2012 IL App (1st) 111692-U

FIRST DIVISION
March 26, 2012

No. 1-11-1692

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE ILLINOIS FRATERNAL ORDER OF POLICE, LABOR COUNCIL,	)	Petition for Review from the Illinois Labor Relations Board, State Panel
Petitioner,	)	
v.	)	Agency Docket No. S-RC-11-034
THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL, JACALYN ZIMMERMAN, Chairman, MICHAEL HADE, MICHAEL COLI, JESSICA KIMBROUGH, and ALBERT WASHINGTON, Members, and THE CITY OF CARBONDALE,	)	
Respondents.	)	

O R D E R

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

Held: The Illinois Labor Relations Board, State Panel, properly dismissed petition seeking to certify a collective bargaining representative for police sergeants employed by the City of Carbondale, where those sergeants were properly found to be supervisors pursuant to the Illinois Public Labor Relations Act by virtue of their authority to discipline subordinates.

¶ 1 Petitioner, the Illinois Fraternal Order of Police, Labor Council (IFOP), seeks review of the decision and order of respondent, Illinois Labor Relations Board, State Panel (Labor Board),

rejecting and dismissing the IFOP's request to be certified as the exclusive collective bargaining representative of all police sergeants employed by the respondent, the City of Carbondale (the City). For the following reasons, we affirm the decision of the Labor Board.

¶ 2 I. BACKGROUND

¶ 3 On August 19, 2010, the IFOP filed a petition with the Labor Board seeking to represent a bargaining unit consisting of all the police sergeants employed by the City, pursuant to the Illinois Public Labor Relations Act (Act). 5 ILCS 315/1 *et seq*. (West 2010). The IFOP already represented those police officers employed by the City below the rank of sergeant. The City opposed that petition, arguing that because its sergeants are supervisors under section 3(r) of the Act (see 5 ILCS 315/3(r) (West 2010)), they were excluded from coverage under the Act and could not form a bargaining unit pursuant to section 3(s)(1). See 5 ILCS 315/3(s)(1) (West 2010). An administrative law judge (ALJ) conducted a hearing on the IFOP's petition on December 8, 2010.

¶ 4 At that hearing, the ALJ heard testimony from a number of the City's police officers, including Deputy Police Chief Jeff Grubbs, Administrative Lieutenant Heather Reno, Lieutenant Mark Goddard, and Patrol Sargent Charles Shiplett. Various stipulations and documentary evidence were also entered into the record. The evidence presented at the hearing established that the City's police department included a total of 66 sworn officers, including: one chief of police; one deputy chief; five lieutenants; 10 sergeants; and 49 patrol officers. The department also employed a number of civilian employees, and who were divided into three divisions: (1) a patrol division; (2) an investigations bureau; and (3) an administrative services division. Each division, in turn, is divided into a number of units, with one or more sergeants assigned to each unit as follows: (1) six sergeants assigned to the patrol division, with two sergeants assigned to each of the department's three daily

shifts; (2) two sergeants assigned to the investigations bureau, one each to the detective unit and the street crimes unit; and (3) two sergeants assigned to the administrative services division–an administrative sergeant and a traffic and property unit sergeant. Finally, one or more of the patrol officers were also assigned to each unit, with the exception of the newly formed traffic and property unit, for which no patrol officers had yet been designated.

¶ 5 The parties also presented evidence regarding the extent to which the City's police sergeants exercised any of the 11 supervisory functions recognized under the Act.[1] After reviewing this evidence, the ALJ issued a recommended decision and order, in which she found that the City's patrol, detective, administrative services, and street crimes unit sergeants were all supervisors under the Act because these sergeants all had the authority to discipline or direct subordinates. The ALJ specifically noted that the authority to "discipline" subordinates–or effectively recommend such discipline–was demonstrated by evidence that all sergeants could issue negative written performance evaluation forms (POF's) and request letters of reprimand as part of the police department's progressive disciplinary system. The authority to "direct" was established by evidence that patrol division sergeants could substantively correct the reports of patrol officers and detective division sergeants could assign detectives to specific cases using their independent judgment. While the ALJ also found that the traffic unit and property sergeant was not a supervisor because that sergeant did not oversee any subordinates, the ALJ concluded it would not be appropriate to certify a collective bargaining unit that only included a single member. The ALJ, therefore, recommended that the

[1] These supervisory functions include the authority 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 ***." 5 ILCS 315/3(r) (West 2010).

