discipline." While Sergeant Nieukirk admitted he has never had to deal with a nonattendance discipline issue, he noted he does have discretion under the department's policy to recommend different levels of discipline based on the circumstances of the particular incident.

¶ 13 Following the hearing, the ALJ found the principal work of the Village's police sergeants "is substantially different from that of their subordinates." However, the ALJ found the Village had failed to show that the sergeants were supervisors. In determining the sergeants here were not supervisors within the meaning of the Act, the ALJ found the "sergeants lack the authority to effectively recommend discipline with consistent independent judgment." While the ALJ recognized sergeants could counsel officers, the ALJ noted Chief Mannino specifically indicated such counseling did not constitute discipline under department procedures. The ALJ found Chief Mannino's testimony

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also indicated that when a sergeant learns an officer was tardy without excuse--which the record reflects is one of the more common reasons why discipline is initiated within the department--the department's progressive discipline policy clearly dictates how the sergeant should respond. The ALJ noted that the Village did not cite an example of a situation where the sergeant would have independent discretion outside of the department's progressive discipline policy to recommend or institute discipline of a subordinate.

¶ 14 Accordingly, the ALJ found "employees in the title of sergeant employed by the [Village] are not supervisory employees within the meaning of Section 3(r) of the Act." The ALJ recommended Petitioner be certified as the exclusive representative of all sworn police officers in the rank of sergeant employed by the Village. The Board adopted the ALJ's recommended decision and order on January 18, 2011. The Village appeals.

¶ 15 ANALYSIS

¶ 16 The sole issue presented for review is whether the Board erred in determining that employees employed in the rank of sergeant by the Village are not "supervisory" employees as defined by the Act.

¶ 17 The standard of review applied to an agency's findings

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depends on the type of question presented. *Village of Hazel Crest v. Illinois Labor Relations Board*, 385 Ill. App. 3d 109, 113 (2008). An agency's findings and conclusions on questions of fact are deemed *prima facie* correct and will not be disturbed unless against the manifest weight of the evidence; however, where the question presented is a purely legal one, such as the proper interpretation of a statute, our review is *de novo*. *Village of Hazel Crest*, 385 Ill. App. 3d at 113. Mixed questions of law and fact--such as the type presented here--are subject to a clearly erroneous standard of review. *Village of Hazel Crest*, 385 Ill. App. 3d at 113 ("This appeal involves a mixed question of law and fact: we are asked to review the Board's application of undisputed facts to section 3(r) of the Act, which defines the term 'supervisor' and is relevant to whether the sergeants may form collective bargaining units.") "An agency 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.' " *Village of Hazel Crest*, 385 Ill. App. 3d at 113 (quoting *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001)).

¶ 18 The Act is intended to provide a "comprehensive system of collective bargaining for those public employees and employers who fall within its scope." *City of Freeport v. Illinois State*

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Labor Relations Board, 135 Ill. 2d 499, 505 (1990). One of the purposes of the Act is "to grant employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection." 5 ILCS 315/2 (West 2008). However, the Board cannot certify for the purposes of collective bargaining a unit consisting of either both supervisors and nonsupervisors, or supervisors only, unless the employer agrees. 5 ILCS 315/3(s) (West 2008); *Village of Hazel Crest*, 385 Ill. App. 3d at 114. " 'Supervisors are excluded from bargaining units under the Act to avoid the conflict of interest [that] arises when supervisors, who must apply the employer's policies to subordinates, are subject to control by the same union representing those subordinates.' " *Village of Hazel Crest*, 385 Ill. App. 3d at 114 (quoting *City of Freeport*, 135 Ill. 2d at 517).

¶ 19 The term "supervisor" is defined in the statute as:

"an employee whose principal work is substantially different from that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote,

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discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of these 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, State supervisors not withstanding. In addition, in determining supervisory status in police employment, rank shall not be determinative."

5 ILCS 315/3(r) (West 2008).

¶ 20 Illinois courts have recognized a police officer meets the statutory definition of supervisor only if he: "(1) performs principal work substantially different from that of his subordinates; (2) has authority in the interest of the employer to perform one or more of the 11 enumerated supervisory functions or to effectively recommend such action; and (3) consistently uses independent judgment in performing or recommending the enumerated actions." *Village of Hazel Crest*, 385 Ill. App. 3d at

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114 (citing *City of Freeport*, 135 Ill. 2d at 512.) " 'The presence of even one indicum of supervisory authority accompanied by independent judgment is sufficient to support a finding of supervisory status.' " *Id* (quoting *Metropolitan Alliance of Police v. Illinois Labor Relations Board, State Panel*, 362 Ill. App. 3d 469, 477 (2005).)

¶ 21 The parties stipulated below that the sergeants' principal work here is substantially different from the work of their subordinate officers. What remains in dispute is whether the sergeants employed by the Village have the authority to effectively recommend discipline with the type of independent judgment deemed sufficient to support a finding of supervisory status under section 3(r) of the Act.

