STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and FEDERATED UNIVERSITY POLICE OFFICERS' ASSOCIATION, Exclusive Representative.	Case No. SF-UM-661-H PERB Decision No. 2217-H November 9, 2011

Appearances: Jones & Mayer by Paul R. Coble and Jamaar Boyd-Weatherby, Attorneys, for Regents of the University of California; Lackie, Dammeier & McGill by Dale G. Nowicki, Attorney, for Federated University Police Officers' Association.

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Federated University Police Officers' Association (FUPOA) to a proposed decision (attached) of the administrative law judge (ALJ) arising out of a unit modification petition filed by FUPOA. By its petition, FUPOA seeks to add police sergeants to FUPOA's unit of rank-and-file police officers. The ALJ dismissed the petition on grounds that the Regents of the University of California (University) had met its burden of demonstrating that sergeants are supervisors within the meaning of the Higher Education Employer-Employee Relations Act (HEERA),[1] section 3580.3 and must be excluded from the unit.

[1] HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

In the proposed decision, the ALJ concluded that, contrary to FUPOA's contentions, sergeants should be excluded from the rank-and-file unit in order to allow the University to effectively achieve its mission without undue conflict of interest. Therefore, the ALJ proposed to dismiss FUPOA's unit modification petition.

We have reviewed the entire record, including the proposed decision, the hearing transcripts and exhibits, FUPOA's exceptions and the University's response, in light of the relevant law. Based on this review, the Board finds the ALJ's findings of fact and conclusions of law to be well-reasoned, adequately supported by the evidentiary record and in accordance with the applicable law. Accordingly, the Board adopts the proposed decision as the decision of the Board itself, as supplemented by the following discussion of FUPOA's exceptions.

ISSUES ON APPEAL

FUPOA raises three exceptions to the ALJ's proposed decision.[2] FUPOA excepts to the ALJ's conclusions that: (1) sergeants exercise independent judgment in matters defined as supervisorial work under the applicable statute; (2) the functions performed by supervisors relate to the job security of line officers or directly affect wages such that a significant potential for a conflict of interest exists between line officers and management, and (3) sergeants are decision makers in matters affecting the officers' employment relationship with the University. Additionally, FUPOA asserts that the ALJ disregarded the Board's decision in *The California State University* (1983) PERB Decision No. 351-H (*California State University*).[3] Finally, FUPOA asserts that a failure to allow employees in the rank of sergeant

[2] FUPOA identifies a total of twelve exceptions, but categorizes the twelve exceptions into three main issues due to overlap among the exceptions.

[3] In *California State University*, the statewide university police association (SUPA) filed a unit modification petition requesting that sergeants be added to the established bargaining unit represented by SUPA. The California State University (CSU) opposed the petition, and argued that sergeants were supervisors within the meaning of HEERA

to join FUPOA denies them an opportunity to have full and fair bargaining rights under HEERA, thus disenfranchising a significant number of the University's workforce.

FUPOA's exceptions were raised and considered in the proceedings below, and adequately addressed in the ALJ's proposed decision. In adopting the ALJ's findings of fact and conclusions of law, the Board concurs in the ALJ's reasoning and determination that the unit modification petition should be dismissed. In the following supplemental discussion, we address FUPOA's latter two contentions, to wit, that the ALJ disregarded our decision in *California State University* and FUPOA's assertion that dismissal of the petition denies sergeants an opportunity to have full and fair bargaining rights.

DISCUSSION

The ALJ Did Not Disregard The Decision In *California State University*

FUPOA argues that the ALJ disregarded the Board's decision in *California State University*. We disagree.

The ALJ fully considered the application of the decision to the current petition. He meticulously described the similarities and differences between that decision and the current petition. Further, the ALJ carefully examined and rejected FUPOA's assertion that many, if not all, of the job duties of the sergeants in both the University of California (UC) system and the CSU system are the same, and thus the Board's conclusion in *California State University* controls here. We concur in the ALJ's conclusion that, unlike their counterparts at CSU, the University sergeants perform supervisory work on more than a sporadic or atypical basis, and that the University sergeants exercise independent judgment in the imposition of formal

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section 3580.3. The Board held that CSU did not satisfy its burden of proof that sergeants were supervisors within the meaning of Section 3580.3 and granted the petition for unit modification on grounds that the sergeants did not regularly perform supervisory work, but performed supervisory on a sporadic or atypical basis.

discipline, termination of probationary employees, and evaluation of subordinate officers.[4] Thus, the present case is distinguished from *California State University.*

The Dismissal Of The Petition Does Not Deny Sergeants The Opportunity To Have Full And Fair Bargaining Rights

FUPOA argues that the dismissal of the unit modification petition denies sergeants the opportunity to have full and fair bargaining rights under HEERA, thus disenfranchising a significant number of the UC police workforce. We disagree.

