

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE OF CALIFORNIA (MUSEUM OF)
SCIENCE AND INDUSTRY),)
)
Employer,) Case No. S-UM-578-S
)
and) PERB Decision No. 1117-S
)
CALIFORNIA UNION OF SAFETY)
EMPLOYEES,)
)
)
Exclusive Representative.)
_____)

Appearances: State of California (Department of Personnel Administration) by Roy J. Chastain, Labor Relations Counsel, for State of California (Museum of Science and Industry); James P. Whalen, Legal Representative, for California Union of Safety Employees.

Before Garcia, Johnson and Caffrey, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Museum of Science and Industry) (State) to a proposed decision (attached) by a hearing officer granting a unit modification petition.¹ After review of the entire record, including the State's exceptions, the response to exceptions filed by the California Union of Safety Employees (CAUSE), transcripts, and briefs, the Board hereby adopts the proposed decision.

¹The petition was filed under PERB Regulation 32781(a)(1). (PERB Regulations are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

EXCEPTIONS FILED BY THE STATE

The State filed exceptions to the hearing officer's proposed decision on several grounds. First, the State alleged that the hearing officer made incorrect references to titles of the affected employees, which "... tend to make one wonder whether the hearing officer misread the evidentiary record." Second, the State argued that the hearing officer failed to recognize the amount of discretion that watch commanders have, and failed to give them credit for instances where they "effectively recommend" that certain actions be taken by the lieutenant or chief.² Third, the State excepted to the finding that the work of the watch commanders is "substantially similar" to that of their officers, calling the hearing officer's statements "inaccurate" and "misleading." The State claims that:

While it is true that the watch commanders are in uniform, and spend a majority of the time in the field, the nature of their patrols are not the same as their officers.³
(Exceptions, p. 7.)

²The State identified examples of areas in which the watch commanders exert such authority: transfer decisions; merit salary adjustment recommendations; ordering overtime; writing performance reports on officers; decisions on when an officer can leave the museum grounds; assignment of officers on watch; and "other supervisory indicia."

³Specific instances offered of how the "nature" of the patrol differs between the watch commanders and others included the following: statements regarding who does and who does not drive what type or color of vehicle, with or without the "full array of lights" on top; the fact that sometimes watch commanders are dispatched first when a call comes in, but sometimes they are not; the fact that sometimes watch commanders are the highest ranking person on site, and hence "they exert complete authority and make all judgment calls without conferring with the lieutenant or the chief"; and finally, watch commanders earn more than their subordinates.

CAUSE'S RESPONSE TO EXCEPTIONS

In response to the State's first exception alleging that the hearing officer made incorrect references to titles of the affected employees, CAUSE responds that all parties to the proceeding knew very well that witnesses who testified used the various terms interchangeably. CAUSE states that this is an attempt by the State to "confuse or distract" the Board and has no bearing on the central issue in the case.

In response to the State's argument that the hearing officer failed to credit the watch commanders (referring to them as supervising museum security officers (SMSOs) in the response to exceptions) with all the authority they do have, CAUSE points out that the State's own witness, Chief Rudy Schultz (Schultz), testified that "all of the essential decisions in his unit were made exclusively by himself," with regular input from all members of his unit (not just SMSOs, but officers as well). Testimony from the personnel contributing such input established that Chief Schultz makes the ultimate decisions in all the areas mentioned by the State.

In response to the State's claim that the work of the SMSOs is not substantially similar to that of their officers, CAUSE disagrees, pointing to the "irrefutable testimony at hearing by all of the witnesses."

Finally, CAUSE states that it is irrelevant that SMSOs earn a higher salary than regular officers.

DISCUSSION

Regarding the State's first exception, in which it claims that the hearing officer misstated the titles of various affected employees in the proposed decision, the Board finds that even if that occurred, there is no showing that this constituted prejudicial error.