IFOP's petition be dismissed in its entirety.

¶ 6 The IFOP filed exceptions to the ALJ's recommended decision and order, and the City filed a written response as well as a cross-exception asserting that the evidence established its sergeants, additionally, had the authority to adjust the grievances of their subordinates. On May 19, 2011, the Labor Board entered a brief written order adopting the ALJ's reasoning, in its entirety, and upholding her recommended decision and order. The IFOP has now filed a timely petition with this court seeking direct review of the Labor Board's final decision.

¶ 7 II. ANALYSIS

¶ 8 Before this court, the IFOP contends the Labor Board improperly upheld the ALJ's recommended decision and order because the ALJ's analysis contained a number of incorrect findings of fact and conclusions of law. Because we find the ALJ properly found that the City's sergeants have the authority to discipline their subordinates, we affirm the Labor Board's decision.

¶ 9 A. Standard of Review

¶ 10 Our review of the Labor Board's decision is governed by the Administrative Review Law. 5 ILCS 315/11(e) (West 2010); 735 ILCS 5/3-113 (West 2010). Our review extends to all questions of law and fact presented by the record. 735 ILCS 5/3-110 (West 2010). "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 Bd.*, 216 Ill. 2d 569, 577 (2005). Specifically, it is well established:

> "This court may apply three standards of review when reviewing an agency's decision. On questions of fact, we deem the agency's findings and conclusions to be *prima*

> *facie* true and correct, and we will overturn such findings only if they are against the manifest weight of the evidence. [Citation.] A determination is against the manifest weight of the evidence if the opposite conclusion is clearly evident. [Citation.] Questions of law we review *de novo*, granting no deference to the agency. [Citation.] Mixed questions of law and fact (where historical facts are established or undisputed, and the issue is whether those facts satisfy the statutory standard) are examined with a standard of review of clearly erroneous. [Citation.] An agency's decision is 'clearly erroneous' when the reviewing court is left with a firm and definite conviction that the agency has committed a mistake. [Citation.]" *City of Sandwich v. Illinois Labor Relations Bd.*, 406 Ill. App. 3d 1006, 1008 (2011) (citing *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228 Ill. 2d 200, 210-11 (2008)).

¶ 11 B. Legal Framework

¶ 12 "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 Bd.*, 135 Ill. 2d 499, 505 (1990). However, the Act clearly specifies that a bargaining unit certified by the Labor Board may not include both supervisors and nonsupervisors, except under circumstances not at issue here. See 5/ILCS 315/3(s)(1) (West 2010). As our supreme court has explained, supervisors are excluded from bargaining units that also include their subordinates 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. As such, section 3(r) of the Act provides, in relevant part, as follows:

> " 'Supervisor' is 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, 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, State supervisors notwithstanding. In addition, in determining supervisory status in police employment, rank shall not be determinative. The Board shall consider, as evidence of bargaining unit inclusion or exclusion, the common law enforcement policies and relationships between police officer ranks and certification under applicable civil service law, ordinances, personnel codes, or Division 2.1 of Article 10 of the Illinois Municipal Code, but these factors shall not be the sole or predominant factors considered by the Board in determining police supervisory status." 5/ILCS 315/3(r) (West 2010).

¶ 13 Thus, a "police officer meets this 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 v. Illinois Labor Relations Bd.*, 385 Ill. App. 3d 109, 114 (2008). While the existence of any one of the 11 enumerated supervisory functions–accompanied by independent judgment–is sufficient to support a finding that a police

department employee is a supervisor (*id.*), that employee will be deemed a supervisor and excluded from a bargaining unit only if he meets all three parts of the above test. *City of Freeport*, 135 Ill. 2d at 512. As the party seeking to exclude its police sergeants from a bargaining unit, the City had the burden of proving, by a preponderance of the evidence, that its sergeants are supervisors within the meaning of section 3(r) of the Act. *Village of Broadview v. Illinois Labor Relations Bd.*, 402 Ill. App. 3d 503, 506 (2010).

¶ 14 C. Disciplinary Authority

¶ 15 Finding them to be dispositive, we first address the IFOP's contentions that the ALJ's analysis contained a number of incorrect findings of fact and conclusions of law regarding the authority of the City's police sergeants to discipline their subordinates.