Supervisors have the right to their own representation. HEERA section 3581.1 provides that:

> Supervisory employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of supervisory employee-employer relations as set forth in Section 3581.3. Supervisory employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the employer.

Thus, the sergeants have the right to form their own employee organization and be represented. Dismissing FUPOA's petition does not disenfranchise sergeants, nor deny sergeants the opportunity for full and fair bargaining rights.

ORDER

It is hereby ORDERED that the unit modification petition in Case No. SF-UM-661-H filed by the Federated University Police Officers' Association is DISMISSED.

Members McKeag and Dowdin Calvillo joined in this Decision.

[4] HEERA section 3580.3 defines a "supervisory employee".

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and FEDERATED UNIVERSITY POLICE OFFICERS' ASSOCIATION, Exclusive Representative.	REPRESENTATION CASE NO. SF-UM-661-H PROPOSED DECISION (4/29/2011)

Appearances: Jones & Mayer by Paul R. Coble and Jamaar Boyd-Weatherby, Attorneys, for Regents of the University of California; Lackie, Dammeier & McGill by Rana M. Kawar and Michael D. McCoy, Attorneys, for Federated University Police Officers' Association.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

On April 2, 2008, Federated University Police Officers' Association (FUPOA), the exclusive representative of a bargaining unit of police officers employed by the Regents of the University of California (University), filed a petition for unit modification under the Higher Education Employer-Employee Relations Act (HEERA)[1] pursuant to PERB Regulation 32781(a).[2] The petition, accompanied by adequate proof of support, seeks to add police sergeants to FUPOA's unit of rank-and-file police officers. On May 16, 2008, the University filed a response to the petition opposing the proposed unit modification, contending that sergeants must be excluded from the unit because they are supervisors. On May 27, 2008, FUPOA filed a reply to the opposition.

[1] The HEERA is codified at Government Code section 3560 et seq. All statutory references are to the Government Code.

[2] Regulations of the Public Employment Relations Board (PERB or Board) are codified at California Code of Regulations, title 8, section 31001, et seq.

On July 29 and December 11, 2008, and January 15, 2009, informal settlement conferences were held but the matter was not resolved.

Beginning on September 28, 2009, and continuing for 15 nonconsecutive days through May 26, 2010, a formal hearing was held in Oakland.

On July 29, 2010, the matter was submitted for decision following the submission of post-hearing briefs.

FINDINGS OF FACT

FUPOA is an employee organization within the meaning of section 3562(f)(1) and is the exclusive representative of an appropriate unit of University employees within the meaning of section 3562(i). The University is a higher education employer within the meaning of section 3562(g).

Campus Police Unit Operations

The University operates 10 academic campuses within the state. There are medical centers (teaching hospitals) associated with five of the campuses (San Francisco, Davis, Los Angeles, Irvine, and San Diego). The University maintains a staff of sworn peace officers, as defined by the California Penal Code, to provide public safety services at these locations.[3] The officers are authorized to carry weapons and make arrests.

Each campus has its own police department, organized and led by a chief of police. The chief establishes a "chain of command" through a deployment of officers by rank. Military-style rank follows a hierarchy (chief, assistant chief, captain, lieutenant, sergeant, corporal, police officer), and chevrons on the uniform identify the officer's rank. The highest ranking officer on duty at any given time heads the chain of command, and all subordinates

[3] The University operates two laboratory facilities, Lawrence Livermore National Laboratory and Lawrence Berkeley Laboratory. However no evidence was presented as to safety services at these facilities.

must obey the commanding officer's orders. Due to the differences in the size and needs of the University's police departments, not all ranks are filled. While all departments have sergeants, some dispense with captains, lieutenants, or corporals.

The general policies and practices of the police departments are set forth in the Universitywide Police Policies and Administrative Procedures Manual. The procedures, promulgated by the University's Office of the President, are referred to as the "Gold Book." The Gold Book includes general descriptions of the responsibilities of officers in each of the ranks.