The State's second exception claimed that the hearing officer failed to recognize the amount of discretion that watch commanders have, and failed to give them credit for instances where they "effectively recommend" that certain actions be taken by the lieutenant or chief. This exception essentially conveys the State's disagreement with the hearing officer's legal conclusion. As the hearing officer made clear, PERB's approach to interpreting the Ralph C. Dills Act (Dills Act) section 3513(g),⁴ defining supervisory criteria, is well established. PERB focuses on whether the employee performs any of the powers specified in the statute, or has the power to cause action

⁴The Dills Act is codified at Government Code section 3512 et seq. Section 3513(g) states:

(g) "Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend this action, if, in connection with the foregoing, the exercise of this authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

through recommendation and the use of independent judgment. Merely being involved in the decision-making process does not make an employee a supervisor.⁵

Review of the testimony of the various parties supports the hearing officer's characterization of the watch commanders as nonsupervisory for several reasons. Most decisions made by watch commanders are done pursuant to established guidelines, and often the lieutenant or chief makes the ultimate judgment. The fact that others review their recommendations (and have the power to overrule or disapprove those recommendations) weakens the position that the watch commanders have authority and exercise independent judgment. Therefore, the State's second exception is not persuasive.

In its third exception, the State claims that the hearing officer erroneously found the work of the watch commanders to be "substantially similar" to that of their officers. In support of this position, the State claims that although both groups "spend a majority of the time in the field, the nature of their patrols are not the same as their officers." Although the State offered several examples of how it believes the "nature" of the patrol by officers and watch commanders is different, the examples offer only superficial distinctions (e.g., type of vehicle used on patrol). Even if the watch commanders are occasionally the

⁵See, e.g., The California State University (1983) PERB Decision No. 351-H, where the employees made disciplinary recommendations and were involved in processing employee grievances, but were not supervisory.

highest ranking person on site and, during those occasions, the watch commanders "exert complete authority and make all judgment calls without conferring with the lieutenant or the chief" such action does not elevate them to supervisory status. The testimony does not support that the watch commanders had ongoing, independent authority. Furthermore, the hearing officer's conclusion that the work of the watch commanders and officers is substantially similar is supported by the record.

ORDER

For these reasons and based upon the entire record in this case, it is ORDERED that the petition of the California Union of Safety Employees to include the classification of Supervising Museum Security Officer at the State of California (Museum of Science and Industry) in State Employee Bargaining Unit No. 7:

- (1) Is granted for the positions of watch commanders.
- (2) Is denied for the position of lieutenant.

Member Johnson joined in this Decision.

Member Caffrey's dissent begins on page 7.

CAFFREY, dissenting: I dissent. Employees in the classification of Supervising Museum Security Officer (SMSO), serving in the capacity of watch commander/sergeant, are supervisory employees under the Ralph C. Dills Act (Dills Act). Therefore, the petition of the California Union of Safety Employees (CAUSE) to include that classification in State Employee Bargaining Unit No. 7 should be denied in its entirety.¹

The Dills Act defines "supervisory employee" at section 3513(g):

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend this action, if, in connection with the foregoing, the exercise of this authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

In applying this definition, the Board has held that the various indicators of supervisory status are to be evaluated in the disjunctive; that is, supervisory status may be granted where an employee is found to perform even one of the enumerated functions. (Unit Determination for the State of California (1980) PERB Decision No. 110c-S.) However, sporadic or nominal

¹The Board agent correctly denied the portion of the CAUSE petition dealing with the lieutenant position within the SMSO classification. No exception to this determination has been filed with the Board.

exercise of the statutory functions is insufficient to confer supervisory status. Independent judgment in the exercise of the supervisory function, demonstrated by significant autonomy and control over decision making, is required. (Id.) For example, the authority to assign work does not confer supervisory status on an employee if the work assigned is "so routine and well-structured as to render the act of assigning that work little more than an exercise of ministerial options." (Id. at p. 9.) Similarly, the assignment of work does not meet the statutory criterion where there is substantial review or prior approval involved, or the assignment is merely an application of established policy. (Id.)