¶ 16 1. Factual Findings

¶ 17 The IFOP first asserts that the ALJ was incorrect when it stated in its recommended decision and order: "[n]egative POF's are written records of oral reprimands. The department considers negative POF's to be disciplinary." We disagree.

¶ 18 Among the documentary evidence produced at the hearing were job descriptions of the various types of sergeants employed by the City, with each description indicating that one of the sergeant's primary duties being "supervision." Additionally, the parties presented a number of the City police department's "General Orders." One of these general orders concerned "Performance Appraisals," and contained a provision stating that a "Performance Observation form (POF) shall be utilized on a daily basis (as needed) between evaluations to document effective or superior performance, positive work skills, ineffective or unsatisfactory performance or minor infractions of Departmental rules, regulations and policies, and to document remedial training. In documenting

unsatisfactory performance, the supervisor should define actions to be taken to improve performance."

¶ 19 Another general order dealt with "Discipline/Suspension/Relief from Duty." That general order generally indicates that the department's disciplinary policy is "intended to be corrective and progressive in nature," and supervisors have a responsibility to, when necessary, take "suitable disciplinary measures to ensure adherence to Department procedures." To that end, this general order goes on to note that employee counseling and remedial training are considered non-disciplinary action, and such incidents "may be documented in the employee's Performance Observation file as a training/neutral entry." In contrast, "Disciplinary Actions" include oral reprimands, written reprimands, suspensions without pay, demotion in rank or position, and discharge from employment. Oral reprimands are defined as: "[a]n oral warning that some action, lack of action, or level of performance is unacceptable and will result in further disciplinary action if repeated or continued." The order further provides that such oral reprimands "may be documented in the member or employee's Performance Observation file as a negative entry." Lastly, this order provides that supervisors "are responsible for the counseling, oral reprimands, and the initiation of written discipline of Department employees under their command" and "[r]ecords of oral reprimands should be maintained by the supervisor on the Performance Observation form." An example of a written record of an oral reprimand was introduced at the hearing, identified as a "Negative (-) entry in Performance Observation File (POF)."

¶ 20 Finally, the ALJ also heard testimony regarding these issues. Deputy Chief Grubbs testified that an employee's POF file contained, among other things, "documented oral reprimands." Lieutenant Reno also testified that placing negative entries into an employee's POF file constituted

"discipline." In light of this factual record, we fail to see how one could come to any other conclusion than the one reached by the ALJ; *i.e.*, that negative POF entries were part of the department's overall system of discipline.

¶ 21 Nevertheless, before this court, the IFOP asserts the ALJ's analysis, somehow, reflect her incorrect understanding that *all* entries in the POF file are negative and constitute discipline, while "the record indicates that POF's can contain both positive and negative entries." We do not find this argument to be well-founded.

¶ 22 Clearly, the IFOP is correct to note, the evidence presented at the hearing established that the FOP files maintained by the City's police department can contain a host of different entries, as they are used "to document effective or superior performance, positive work skills, ineffective or unsatisfactory performance or minor infractions of Departmental rules, regulations and policies, and to document remedial training." Furthermore, these entries can be either positive, training/neutral, or negative. However, nothing in the ALJ's analysis calls these facts into question. The ALJ did not, as the IFOP seems to suggest, find that all entries a sergeant may make in a subordinate's POF file would be considered negative and, therefore, part of the department's disciplinary system. It simply recognized that *negative* POF entries are written records of oral reprimands and, as such, are written documentation of disciplinary action.

¶ 23 Moreover, this finding is supported by the documents in the record. As noted above, one of the department's general orders specifically indicates that disciplinary actions include oral reprimands, and such oral reprimands "may be documented in the member or employee's Performance Observation file as a negative entry." This documentary evidence was further supported by the testimony of Deputy Chief Grubbs and Lieutenant Reno. Clearly, when the ALJ

spoke of a disciplinary negative POF entry, it was referring to written documentation of an oral reprimand. We find no evidence that the ALJ's findings of fact on this issue were incorrect in any way, and there is certainly no indication that an opposite conclusion is so evident that the ALJ's findings were against the manifest weight of the evidence. *City of Sandwich*, 406 Ill. App. 3d at 1008.