According to these descriptions, sergeants and lieutenants share responsibility for disseminating and enforcing orders, policies and procedures, and making recommendations concerning hiring, disciplining, and terminating employees. The role of the police officer is to prevent and suppress crimes, enforce laws, and arrest offenders.

Sergeants' job descriptions also require that they be able to perform the duties and functions of a police officer. Sergeants are required to complete an 80-hour supervisor's training course approved by the Peace Officers Standards and Training Commission (POST). The POST training covers leadership principles, officers training, and case law. Sergeants, like officers, are non-exempt employees for Fair Labor Standards Act purposes.

In addition to normal rank positions, the chief is authorized to appoint "specialists." These include such positions as field training officer, detective/investigator, corporal, firearms instructor, defensive tactics instructor, motorcycle officer, and crime prevention officer. Specialists working a 50-percent-or-more assignment are entitled to a stipend for that month.[4]

[4] An investigator/detective position was posted at the Los Angeles campus as a four-year assignment with a monthly stipend of $175.00.

The University maintains minimum standards for employment and training. These include absence of a felony conviction, good moral character, physical fitness, reading and writing ability, and an oral interview by the department. Probationary employees must complete a 12-month probationary period, during which they must pass a certified field training course. The policies prohibit consumption of alcohol on duty and reporting to duty under the influence. The Gold Book includes within the meaning of "promotion" appointment to the ranks of sergeant and lieutenant, but not the assignment of specialty positions. Promotions in rank are made on the basis of a competitive process. The Gold Book also mandates that officers at one campus may be called for duty to provide "mutual aid" at other campuses.

Each police department maintains a set of internal policies, known as the department's general orders. They cover such subjects as the expectations within the chain of command, minimum staffing levels, and disciplinary procedures.

Campuses vary in size, and so, too, do the size of the police departments. Sergeants range in number from one at the Merced campus to twelve at the Berkeley campus. Five of the campuses have between four and six sergeants, which represents the average staffing number. The vast majority of sergeants are patrol sergeants. Other positions include detective sergeants, who oversee the department's (plainclothes) crimes investigation unit, and administrative sergeants, who oversee the field training program, plan special events, and undertake matters related to hiring.

A patrol sergeant commands the officers on his shift. The number of subordinate officers assigned varies, from two to nine.[5] At some campuses, non-sworn employees, such as

[5] A Santa Cruz sergeant testified he might be the only officer on duty on a given shift. The circumstances of this occurrence were not explained, and it is deemed an anomalous practice.

community service officers (security guards), dispatchers, student employees, and others performing administrative functions also work under the direction of sergeants. At others, non-sworn staff oversee these employees.

Patrol Duties

As reflected in the job descriptions for police officers, the primary function of the position is to engage in the routine patrol duties, also referred to as crime suppression or law enforcement activity. The police dispatcher receives a call for service and directs it to the next available officer or to the officer assigned to the "beat" or area of patrol responsibility. The officer responds to investigate the complaint or incident. Some, but not all campuses, assign officers to beats. Beats are more likely to exist at a large-sized campus.

After ascertaining the nature of the problem, the officer renders assistance, conducts investigation, and/or engages in an enforcement action (e.g., a traffic stop and citation, or an arrest for a non-citation offense). In many cases, the officer completes a written report after the service call. The report calls for routine information as well as a narrative portion, in which the officer describes the events that occurred and enforcement activities undertaken. In cases where an arrest is made, the narrative must contain information to support each element of the crime for which the arrest was made. In such cases, the report often contains information of investigative or evidentiary value to the district attorney's office.

All of the police departments provide around-the-clock coverage. There are various schedules for deployment, some involving eight-hour shifts, others of longer duration. Each campus establishes minimum staffing levels for the shifts. While staffing levels are generally uniform, at one campus they vary by days in the week. Sergeants are assigned to shifts outside normal business hours. Lieutenants, and those ranking above, are not.

Responsibly Direct and Assign

In most cases, the officer in command ranks no lower than a sergeant. Because the command staff usually works business hours and two shifts occur outside of this time period, a sergeant is very often the officer in command. Despite full command control, the sergeant is expected to contact a member of the command staff for guidance and direction in the event of a major incident or issue during the sergeant's watch. Occasionally, a corporal or police officer will be the officer in command due to the absence of a sergeant. This occurs regularly but infrequently, and, with one campus excepted, on a temporary basis only.

