2012 IL App (1st) 111691-U

THIRD DIVISION
May 23, 2012

1-11-1691

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, Petitioner-Appellant, v. ILLINOIS LABOR RELATIONS BOARD, STATE PANEL, JACALYN ZIMMERMAN, Chairman, MICHAEL HADE, MICHAEL COLI, JESSICA KIMBROUGH and ALBERT WASHINGTON, Members, and the CITY OF SPRINGFIELD, Respondents-Appellees.	)	Appeal from the Illinois Labor Relations Board, State Panel Agency Docket No. S-RC-09-184 Honorable Martin Kehoe, Administrative Law Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

HELD: Dismissal of petition to certify collective bargaining unit proper where unit would contain supervisors, as defined in the Illinois Public Labor Relations Act.

BACKGROUND

¶ 1 This is a direct appeal from a final order of the Illinois Labor Relations Board, State Panel (Board). Petitioner, the Illinois Fraternal Order of Police Labor Council (Union) sought certification of a collective bargaining unit made up entirely of full-time police lieutenants employed by the City of Springfield (City). The City opposed certification, arguing that the lieutenants were either confidential employees, managerial employees and/or supervisors as defined in the Illinois Public Labor Relations Act (5 ILCS 315/1 *et seq.* (West 2010)) (Act). The Act governs the rights of employees of the State to collectively bargain. However, confidential employees, managerial employees and supervisors, each as defined therein, are excluded from the rights and protections afforded public employees under the Act without the agreement of their employer. 5 ILCS 315/3(n).

¶ 2 The administrative law judge (ALJ) determined that the lieutenants were not managerial employees, but were confidential employees and supervisors, and thus prohibited under the Act from forming a bargaining unit. For this reason, the ALJ recommended that the Union's petition for certification be dismissed. The Union filed exceptions to the ALJ's recommendations and, after reviewing the record and the parties' written arguments, the Board accepted the ALJ's conclusions and recommendations without further comment and dismissed the petition.

¶ 3 Pursuant to section 9(i) of the Act, the Union filed a timely appeal to this court. The Union raises a number of issues, which can be restated as follows: (1) whether the Board's determination that the City's police lieutenants are "confidential employees" under Section 3(c) of the Act is clearly erroneous and (2) whether the Board's determination that the City's police lieutenants are "supervisors" under Section 3(r) of the Act is clearly erroneous.

¶ 4 The rights and protections afforded under the Act do not extend to either confidential employees or supervisors. As explained below, we find that the Board erred in finding the lieutenants to be confidential employees. However, the Board did not err in finding that the lieutenants are supervisors. Because supervisors are prohibited from forming a bargaining unit under the Act, we affirm the Board's decision to dismiss the Union's petition.

¶ 5 ANALYSIS

1. Standard of Review

¶ 6 Before addressing the merits of the arguments, we must first determine the applicable standard of review. This appeal comes from an order of an administrative agency. The Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2008)) governs judicial review of the Board's decisions. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill.2d 191, 204 (1998). The applicable standard of review depends upon whether the questions presented are questions of fact, questions of law or mixed questions of law and fact. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill.2d 380, 391 (2001); *Village of Broadview v. Illinois Labor Relations Board, State Panel*, 402 Ill.App.3d 503, 505 (2010). An administrative agency's findings and conclusions on questions of fact are deemed to be *prima facie* true and correct and only reversed where the facts are contrary to the manifest weight of the evidence. *City of Belvidere*, 181 Ill.2d at 205. Findings on questions of law are reviewed *de novo*, and the agency's findings are not binding on a reviewing court. *Id.* A mixed question of law and fact is one where the issue is whether the facts satisfy the statutory standard or whether the law as applied to the established facts violates the rule of law. *AFM*, 198 Ill.2d at 391. When presented with a mixed question of law and fact on

appeal of an administrative agency decision, the clearly erroneous standard of review is appropriate. *Id*.; *Village of Broadview*, 402 Ill.App.3d at 505. A reviewing court will not reverse an agency decision unless "left with the definite and firm conviction that a mistake has been committed." *AFM*, 198 Ill.2d at 393. Here, the issues presented are whether the facts presented do or do not show that the lieutenants can be deemed confidential employees and/or supervisors under the Act. Therefore, the clearly erroneous standard of review guides us. As the party seeking to exclude the lieutenants from a bargaining unit, the City has the burden of proving by a preponderance of the evidence that the lieutenants are confidential employees and/or supervisors under the Act. *Illinois Department of Central Management Services (State Police) v. Illinois Labor Relations Board, State Panel*, 382 Ill.App.3d 208, 220-221 (2008).

2. Are Lieutenants "Confidential Employees" Within the Meaning of the Act?

¶ 7 The Union argues that the Board erred in finding that the lieutenants are confidential employees within the meaning of the Act. Confidential employee is defined as:

> "* * * an employee who, in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies." 5 ILCS 315/3(c) (West 2010).