Where employees are found to meet one or more of the statutory criteria, Dills Act section 3513(g) requires that their duties be evaluated to determine if they are substantially similar to those of their subordinates. If not, supervisory status will be conferred. If so, they will not be considered supervisory employees for purposes of the Dills Act. In applying the "substantial similarity" provision, the Board has not relied on a quantitative, or percentage-of-duties approach, instead finding that substantial similarity no longer exists when "the employees' supervisory obligation to the employer outweighs their entitlement to the rights afforded rank-and-file employees." (Id. at p. 7-8.)

Applying this precedent to the evidence in this case, I conclude that SMSOs serving as watch commanders/sergeants have

the authority and responsibility to assign and direct the work of subordinate employees; and that the performance of these supervisory functions is not sporadic or nominal and involves the exercise of independent judgment.

Initially, it is critical to note that this case involves law enforcement officers. The California Museum of Science and Industry (Museum) employs its own police force which is responsible for protecting the buildings and grounds located on the 140 acres of Exposition Park in Los Angeles. Officers within this force, including SMSOs, are armed peace officers, vested with the power to enforce California law. The Museum police force adheres to a strict chain of command. The chief of police (chief) directs the entire force, consisting of five SMSOs (one lieutenant and four watch commanders/sergeants) and 23 officers. Certain officers are designated as corporals and have the authority to act as the watch commander/sergeant in the event of his absence.

The Museum police force operates 24 hours per day, seven days a week, with each day broken into three shifts or watches which are supervised by the watch commanders/sergeants. The chief and the lieutenant typically work the day shift. During the 16 work shifts per week when the chief and lieutenant are generally off duty, a watch commander/sergeant is the ranking on-duty officer.

The record contains numerous references to the responsibility of watch commanders/sergeants to assign and direct

the work of subordinate officers. Chief Rudy Schultz testified that it is a fundamental function of watch commanders/sergeants "to make sure that those officers under their command are performing their duties and responsibilities." (R.T. p. 127.) Lieutenant Warner Meyers testified that the assignment of officers is typically the responsibility of the watch commanders/sergeants. (R.T. p. 120.) Watch Commander/Sergeant Benjamin Jones testified that he assigns subordinate officers to patrol sectors and units (R.T. p. 17.); and that he decides how and where to assign the officers based on the events which are occurring in the patrol area at any particular time. (R.T. p. 86-87.) The California State Personnel Board specification for Supervising Museum Security Officer includes among the typical tasks of the SMSO, "assigns Guards and Security Officers to stations as scheduled." (State Exh. No. 5.)

The assignment and direction of the work of subordinate officers is not a sporadic or nominal duty. Rather, it is an essential, daily function and responsibility of the watch commander/sergeant. (R.T. p. 17-18.) Watch Commander/Sergeant Jones lists "Deployment of Dept of Public Safety officers" (sic) as one of his daily functions. (CAUSE Exh. No. 1.) In evaluating these daily responsibilities the Board agent notes that "officers are assigned to patrol based on the previous night's activities." (Proposed Decision, p. 14.) Noting this responsibility, the Board agent concludes that SMSOs exercise little independent discretion in the performance of their duties.

This method of determining officer assignments leads me to the opposite conclusion. The authority and responsibility to evaluate changing circumstances, such as varying event schedules and recent patterns of law enforcement activity, and to determine police officer assignments in accordance with these considerations, clearly demonstrates the exercise of independent judgment by SMSOs.

Accordingly, I conclude that SMSOs serving as watch commanders/sergeants meet at least one of the statutory criteria of a supervisory employee, they assign other employees.² Therefore, the determination of whether supervisory status will be conferred on these employees requires the application of the "substantial similarity" standard included in Dills Act section 3513(g).

Noting that watch commanders/sergeants may spend as much as 75 percent of their time on patrol, similar to their subordinate officers, the Board agent concludes that "performance of this extensive amount of bargaining unit work indicates that the watch commanders' supervisory obligations do not outweigh their entitlement to the rights of a rank and file employee."

(Proposed Decision, p. 14.)