As the officer in command, the patrol sergeant directs his staff. In larger departments this activity takes place regularly during roll-call (start-of-shift) briefings. Sergeants inspect uniforms and equipment. The sergeant discusses problems reported from the previous shift and trends during the week. Bicycle thefts, laptop thefts, burglaries, problems with the homeless, skateboard and bicycle enforcement, graffiti, and traffic enforcement are issues typically requiring attention. Action plans and operation tactics may be discussed. The sergeant may direct certain officers to engage in surveillance or an undercover operation. The sergeant may issue equipment. He/she may arrange for roll-call training, bringing in a field-training officer to cover topical matters.

During the shift, the sergeant monitors the enforcement activities of his officers. He/she may arrive on scene to observe and/or approve an arrest, or follow enforcement activities via radio from a distance. A sergeant's approval may be required for an officer's in-custody arrest as opposed to a "cite-out." This determination is addressed by policy, though a sergeant exercises his discretion without prior approval where a choice must be made. Once a crime report is prepared, the sergeant will review it, paying particular attention to the

narrative portion of the report.[6] Apart from ensuring that the elements of the charged offense are supported, sergeants confine their review to grammatical or other technical errors. In cases not involving a crime but where some investigation occurs, an incident report is created by the officer, which is also reviewed by the sergeant.

The patrol sergeant is charged with maintaining minimum staffing on the shift. If an officer calls in sick, the sergeant approves the sick leave. The decision is routine because such leave is not questioned, unless there is some cause for suspicion at the time or as result of a pattern of irregular attendance. A number of approaches are used to summon another officer to substitute. An officer from the ending shift may be directed to hold over. The sergeant may call off-duty officers at random until a volunteer is obtained ("whoever answers the phone"), or work from a list of officers who have indicated interest in overtime. In the absence of a volunteer, officers might be called in order of inverse seniority. At some but not all campuses, sergeants have independent authority to approve permanent shift switches between officers. Sergeants review timesheets for accuracy and independently approve them.

Sergeants are responsible for planning coverage for special events, such as intercollegiate athletic events, musical concerts, a potential protest demonstration, and hosting of dignitaries. Their concerns are logistical: determining the number of officers required, the duration of coverage, the amount of overtime charged, whether expenses can be charged back to the campus entity sponsoring the event, etc. For routine events, such as athletic events and concerts, the planning usually follows a template. Interest in the assignments is often solicited because overtime pay is earned. At one campus, if no one volunteers the sergeant follows a list based on the least amount of accrued overtime. If there is no call-up procedure, a sergeant

[6] Officers receive training on the elements of crimes in police academy. The departments also update their staff concerning changes in the law.

assigns the duty. Where overtime is not necessary for minimum staffing or planned event purposes, a member of the command staff usually must approve it.

Occasionally an unplanned event will require swift, decisive action, including a call for mutual aid. On one occasion, the sergeant on duty at the Davis campus was required to order all officers on duty to respond to a riot situation. A large automobile accident may require a sergeant to take command of the incident and call in additional support.[7] There is little evidence that sergeants are regularly required to take independent decisive action related to deployment or direct officers into life-threatening situations, as might be the case in large urban police departments.[8] One University witness indicated that a typical deployment issue would be choosing an officer more experienced in driving-under-the-influence cases over a less experienced one for assignment to a DUI checkpoint.

At campuses where there is more than one detective, the detective sergeant has discretion in assigning cases for investigation. That discretion is exercised on the basis of the level of the crime's seriousness or complexity.

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[7] Incident command is often set up at the scene of a major incident. The incident commander may direct operations from a mobile unit equipped with radio communications.

[8] The Jeanne Clery Act (20 U.S.C. 1092(f)) requires institutions of higher learning receiving federal funds to collect, maintain, and report data on crimes. The statistics classify crimes by type and level of seriousness. Serious crimes (e.g., homicide, aggravated assault, sexual assault, robbery) can range from zero to 35 per year at any given campus. Based on the record in this case and other matters of public record, the University's campuses are relatively safe enclaves. For example, the Santa Cruz campus is closed to the public between 8:00 p.m. and 3:00 a.m. The vast majority of offenses at the various campuses involve illegal use of alcohol and theft. (See A. Fell, "Most crimes reported under Clery Act down in 2009" (Oct. 10, 2010) [http://www.universityofcalifornia.edu/news/article/24219]; University of California, Santa Barbara, Division of Student Affairs, Annual Clery Report 2007-2008-2009 Statistics [http://www.sa.ucsb.edu/CMSMedia/Documents/AnnualCleryReport2007-2008-2009Statistics.pdf].) Reflective of this feature, a captain at the Santa Barbara campus indicated there were few reportable high level crimes. The Berkeley campus and the San Francisco campus are distinguished by policing facilities in contiguous urban areas. The San Francisco department has recently hired managers with urban police department experience, suggesting the need for different type of leadership.