¶ 8 The Board has formulated three tests to determine whether an employee is deemed

confidential under the Act. *Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, AFL-CIO*, 153 Ill.2d 508, 523-524. The first, the "labor-nexus" test, determines whether an employee assists, in the regular course of his or her duties, someone who formulates, determines and effectuates management labor relations policies. *Id*. at 523. The court noted that all three functions must be performed by the person being assisted. *Id.* The second test is the "authorized access" test, which assesses whether the employee, in the regular course of his or her duties, has authorized access to information specifically related to the collective bargaining process. *Id.* The third test is the "reasonable expectation" test. *Id.* at 524. This test applies when no collective bargaining unit is in place, and determines "whether the onset of collective bargaining would reasonably bring the individual confidential duties." *Id*.

¶ 9 The ALJ determined here that the labor nexus test does not apply because there was no evidence presented that the lieutenants assist any superiors who might formulate, determine and effectuate labor relations policies. He also found that the reasonable expectation test did not apply because at least two bargaining units were already in place at the time the Union's current petition was made. Instead, the ALJ made his finding relying on the authorized access test.

¶ 10 The ALJ considered the testimony of Commander Arnold and Lieutenant Williamson. Arnold stated that during the previous negotiations in 2006-2007, at which time he was a lieutenant, he fully participated in the negotiations with the Union. At these meetings, he heard and made proposals and discussed counter-proposals, potential bargaining positions and bargaining strategy. Williamson stated that he also participated in these meetings. Williamson took notes at the meetings and caucused with the other team members to discuss issues that had been brought up in meetings

with the Union representatives. Based on this testimony, the ALJ concluded that the lieutenants were confidential employees.

¶ 11 However, the ALJ overlooked a key factor in the authorized access test. The statute requires that the duties performed and the access granted to a confidential employee must be *in the regular course of his or her duties*. The ALJ does not appear to have considered this portion of the test. Arnold requested permission to participate in the contract negotiations; there is no evidence that he would otherwise have been allowed to take part in the discussions. Williamson was only asked to participate to fill in for a deputy chief who had retired. His participation lasted only about two weeks, until another deputy chief took his place on the contract negotiations team. Arnold confirmed that during this round of negotiations, there were no other lieutenants present on the team. On the basis of this evidence alone, we cannot conclude that lieutenants regularly participate on the contract negotiations team or that any such participation is a part of their regular duties. *See, e.g.*, *Chief Judge* 153 Ill.2d at 525 (noting that confidential employee status did not extend to an employee on the basis of her occasional substitution for a confidential employee). We therefore find that the Board erred in finding that the lieutenants were confidential employees.

3. Are Lieutenants "Supervisors" Under the Act?

¶ 12 The Union also argues that the Board erred in finding that the lieutenants are supervisors. A "supervisor" is defined in section 3(r) of the Act 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, 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." 5 ILCS 315/3(r).

¶ 13 Section 3(r) thus creates a three-pronged test for determining whether certain employees of a police department are supervisors under the Act: "if they: (1) perform principal work substantially different than their subordinates; (2) have the authority in the interest of the employer to perform one of 11 enumerated supervisory functions, or to effectively recommend such actions; and (3) consistently use independent judgment in performing or recommending the enumerated actions. *Village of Broadview*, 402 Ill.App.3d at 506 (citing *City of Freeport v. Illinois State Labor Relations Board*, 135 Ill.2d 499, 512 (1990)). An employee must meet all three prongs of the test to be deemed a supervisor. *City of Freeport*, 135 Ill.2d at 512. Because section 3(r) specifically exempts police employees from having to spend a preponderance of their time to supervisory functions, a police department employee may qualify as supervisors even if he or she only spends a little time performing such duties. *Id.*

¶ 14 The Union stipulates that the lieutenants' work is substantially different from their subordinates; thus, the first prong of the supervisory test is satisfied. The Union also stipulates that lieutenants have the authority to issue reprimands, i.e. discipline their subordinates, thereby satisfying

the second prong. Therefore, the only question is whether the lieutenants exercise independent judgment when issuing forms of discipline – whether the third prong of the test is satisfied.

¶ 15 Independent judgment generally has been interpreted by the Board to mean that the employee in question has the authority to "make choices between two or more significant courses of action without substantial review by superiors ". *Chief Judge*, 152 Ill.2d at 516. Four lieutenants each testified as to the protocol he follows when faced with the need to discipline an officer. The police chief also testified as to steps taken by lieutenants to issue discipline. When an incident occurs, there are several courses of action that a lieutenant can take. The lieutenant can decide not to pursue any form of discipline at all. Or, he may elect to have an informal conversation with the officer to advise him or her of the wrongdoing and the correct course of action for the future. He may opt to issue a counseling form, which is not considered discipline but remains in the officer's personnel file for six months. The lieutenant also has the option to refer the officer for additional training. He may elect to issue a more formal verbal reprimand, which is documented and is considered discipline. Or, he may elect to issue a written reprimand.