¶ 24 2. Legal Conclusions

¶ 25 We next address the IFOP's argument that the ALJ incorrectly concluded the authority of the City's sergeants to discipline their subordinates was established by evidence of their ability to both, make negative entries in POF files, and to request letters of reprimand. We again note that the City's sergeants will be deemed supervisors only if they satisfy each element of the three-part test discussed above. *Village of Hazel Crest*, 385 Ill. App. 3d at 114. However, we need not address the first element of that test because, on appeal, the IFOP does not dispute that the City's sergeants perform principal work substantially different from that of their subordinates. *Id.*; see also *City of Freeport*, 135 Ill. 2d at 513. Thus, we will focus on the two final elements of that test; *i.e.*, whether the sergeants have authority to discipline their subordinates (or to effectively recommend such discipline), and whether they consistently use independent judgment in performing or recommending such discipline. *Id.*

¶ 26 With respect to the second element, we initially reject the IFOP's assertion that the authority to discipline cannot be established on the basis of the sergeant's ability to place negative entries in their subordinates' POF files. This argument is based upon the IFOP's assertion, which we have already rejected, that such entries were not a part of the police department's progressive disciplinary system. Indeed, the evidence clearly established that such entries were in fact considered

disciplinary in nature.

¶ 27 We also reject the IFOP's strong reliance upon a portion of the police department's rules and regulations manual–also introduced at the hearing–which states: "[d]epartmental disciplinary authority and responsibility rest with the Chief of Police, subject to the authority and control of the City Manager." Citing to this provision, the IFOP asserts: "[i]f the Chief of Police issues all discipline, then negative entries in POF's from Sergeants cannot be discipline."

¶ 28 This is simply not the case, as the evidence produced here established the City's sergeants played an active role in the department's disciplinary system. The City's sergeants are authorized to issue oral reprimands, which are defined as "[a]n oral warning that some action, lack of action, or level of performance is unacceptable and will result in further disciplinary action if repeated or continued." The department's general order on discipline further provides, such oral reprimands, "may be documented in the member or employee's Performance Observation file as a negative entry." Lieutenant Reno testified that such negative entries in a police officer's POF file, may result in a sergeant referring that officer up the chain of command for further discipline. Higher ranking officers could then refer to a sergeant's POF entries in considering such further discipline, which could range from a letter of reprimand, up to and including, termination. Indeed, the City introduced a written request for a letter of reprimand Lieutenant Reno filed when she was previously employed as a sergeant. In part, that request was made on the basis of a prior entry entered into the officer's POF file by another supervising sergeant. The City also introduced evidence that a letter of reprimand was issued by the City's chief of police following this written request, and that letter also made reference to the sergeant's prior POF entry.

¶ 29 "The power to issue documented verbal reprimands or to recommend more severe

disciplinary action has been found to be authority to discipline." *City of Sandwich*, 406 Ill. App. 3d at 1012 (citing *Village of Hazel Crest*, 385 Ill. App. 3d at 117, and *City of Freeport*, 135 Ill. 2d at 513). Documented verbal reprimands are considered disciplinary where, as here, they can be used as the basis for more severe discipline in the future. *Metropolitan Alliance of Police v. Illinois Labor Relations Bd., State Panel*, 362 Ill. App. 3d 469, 478-79 (2005); *Village of Hazel Crest*, 385 Ill. App. 3d at 117. Furthermore, a recommendation for further disciplinary action "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. That is because "[t]here 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." *City of Sandwich*, 406 Ill. App. 3d at 1012. The "facts here show that the sergeants have authority to do both: issue verbal reprimands that are documented and recommend more severe disciplinary action." *Id*. As such, we find the ALJ's properly found the City's sergeants had sufficient disciplinary authority to satisfy the second element of the supervisory test. We certainly are not left with such a firm and definite conviction that this finding is so mistaken that it could be deemed clearly erroneous.

¶ 30 In reaching this conclusion, we briefly discuss our recent decision in *Village of Broadview v. Illinois Labor Relations Bd.*, 402 Ill. App. 3d 503, 508-09 (2010). There, we affirmed the Labor Board's determination that a group of police department sergeants were not supervisors under the Act because they lacked the authority to discipline their subordinates. However, in *Village of Broadview* we affirmed the Labor Board's finding of a lack of disciplinary authority only after specifically noting: (1) the sergeant's oral reprimands were not memorialized or recorded in the subordinate's personal file; (2) the sergeants did not make any disciplinary recommendations; and

(3) higher ranking officers would make disciplinary decisions only after a full, independent investigation that proceeded without any input from sergeants. *Id*. The facts of this case are quite different from those presented in *Village of Broadview*, and it is on that basis that we come to a different conclusion here as to the ALJ's finding of disciplinary authority.