Officers are required to rotate shifts periodically during the year. The frequency of rotation varies (three or six months). Sign-ups are voluntary, though typically there is a bidding process based on seniority. The benefit of seniority is tempered by the fact that the officers must rotate through all of the shifts.

Sergeants approve requests for vacation. Officers submit their choices, in some cases far in advance. At other campuses, requests are granted on a first-come, first-served basis. Seniority may be a tie-breaker where requests conflict.

Time Spent on Routine Patrol Duties

A key factual dispute involves the proportion of time patrol sergeants devote to law enforcement activities in the field. Sergeants for FUPOA testified that sergeants spend a majority of their time engaged in field patrol duties similar to those of patrol officers, with the average estimate around 70-75 percent of time. Sergeants from the Santa Cruz, Santa Barbara, Davis, San Francisco, Riverside, and Berkeley campuses testified they respond to dispatch calls, made solo arrests, issued citations, and wrote reports. The remainder of their time is spent on administrative tasks, such as scheduling staff, approving time sheets, investigating and responding to citizen complaints, and reviewing and correcting reports. Sergeants from Santa Cruz and Santa Barbara, where minimum staffing may be only two, were ones offering the highest estimates of time spent on "line" police work.

Witnesses for the University from the various campuses testified that on average between less-than-five and 20 percent of the sergeants' time involved regular patrol duty. The majority of University witnesses were at the level of lieutenant and above.

The wide divergence in estimates offered by credible witnesses on both sides appears to be explained by a different understanding of what constitutes line police work. Former Los Angeles campus Chief Carl Ross explained that patrol sergeants are expected to "lead,

guide, and direct" "100 percent of the time," referring to the self-conscious responsibility to model correct procedures, counsel front-line officers, and issue tactical orders.[9] Under this definition, the high percentages estimated for supervision by University witnesses do not coincide with HEERA's definition of the same, and are therefore not useful.

Due to the variation in the size of campus police departments, their complexity, and division of labor, it is difficult to arrive at an overall estimate of the time sergeants are engaged in duties substantially similar to line officers. During the swing and graveyard shifts, sergeants spend more time in the field. At some campuses they rotate on dispatch calls; at others they do not. In either case, patrol sergeants are making observations and investigating, though acting more independently. For example, one sergeant who is not in the dispatch rotation testified that if he witnesses a traffic violation he will "proactively" address the situation rather than call a subordinate. Or, if an arrest is made, a sergeant often arrives at the scene to oversee the enforcement action. According to policy, certain types of calls require two officers on scene, and one may happen to be a sergeant. Some sergeants spend time with officers during meal breaks. During normal business hours, it is common for the sergeants' time to be devoted largely to administrative tasks, including special projects assigned by the command staff, which reduces the overall time devoted to field work. Whether this is a function of ample staffing rather than necessity is unclear.

[9] A Los Angeles job description estimates that law enforcement constitutes 25 percent of a sergeant's time, supervision 35 percent (overseeing activities of officers, insuring proper performance, enforcing policies), administration 30 percent (coordinating schedules, disseminating orders, review incident reports, investigate citizen complaints, act as liaison to other departments), and special projects 10 percent. The Davis job description estimates 45 percent for supervision (maintaining policy standards and controls, directing activities of officers, monitoring job performance), 10 percent for resource management (scheduling and monitoring), and 35 percent for training, and liaison work.

Hire

The police departments all conduct hiring through a process in which eligible candidates are initially screened, tested, interviewed, and placed on an eligibles list. A subsequent interview by a chief, assistant chief, or captain is necessary to obtain a formal offer of employment. Applications are first solicited and screened for disqualifying factors. Qualified applicants typically complete a written and a physical test in the eligibility determination step.