¶ 16 One other result is that the internal affairs division may conduct an official investigation into the incident. Evidence was presented that, for more serious allegations of misconduct, an internal affairs investigation is mandated by department policy. A lieutenant in internal affairs conducts the investigation and returns the investigation file to a lieutenant in the division in which the officer in question works. That lieutenant would review the file and make a recommendation for further discipline if he felt discipline was warranted.

¶ 17 In its brief, the Union cites the testimony of each of the four lieutenants who testified

during the hearing. The Union notes that each testified that he calls a superior first to request permission to issue a written reprimand; two of the lieutenants testified to specific incidents where they sought a superior's permission before taking action. This leads the Union to conclude that lieutenants do not have the authority to issue written reprimands or have a formal internal affairs investigation opened, and therefore do not exercise independent judgment in issuing discipline.

¶ 18 However, in the full context of the entire record, this conclusion can be refuted on a number of different points. First, there is the testimony of the lieutenants themselves. Lieutenant Winslow testified only on situations where a supervisor advised whether to issue a written reprimand specifically, or to order an investigation by internal affairs. He specifically stated that his decision to issue some form of discipline had never been contradicted by a superior. Lieutenant Buscher stated that when he was presented with an incident, he would decide whether to handle the situation himself or, if he felt a written reprimand was warranted, inform the deputy chief and let the deputy chief decide if a written reprimand was sufficient or if the situation warranted a full investigation by internal affairs. Lieutenant Williamson testified that he contacted his superiors if he felt a situation rose to the level of requiring a written reprimand, but noted there were several lesser forms of discipline that he would handle himself.

¶ 19 The Union also overlooks the testimony of the chief of police. Chief Williams testified that lieutenants are not required to get the approval of a superior before issuing a written reprimand. He further explained that lieutenants have full authority to handle lesser "Level 2" offenses without approval or even input from their superiors. He also stated that when formal investigations by internal affairs were conducted, the reviewing lieutenants' recommendations as to how to proceed are

followed approximately 80% of the time.

¶ 20 Here, the Union focuses its arguments solely on the question of whether the lieutenants have the independent authority to issue a written reprimand as opposed to a formal investigation by internal affairs. The Union does not dispute the testimony of the lieutenants or the chief that the lieutenants have full authority to handle discipline for lesser violations – namely to issue an informal talking-to, counseling, a verbal reprimand, a referral for training or to issue no discipline at all. While these may be lesser forms of discipline that can be issued, they are nonetheless several options from which the lieutenants have the full authority to choose, without substantial review by their superiors. The Union also argues that the chief's "generic claim" that lieutenants are not required to seek approval before issuing written reprimands is refuted by the specific evidence of the lieutenants to the contrary. However, in the most favorable light to the Union, the lieutenants only testified that they ask for permission in practice, not that they are required to do so.

¶ 21 We also note that the statute states that an employee need not have authority to discipline, but simply the authority to *effectively recommend* such action. Section 3(r) (emphasis added); *see also City of Freeport*, 135 Ill.2d at 512-513 (concluding that sergeants in the police department met the second prong of the test in part due to their authority to recommend suspension of officers). Likewise, the third prong of the supervisor test requires only that the employee exercise judgment in performing *or recommending* the supervisory act in question. *See Freeport*, 135 Ill.2d at 521 (noting that supervisory status would confer when an employee could choose between issuing written reprimands and recommending suspension).

¶ 22 Because the lieutenants choose between several forms of issuing discipline without

substantial oversight by their superiors, and because they exercise judgment in recommending more serious forms of discipline, we find that the third and final prong of the supervisory test is satisfied.

¶ 23 We note that the Union has argued that the lieutenants do not meet several other supervisory functions enumerated in the Act as further proof that the lieutenants are not supervisors. It challenges the lieutenants' authority to direct employees by disputing their power to assign work, grant time off, evaluate subordinates and review the work of subordinates. It further argues that they have no authority to adjust the grievances of subordinates. However, because we have satisfactorily established proof of supervisory authority using the indicium of discipline, we need not address any other indicia argued against by the Union. *Chief Judge*, 153 Ill.2d at 516.

¶ 24 CONCLUSION

¶ 25 By finding that the lieutenants were supervisors and confidential employees, the Board adopted the ALJ's recommendation to dismissed the Unions's petition. While we do not find that the lieutenants are confidential employees, we do find that they are supervisors within the meaning of the Act. For this reason, the decision of the Board is affirmed.

¶ 26 Affirmed.