¶ 22 In *City of Freeport*, our supreme court held police sergeants employed by the city of Freeport were supervisors under section 3(r) of the Act because the evidence presented established those sergeants had authority to discipline patrol officers through verbal and written reprimands. *City of Freeport*, 135 Ill. 2d at 518-19. There, the Board determined the sergeants' authority to direct was so circumscribed by orders from the chief that it did not require independent judgment. Similarly, suspensions were only imposed pursuant to the chief's orders, and, therefore, did not involve the exercise of independent judgment. The Board

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noted other disciplinary measures were imposed so rarely by sergeants that those measures did not involve the consistent use of independent judgment.

¶ 23 In finding the Board's decision was clearly erroneous, the court noted:

"Certain supervisory functions are routine or ministerial in nature and do not generally require the use of independent judgment. The fact that performance of those 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 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

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courses of action. Accordingly, the ranking officers consistently use independent judgment when exercising their authority to discipline patrol officers." *Id* at 521.

The court held it is the sergeant's authority to use independent judgment in imposing discipline, rather than how often such discipline is imposed, that is important. *Id*.

¶ 24 In *Metropolitan Alliance of Police, Bellwood Command Chapter No. 339 v. Illinois Labor Relations Board*, 354 Ill. App. 3d 672, 680 (2004) (*Bellwood*), the Board held that sergeants and lieutenants employed by the Village of Bellwood were supervisors within the meaning of the Act because they possessed discretionary authority to choose between different disciplinary measures for minor infractions committed by their subordinates. The union argued on appeal that the sergeants lacked discretion to discipline in light of a department policy making it a violation to report instances of wrongdoing by subordinates. *Bellwood*, 354 Ill. App. 3d at 680. This court rejected the union's contention, holding the directive to report did not affect the sergeants' discretion to discipline. *Id* at 683.

¶ 25 Likewise, in *Village of Hazel Crest*, this court held the Village of Hazel Crest met its burden of showing that sergeants are supervisors within the meaning of the Act because they had

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authority to issue verbal reprimands, authority to issue more severe disciplinary action, and consistently used independent judgment in exercising such authority. *Village of Hazel Crest*, 385 Ill. App. 3d at 118-19. The Village police department's disciplinary procedure was governed by general order of the police chief, which set out a progressive disciplinary scheme that incorporated counseling and training as well as punitive measures as forms of discipline. Testimony by the deputy chief and a department sergeant confirmed that while sergeants had authority to counsel, train, issue verbal warning for minor infractions and recommend disciplinary measures beyond verbal warnings, they had no authority to initiate those measures independently. *Id* at 111-12. The ALJ found the sergeants were not supervisors within the meaning of the Act, noting they were required to report all misconduct, such as tardiness and absenteeism, to the current police chief. The ALJ found the chief's directive to report all instances of misconduct terminated the sergeant's discretion to discipline. *Id* at 112. This court found the ALJ's decision was clearly erroneous.

¶ 26 On appeal, the Board maintained that the sergeants' authority to recommend greater disciplinary action did not constitute discipline under section 3(r) because the recommendations were subject to independent review by the deputy

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chief and chief. In rejecting the Board's contention, the court noted a recommendation need not be rubber-stamped to constitute discipline within the meaning of the Act. *Id* at 117. The court recognized:

" '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 higher authority.' " *Id* at 117-18 (quoting *City of Peru v. Illinois State Labor Relations Board*, 167 Ill. App. 3d 284, 290 (1988)).

The court recognized the general order made clear sergeants had the authority to recommend discipline greater than a verbal warning. While the Board contended the sergeants' authority was merely ministerial in nature and did not require the use of independent judgment, the court noted there was no evidence that the chief's directive affected the sergeants' discretion to choose between issuing a verbal reprimand and recommending greater disciplinary action based on the particular circumstances

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of the infraction. *Id.* See also *City of Sandwich v. Illinois Labor Relations Board*, 406 Ill. App. 3d 1006, 1012 (2011) ("There is no less of a conflict of interest where the sergeants are required to investigate, report, and recommend discipline as opposed to ultimately imposing the discipline. A sergeant's independent judgment as to recommended discipline, as well as whether to even report an incident, might well be affected by bonds formed by common union brotherhood.")

¶ 27 By contrast, in *Village of Broadview v. Illinois Labor Relations Board*, 402 Ill. App. 3d 503 (2010) the Board determined sergeants employed by the Village of Broadview police department were not supervisors under section 3(r) of the Act. The Board concluded the sergeants lacked authority to suspend or discipline a subordinate and that they merely report misconduct to the lieutenant, who independently investigates the matter and determines what discipline to impose. *Id.* at 509. The Board also found that the sergeants' reports to the lieutenant in such instances did not constitute a recommendation for discipline. In affirming the Board's decision, this court noted the evidence reflected that, when a subordinate engaged in improper conduct, a sergeant writes a report to the lieutenant or to the chief outlining the facts of the incident, but no actual recommendation for discipline is ever made. *Id.* at 508. While this court

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recognized sergeants may orally counsel subordinates who engage in inappropriate behavior, the court noted such counseling sessions are neither memorialized nor recorded in the patrol officer's personnel file. *Id.* Two sergeants also testified that they had never reprimanded a subordinate. *Id.*

¶ 28 In this case, the Board contends the sergeants' authority to recommend disciplinary action does not constitute discipline within the meaning of section 3(r) of the Act because the recommendations are only made pursuant to the progressive disciplinary policy adopted by the department and are subject to independent review by the chief. Specifically, the Board contends the sergeants' required adherence to the progressive discipline policy reflects that they are not consistently required to use independent judgment in performing or recommending disciplinary actions.