Based on the record, this conclusion is simply incorrect. While watch commanders/sergeants may spend a significant amount of their time on patrol, as do their subordinates, the nature of

²Because I find that at least one of the statutory criteria for supervisory employee is met, it is unnecessary to review all of the statutory factors considered by the Board agent.

their patrol responsibilities is fundamentally different than that of the officers they supervise. Chief Schultz testified as to the responsibilities of watch commanders/sergeants while on patrol:

. . . their responsibilities when they're on patrol is to make certain, to make sure that those officers under their command are performing their duties and responsibilities as the Department sees -- would have it performed. And the ultimate responsibility of that particular watch is theirs. So in other words, they have to be in a position to be able to, not only to monitor, but to also physically and visually be in those areas that they need to be when those things are happening. [R.T. p. 127.]

Chief Schultz further testified that under normal circumstances a watch commander/sergeant should not be dispatched first to handle any incident:

The way it's supposed to work or should be functioning is that, the officer is always the one that is dispatched first to any particular incident. Unless there's a major incident, then they would ask for more units or all units.

A supervisor, sergeant, watch commander, whatever you choose to call that person, should not be in a position that they get tied up and that they can't respond somewhere else. [R.T. p. 128.]

This testimony describes employees whose primary obligation is to be responsible on behalf of the employer for everything which happens during their watch. In order to fulfill this responsibility in a police agency, they must spend significant amounts of time on patrol, observing and backing up the work of subordinate officers while remaining free to respond to incidents

which may require supervisory decision making. Chief Schultz testified as to the potential magnitude of this responsibility in a situation involving the supervision of armed law enforcement officers:

Basically what happens, if the supervisor is responding to a call, it means that it's a situation that could be either dangerous or it could be something that involves health or safety. It's of a magnitude that could create problems for someone if not a group of people and liability factors are also higher.

When a supervisor responds to situations like that, often he or she is placed in a position of having to make a decision, what I call a tactical field or command decision.

We also have occasions where we are involved with LAPD on our property as well as around the property. And a lot of times when we have certain situations, whether it involves a man with a gun or whatever it may be, LAPD normally says, we're on State property, what can we do for you. What do you want us to do. You have to be in a position as a supervisor to be in that area to make those decisions, not involved in something that you shouldn't have that you can't get out of.

So, in other words, there is going to be a situation where this person has to be in a position to make a decision and it has to be a supervisor. Because when we're dealing with outside agencies, that's what they'll ask for; where's your sergeant. [R.T. p. 129.]

The record also reveals that under normal circumstances watch commanders/sergeants are the ranking on-duty Museum police officers more than 75 percent of the time (16 of 21 shifts each week). In fact, Sergeant Jones testified that, not only is he the ranking on-duty officer for most of his shift, after hours he

actually becomes the acting director of the entire Museum as the highest level on-duty employee. (R.T. p. 25-26.)

The responsibility in a police agency of the ranking, on-duty officer to make independent judgments concerning the assignment and direction of subordinate officers in circumstances involving the potential use of police powers, is a compelling and unique duty. Watch commanders/sergeants are given that responsibility on behalf of their employer, an obligation which far outweighs their entitlement to the rights of rank and file employees. Therefore, the "substantial similarity" standard included in Dills Act section 3513(g) has not been met here.

Based on the foregoing, I conclude that SMSOs serving as watch commanders/sergeants meet the definition of "supervisory employee" contained in Dills Act section 3513(g). Therefore, I would deny in its entirety the CAUSE petition seeking to include the classification Supervising Museum Security Officer in State Bargaining Unit No. 7.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (MUSEUM OF)	
SCIENCE AND INDUSTRY),)	
)	
Employer,)	Representation
)	Case No. S-UM-578-S
and)	
)	PROPOSED DECISION
CALIFORNIA UNION OF SAFETY)	(5/5/95)
EMPLOYEES,)	
)	
Exclusive Representative.)	
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Appearances: Roy Chastain, Labor Relations Counsel, State of California, Department of Personnel Administration, for the State of California (Museum of Science and Industry); James P. Whalen, Legal Representative, for the California Union of Safety Employees.

Before Robert Thompson, Hearing Officer.