¶ 31 Lastly, we reject the IFOP's contention that the ALJ incorrectly found City's sergeants consistently use independent judgment in recommending discipline so as to satisfy the third element of the supervisory test. The IFOP's argument centers around the requirement that the sergeants use their judgment "consistently," faulting the City for introducing only the single example of Lieutenant Reno filing a written request for a letter of reprimand when she was a sergeant. The IFOP asserts that evidence of a single recommendation cannot satisfy the statutory requirement that such recommendation be made "consistently."

¶ 32 We disagree. As an initial matter, we note the ALJ specifically found the third element of the supervisory test was satisfied with respect to *both* the sergeant's authority to place negative entries in their subordinates' POF files and their authority to recommend discipline. Thus, even if we did accept the argument IFOP has raised with respect to the sergeant's authority to recommend discipline, the ALJ's analysis of the third element would still stand with respect to the sergeant's authority regarding POF file entries. Notably, the IFOP has *not* challenged that analysis on appeal.

¶ 33 Moreover, the very argument the IFOP has raised on appeal had been rejected by both this court and our supreme court. *Village of Hazel Crest*, 385 Ill. App. 3d at 118 (quoting *City of Freeport*, 135 Ill. 2d at 521). Indeed, as our supreme court has stated:

> "In requiring the 'consistent use of independent judgment,' the legislature clearly was not referring to the number of times the alleged supervisor actually exercised his supervisory

authority. Rather, the legislature was referring to the number of times in which independent judgment might be required in performing a particular supervisory function. [Citation.]

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 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.

It is the authority to use independent judgment in imposing discipline, rather than how often such discipline is imposed, which is important. [Citations.] It would be absurd to require a supervisor to continuously discipline subordinates who do not deserve discipline. The supervisor's authority to discipline is what distinguishes him from his subordinates. The fact that the ranking officers exercise this authority infrequently is proof that the patrol officers do not warrant discipline rather than that their supervisors do not use independent judgment when they impose discipline. The ranking officers clearly satisfy the third prong of the supervisory definition with respect to discipline." *City of Freeport*, 135 Ill. 2d at 520-21.

¶ 34 Following the supreme court's direction, we come to a similar conclusion here. The documentary evidence and testimony presented at the hearing demonstrated the sergeants employed by the City had *general* authority to consistently exercise their judgment to recommend discipline for their subordinates, and also demonstrated a *specific* instance in with such independent judgment was in fact exercised. We, therefore, find the ALJ correctly found the City satisfied the third element of the supervisory test by establishing that its sergeants consistently use independent judgment in recommending discipline.

¶ 35 Moreover, because all three elements of the supervisory test have been met with respect to the authority to discipline subordinates, we affirm the ALJ's conclusion that the City's sergeants supervise their subordinates on that basis.

¶ 36 D. Remaining Issues

¶ 37 The IFOP further contends the ALJ's analysis contained a number of other incorrect findings of fact and conclusions of law, primarily associated with its conclusion that the City's patrol and detective sergeant's supervisory authority was also demonstrated by their ability to "direct" their subordinates. None of the IFOP's remaining assertions of error involve the ALJ's determination that the City's sergeants were supervisors by virtue of their ability to discipline their subordinates, however, and we have already found that conclusion to be correct.

¶ 38 As we previously indicated, " '[t]he presence of even one indicium of supervisory authority accompanied by independent judgment is sufficient to support a finding of supervisory status.' " *Metropolitan Alliance of Police*, 362 Ill. App. 3d 469, 477 (2005) (quoting *Department of Central Management Services v. Illinois State Labor Relations Bd.*, 278 Ill. App. 3d 79, 83 (1996)). Additionally, courts have also recognized, where one such indicum of supervisory authority has in

fact been properly established, any findings or conclusions regarding other indica need not be further evaluated on appeal. *City of Sandwich*, 406 Ill. App. 3d at 1013; *Metropolitan Alliance of Police*, 362 Ill. App. 3d at 478. As such, having found the ALJ's analysis of the sergeant's disciplinary authority was correct, we, similarly, need not further address any of the additional arguments raised by the IFOP in this case.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we affirm the judgement of the Labor Board.

¶ 41 Affirmed.