¶ 29 We recognize the sergeants employed by the Village here do not actually reprimand the officer themselves; instead, the sergeants prepare a written recommendation for discipline that is then submitted and independently reviewed by the chief. While it is the chief who ultimately decides what discipline will be enacted against an officer for an infraction, the investigating sergeant has some discretion under the progressive discipline policy as to what level of discipline is recommended for a

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particular infraction.

¶ 30 As we noted in *Hazel Crest*, however, "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 117-18. When dealing with a paramilitary-style police environment--where a great deal of emphasis is placed upon a structured chain of command--it is entirely expected that a disciplinary recommendation will be subject to an independent review by a higher authority before implementation. *Id* (citing *City of Peru*, 167 Ill. App. 3d at 290). Accordingly, we find the fact that a sergeant's recommendation for discipline is ultimately subject to the chief's independent review does not support the Board's finding that the sergeants are not supervisors under section 3(r) of the Act. See *Id*.

¶ 31 Moreover, while Chief Mannino and Sergeant Nieukirk each admitted that sergeants have very little discretion in recommending discipline under the department's progressive disciplinary and attendance policies where attendance-related infractions are concerned, both testified sergeants do have discretion under the department's discipline policy to recommend different levels of discipline based on the circumstances of the particular incident when nonattendance-related disciplinary matters present themselves. We recognize that Chief Mannino

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testified most disciplinary issues within the department are attendance related. Further, Sergeant Nieukirk also admitted that he has never had to deal with a nonattendance discipline issue during his 15-year career. Notwithstanding, Sergeant Nieukirk specifically testified he has discretion under the policy in terms of the level of discipline he may recommend based on the circumstances of a particular nonattendance-related disciplinary issue if such an issue ever arises. On cross-examination, Chief Mannino was also questioned regarding whether a sergeant's ability to recommend discipline is clearly "spelled out by policy and practice" in all situations:

"Q. Okay. Can you think of an instance where it was an officer involved and a sergeant made a recommendation on something other than tardiness or attendance?

[Chief Mannino]: A. I don't think we've had anything. Well, there was one incident.

Q. Okay.

A. Where a corporal did, basically did a press conference along with an officer. So we -- I believe that was handled by a sergeant.

Q. And do you remember what came out of

that?

A. The corporal was suspended for one day, and I believe a written reprimand to the officer.

Q. And those disciplinary actions were imposed by you?

A. Yes.

Q. So when you testified that the level of discipline recommended by the sergeant is whatever they deem appropriate, that's not really true; is it? Isn't that spelled out by policy and practice?

A. It depends on what the issue is. I mean, we have -- the tardiness one, that's cut and dry. I don't know. Use of force as an example, they have a full gamut of saying, this is what I think happened.

Q. That they could do?

A. That they would recommend.

Q. But you testified that there have not been any instances like that, to your knowledge?

A. Right."

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¶ 32 In determining sergeants were not supervisors under the Act, the ALJ found the Village had not cited "any example of a situation where a sergeant would have discretion in counseling or recommending discipline of a subordinate." We note, however, that our supreme court has recognized " '[i]t is the authority to use independent judgment in imposing discipline, rather than how often such discipline is imposed, [that] is important.' " *Id* at 118 (quoting *City of Freeport*, 135 Ill. 2d at 521). The evidence presented here indicates sergeants do have the authority to recommend varying levels of discipline based on the circumstances of a particular nonattendance-related infraction if such infractions occur. While such nonattendance-related infractions are admittedly rare within the department, "the fact that the ranking officers exercise this authority infrequently is proof that patrol officers do not warrant discipline rather than that their supervisors do not use independent judgment when they impose discipline." See *City of Freeport*, 135 Ill. 2d at 521.

¶ 33 Based on the record before us, we find the Village met its burden of showing that its sergeants are supervisors within the meaning of section 3(r) of the Act. While we agree with the Board that a sergeant's ability to recommend discipline where attendance-related disciplinary matters are concerned is clearly circumscribed by the department's progressive discipline and

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attendance policies, the evidence presented indicates the progressive discipline policy does not impinge on a sergeant's authority to recommend varying levels of discipline based on the particular circumstances of a nonattendance-related infraction. Accordingly, we find the Board's decision that the sergeants employed by the Village are not supervisors under section 3(r) of the Act is clearly erroneous. See *Village of Hazel Crest*, 385 Ill. App. 3d at 118-19.

¶ 34 CONCLUSION

¶ 35 We reverse the Board's decision.

¶ 36 Reversed.