PROCEDURAL HISTORY

The California Union of Safety Employees (CAUSE) commenced this action on June 9, 1994, by filing a petition for unit modification of State Employee Bargaining Unit No. 7 (Unit 7), Protective Services and Public Safety.¹ The petition seeks the inclusion of the classification of Supervising Museum Security Officer (VC 85) (sergeant) at the State of California (Museum of Science and Industry) (State or Museum) in the bargaining unit. The parties previously stipulated, and PERB accepted, that this classification was supervisory in Unit Determination for the State of California (1980) PERB Decision No. 110c-S (State of

¹ The petition was filed under Public Employment Relations Board (PERB or Board) Regulation 32781(a)(1). (PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

California). There are five sergeants, all full-time employees. Four are commonly referred to as watch commanders and one has the working title of lieutenant.

In its opposition to the petition filed on June 27, 1994, the State asserts that the sergeants properly belong outside the bargaining unit since they perform supervisory duties. The parties met on September 20, 1994, but were unable to resolve their differences and the matter was heard in a formal hearing on January 18, 1995. Amended versions of Exhibit "1" and "4" were provided by the State on January 26, 1995. With the filing of post-hearing briefs, the matter was submitted for decision on March 21, 1995.

FINDINGS OF FACT

The Museum employs a police force which includes 23 officers, five sergeants (four watch commanders and one lieutenant) and one chief of police. The police department is responsible for protecting the buildings and grounds located on the 140 acres of Exposition Park in Los Angeles. The employees of the police department work primarily in three eight-hour shifts or watches (first watch - 11 p.m. to 7 a.m., second watch - 7 a.m. to 3 p.m., and third watch - 3 p.m. to 11 p.m.) The chief and the lieutenant work predominantly during regular business hours, i.e., 8 a.m. to 5 p.m.

The department has a chain of command which requires each officer to report to the watch commander of his or her watch.² These watch commanders report to the lieutenant who, in turn, reports to the chief of police. In addition, one officer acts as an investigator and reports directly to the chief regarding investigations, one officer acts as a logistics person and one officer acts as a training officer. The latter two individuals report directly to the lieutenant with respect to those specialized duties.

Of the five sergeants which are the subject of this petition, three are watch commanders, one is a relief watch commander and one serves in the working title of acting lieutenant.

Watch Commanders

A watch consists of a sergeant and two to five officers. One of the officers acts as a dispatcher and the remaining officers are on patrol. The watch commander who testified has worked for three years, predominantly during the third watch, although he has been a watch commander on both the first and second watch. He begins a typical work day at 3:00 p.m. by briefly discussing with either the lieutenant or chief issues such as strategy, morale, deployment and scheduling. The watch commander then conducts a short briefing with the officers, holds

²Certain officers are designated corporals and have authority to act as the watch commander in his absence. However, unlike the watch commander, a corporal cannot authorize an officer to leave the park to resolve a problem.

a ten-minute training discussion and assigns patrols. For the remainder of the first two hours of the shift the watch commander performs administrative work while the officers patrol the buildings on foot. For the next 5 hours and 45 minutes the watch commander patrols along with the officers, each in his or her own car.³ While on patrol the watch commander drives a vehicle which is identical to those used by the officers except that it is a different color and does not have full police markings. The officers and the watch commander do "figure eight" patrolling which periodically puts them in visual contact. In addition, the officers and watch commander use radio contact to monitor each other's location. For the final 15 minutes of the shift the watch commander works in the office, signing off and logging reports, and checking the officers' return of their keys, credit cards and vehicle slips. Finally, he debriefs for the watch commander coming on to the next watch.

When an incident is reported during a watch, the dispatcher sends the closest vehicle, which may be the watch commander's vehicle. If an officer is dispatched to an incident, the watch commander also responds to the call. Typically, the watch commander does not interject himself into the situation unless requested to do so. If the officer is handling an incident in an inappropriate manner, the watch commander may counsel the officer. If counseling occurs, a written description of the

³In addition, patrolling is done on bicycles by officers who have volunteered for that duty.

incident is then provided by the watch commander to the lieutenant. The watch commander is responsible for deciding whether an officer should leave the park to perform his or her duties ("break the boundaries of the park"). All incidents are reported by the officers in a written report which is proofread by the watch commander for elements of the crime, spelling and structure. The officer makes corrections as required by the watch commander.

Watch commanders neither hire nor fire officers. Watch commanders write up performance reports and may discuss these with the lieutenant, especially if the recipient employee is going to be denied a merit salary adjustment (MSA). The watch commander signs the performance report. The final decision on whether a MSA is granted resides with the chief. Questions of time off or vacation are typically scheduled with the watch commander who will inform or consult with the lieutenant when a conflict arises. The watch commander is responsible for the officer's sign-in sheet and can find an officer AWOL (absent without leave) if he/she fails to call in when absent. The watch commander has authority to request officers to work overtime, unless the lieutenant has dictated that a zero overtime situation exists.

The watch commanders monitor sick leave usage and request employees fill out the proper form or provide the required documentation for sick leave usage. An officer cannot be put on an attendance program by a watch commander, however, the watch

commander who testified has effectively recommended such a program. When an officer is requested, and fails to bring in a doctor's note, the watch commander will not allow him to come back to work. Rather, the officer is sent home to procure the note. If a problem develops with an employee, the watch commander typically alerts the lieutenant to the problem. A written counseling memo prepared by the watch commander with the approval of the lieutenant may follow.

On the 20th day of each month the watch commander prepares the monthly work schedule. At the beginning of each shift, the watch commander assigns each officer to a car and a patrol sector. In the watch commander's absence, the corporal assigns officers to their duties. Officers are typically assigned duties based on the previous night's activity. Officers will also have input into this decision. An exception is the duty of escorting the receipts from the IMAX Theater, which is assigned by the dispatcher. An officer typically performs this duty although a watch commander performed this duty approximately six times in an eight week period.

Watch commanders attend the chief's quarterly supervisory meeting during which the chief discusses developments in the department as well as changes in the laws and any other matters related to the employees of the department. These matters are actively discussed by the watch commanders, lieutenant and chief at this meeting. At least one watch commander has had 80 hours

of supervisory training through POST (Commission on Peace Officers Standards and Training).

Shift assignments are determined on a yearly basis by a seniority-based bidding system. The individual with the most seniority is given the first opportunity to select the watch on which he/she wishes to serve. Once his/her selection is made., the employee remains on that shift for the entire year. If an officer requests a transfer in writing, the watch commander determines whether there is anyone on the appropriate shift that is willing to trade with the requesting officer. Watch commanders have never forced an individual to transfer. Any transfers required for training purposes are initiated by the watch commander and proceed through the lieutenant making a recommendation to the chief. The chief has the authority to transfer the officer.

If an officer should be disciplined, typically the watch commander will recommend the appropriate level of discipline to the lieutenant who then discusses the matter with the chief. The chief makes the final decision. If the discipline recommended is an adverse action, the chief would typically investigate further on his own if the information provided to him raises questions. The chief maintains a working file for each employee in a locked cabinet in his office. The lieutenant is the only other individual having a key to this file cabinet. No disciplinary document goes into the working files without the knowledge of the

chief. Watch commanders do not give an officer a verbal or written warning without the knowledge of the lieutenant.

Watch commanders can resolve grievances during a verbal discussion with the grievant only if the grievance does not involve money, discrimination against the grievant, or a policy change which would affect more than the individual grievant. Once a grievance is reduced to writing, the grievance form is presented to the chief who is the first level in the grievance procedure.

New officers are trained by being assigned first to dispatching, then riding with the watch commander in his car. When the watch commander feels the officer is ready to patrol on his own, he recommends that to the lieutenant who then makes the decision.

The Lieutenant

The lieutenant works primarily from 8 a.m. to 5 p.m. and is not required to be in uniform. He patrols in uniform, although not on a daily basis and usually only when there is a shortage of staff due to training or illness. In the absence of the chief, he assumes that role.

If a watch commander recommends discipline for an officer, the lieutenant conducts an independent investigation and makes a recommendation to the chief. Vacation requests are presented to the lieutenant only when the watch commander indicates there is a disagreement or problem with the watch commander's decision. The lieutenant takes such an issue to the chief only if there is a

major problem. The lieutenant signs off on the monthly schedule of officers.

The lieutenant acts as the department liaison to sponsors of special events. He ascertains what department resources are needed for the event, informs the chief, and tells the watch commanders to schedule officers for the event. The lieutenant reviews any overtime slips which result from the event. He also signs off on travel claims for training. He consults with the chief to do the sergeants' performance reports. The lieutenant is not involved in the grievance procedure.

When the bike patrol was instituted, officers were transferred from one shift to another. Transfers were done by seniority with the lieutenant and chief working it out.

LEGAL ISSUE

Should the classification of Supervising Museum Security Officer remain excluded from Unit 7 as supervisory?

CONCLUSIONS OF LAW

The criteria required to establish the supervisory status of an employee is set out in the Ralph C. Dills Act (Dills Act)⁴ at section 3513(g) (formerly Govt. Code § 3522.1, repealed 1990) which reads:

(g) "Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign,

⁴The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend this action, if, in connection with the foregoing, the exercise of this authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

Application of this statutory provision requires a two-step process. First, the duties of the alleged supervisory employee must be tested against the statutory criteria. Second, if the employee performs supervisory duties, the duties must be tested against the substantial similarity requirement.

The burden of proving an exclusionary claim is on the party asserting it. "Absent that burden being met, the employees involved are to be included in the unit." (State of California at p. 1.)⁵

In analyzing the statutory criteria, the Board in the State of California reaffirmed previous holdings that the various indicia of supervisory status are to be evaluated in the disjunctive. "Where it is demonstrated that an employee meets one of the specified criteria for exclusion and does none of the rank-and-file work, he/she is to be excluded from the unit." (Id. at p. 6.) However, sporadic and atypical exercise of supervisory duties is insufficient to qualify an employee as a

⁵This case interprets Dills Act section 3522.1 which was repealed in 1990 and replaced by section 3513(g). The case is still applicable because the two sections are identical.

supervisor. (Id. at p. 6; see also, Lawrence Livermore National Laboratory (1983) PERB Decision No. 241C-H.)

Nominal exercise of the statutory criteria is not enough to qualify for supervisory status. The employee must demonstrate independent judgment in the exercise of these functions. (State of California at p. 8.) Independent judgment is marked by "the opportunity to make a clear choice between two or more significant alternative courses of action and the power to make that choice without broad review and approval." (Id. at p. 9.) An employee exercises independent judgment by demonstrating significant autonomy and control over the decision making and recommending processes.

The authority to assign work does not make an employee a supervisor unless the purported supervisor has significant control over the decision making process. This standard is not met where the work assigned is "so routine and well structured as to render the act of assigning that work little more than an exercise of ministerial options." (Ibid.) The assignment of work also fails to meet the supervisory criterion where there is substantial review or prior approval of the supervisory act or where the assignment is merely an application of policy. (Ibid.)

Routine transfers within the normal patterns of work distribution or those made only upon the review and approval of others do not meet the standard for exclusion. (Ibid.) The statutory criteria are likewise not met where the purported supervisor's power to suspend, discharge, reward or discipline is

limited to informal, oral counseling. (State of California.) Nor are the criteria established where the employee's responsibility is only to gather information and refer it to others for action. (Id. at p. 13.)

Evidence that an employee had a role in the preparation of evaluations does not establish supervisory status where it is not marked by independent judgment. Thus, supervisory status does not exist where preparation of the evaluation "is subject to substantial review and approval or where it follows a routine course prescribed by past practice or existing policy." (Id. at p. 14.)

Similarly, no supervisory status is found where the scheduling of vacations was "essentially ministerial, following a seniority system or other defined policy." (Ibid.) Nor is there supervisory status where the authority to approve or disapprove sick leave is based on articulated departmental or state standards. (Ibid.) Supervisory status likewise is not found where an employee's role in the approval of merit increases is the routine administration of a well articulated system.

If a purported supervisor meets at least one of the statutory criteria, the claim of supervisory status must then be tested against the substantial similarity requirement. Under section 3513(g), "[e]mployees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees." The Board has not applied a standard of percentages in interpreting this section. Rather, the Board

has concluded that substantial similarity occurs at "the point at which the employees' supervisory obligation to the employer outweighs their entitlement to the rights afforded rank-and-file employees." (State of California at pp. 7-8.) Where supervisory obligations exist to the degree that they outweigh rights to organize, an employee no longer performs duties substantially similar to his/her subordinates.

Finally, in evaluation of any claim of supervisory status, it is important to keep in mind the purpose behind the statutory exclusion of supervisors. "[E]xclusions are designed to prevent a division of supervisors' loyalties that might occur because of the negotiating relationship of the parties, concerned as it is with wages, hours, and working conditions." (Id. at pp. 9-10.) The potential for the conflict of interest lies in the authority to control personnel decisions, as distinguished from control over work processes, that lies at the core of supervisory status.

Watch Commanders

In State of California, p. 90, B-98, the Board approved a stipulation of the parties that the classification of Supervising Museum Security Officer was supervisory. Continued supervisory designation of the four watch commanders who function in this classification appears unwarranted.

There is little evidence that watch commanders are supervisors under Dills Act section 3513(g). They do not hire, fire, discipline, involuntarily transfer officers, or resolve written grievances under the contract between CAUSE and the

State. At most, they prepare evaluations of performance, assign work, resolve relatively minor issues (vacation scheduling, sick leave verification), and back up officers when situations develop. Much of this work is performed according to guidelines that leave little to the independent discretion of the watch commanders. For example, officers are assigned to patrol based on the previous night's activities. And, whenever there is a dispute over minor issues (e.g., vacation scheduling), the problem is referred to the lieutenant for resolution.

The closest these positions come to being supervisory is in the preparation of performance reports. These documents are based on the watch commander's observation of the officer and are signed by the watch commander. In cases where an officer is going to be denied a MSA, the watch commander discusses the report with the lieutenant. The chief testified that he had the final say as to who received a MSA.

These facts are not demonstrative of a clear exercise of supervisory functions by the watch commanders. Even if they were, the work of the watch commander is "substantially similar" to that of their officers. During the third watch, the watch commander spends almost 75 percent of his time in uniform, patrolling and responding to calls, the same as his officers. Although there is not a strict percentage test, performance of this extensive amount of bargaining unit work indicates that the watch commanders' supervisory obligations do not outweigh their entitlement to the rights of a rank and file employee. (State of

California at p. 1.) Accordingly, I find that the four Supervising Museum Security Officers who are performing as watch commanders are not supervisors.

Lieutenant

The lieutenant does exercise independent judgement on behalf of the employer. He directs the department in the absence of the chief. Only the chief and the lieutenant have keys to the locked cabinet containing the officers' "working" personnel files. Both the logistics officer and the training officer report directly to him regarding these assignments. The lieutenant signs off on the monthly schedule. He resolves problems which arise between the watch commanders and the officers regarding work schedules, performance reports, and attendance.

The lieutenant represents the police force in meetings with other departments of the park regarding the scheduling of special events. He directs the watch commanders to schedule a sufficient number of officers for the event and approves the resulting overtime.

Some of the lieutenant's work is based on application of established guidelines. The bike patrol was begun with volunteers whose regular assignments then became vacant. He oversaw the transfer of officers to fill these vacancies, but it was accomplished by using seniority to determine which officers were affected.

There is little evidence that the lieutenant performs the work of either the watch commanders or the officers. He rarely

wears a uniform and patrols only in unusual circumstances. He does not attend the watch meetings. Based on this evidence, I find the one Supervising Museum Security Officer who is performing as the lieutenant to be supervisory.

PROPOSED ORDER

For these reasons and based upon the entire record in this case, it is ORDERED that the petition of the California Union of Safety Employees to include the classification of Supervising Museum Security Officer at the State of California (Museum of Science and Industry) in State Employee Bargaining Unit No. 7:

- 1) Is granted for the positions of watch commanders.
- 2) Is denied for the position of lieutenant.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any

statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Robert Thompson
Hearing Officer