The first-round oral interview is conducted before a representative panel of at least three members. A sergeant is usually at least one participant. Others may include a ranking officer (like a captain), patrol officers, a non-sworn staff member, and/or a community representative. The members of the panel have an equal vote. After the interviews the panel meets and attempts to make decisions on a consensus basis. The deliberations may result in a ranking of candidates, a list of eligible candidates without ranking, a hiring recommendation(s), or the presentation of one or more individual candidates to management for the closing interview.

If the sergeant is the highest ranking member on the panel, the department considers the sergeant to represent management's view and expects the sergeant's opinion to carry greater weight than civilian members. It is unclear how this occurs in practice given the equal weighting of votes. There was testimony that the sergeant's opinion on such panels is given greater weight during management's deliberation.

If the panel recommends qualified candidates to be interviewed, the command staff does not deviate from the recommendation. However, when hiring recommendations are made, the chiefs on occasion have rejected those recommendations. At some campuses, the sergeants coordinate the testing process, assemble the panels, and draft the interview questions.

Sergeants may administer the physical agility test and background (character) check and make judgments about the candidate's suitability for further competition. At other campuses, the background check is contracted out, or does not occur until after the chief or chief's designee has conducted the follow-up interview. At one campus, a sergeant screens candidates for the initial interviews but is the lowest ranking member of the panel.

Discharge, Suspend, and Discipline

There was no evidence that sergeants discharge, or effectively recommend the discharge of a permanent employee. Nor was there any evidence sergeants suspend, or effectively recommend the suspension of an employee without pay. Such a notice would be issued by a captain or lieutenant.

If an officer were to arrive at work under the influence, a sergeant in command of the shift has the authority, usually with some input from management, to temporarily suspend the officer and send him/her home with pay pending an investigation.

Sergeants have independent authority, and indeed are expected, to engage in oral counseling and memo-counseling of officers in matters such as tardiness, incomplete investigations, grooming or uniform requirements requiring corrective action. If counseling does not succeed, sergeants have independent authority to issue a written letter of reprimand, which is defined as discipline in FUPOA's memorandum of understanding (MOU). Letters of reprimand are placed in the personnel file, but may be removed after a period of time. Reporting the issuance of such a letter to management is required. At some campuses it requires prior consultation, in the interest of achieving consistency. An appeal of such a letter by the officer is handled by management.

Sergeants have discretion to report rule infractions up the chain of command. In serious matters, like theft, malfeasance must be reported up the chain, where the matter is

handled by the command staff. In matters of discipline handled by management, sergeants are often responsible for conducting a factual investigation into the matter and recommending findings of fact. Sergeants make no recommendation as to the appropriate discipline.

Sergeants may independently issue letters of commendation. Such letters may be offered by other staff or members of the community as well.

Concurrent with their responsibility for maintaining departmental standards and counseling employees, sergeants are charged with preparing performance evaluations of the officers under their supervision. For permanent employees, performance evaluations are issued annually. During the interim, sergeants are responsible for maintaining records covering performance, both negative and positive. In some cases, the sergeant completes an informal "pencil" evaluation at the six-month point. The evaluation forms are lengthy and involve ratings on a substantial number of criteria.

A negative performance evaluation can lead to the denial of a merit-pay step increase on the wage schedule. Sergeants have authority to place a physically impaired officer on light duty or assign them to administrative work. At some campuses, sergeants may independently place an officer on a formal performance improvement plan.

Evaluations are reviewed by management, often at multiple levels. In some cases the evaluation is presented to the employee directly; in others, it must first be reviewed by management. The evaluations are rarely returned with instructions to change an overall rating. Management reviews the evaluations for form, consistency, and completeness. Substantive changes include adding information, like negative incidents or credit for the number of reports completed.

Sergeants are responsible for assessing a new employee's performance during the probationary period. They are expected to recommend whether a new recruit passes or does

not pass probation. These recommendations to management are routinely accepted. Probationary evaluation reports are typically issued to the officer by the sergeant without prior review by management. During a new recruit's field training, daily records are created by a sergeant or, if by a field-training officer, they are reviewed by a sergeant.[10]

Reward and Promote

Similar to the process for initial hires, promotion from the rank of police officer to sergeant involves a formal competitive process. Sergeants do not promote, or effectively recommend the promotion of officers to their own rank.

Where the rank of corporal exists, there is evidence that sergeants are involved in the selection of corporals.

Sergeants are involved in the granting of specialty assignments. In some cases only sergeants are involved. In others, sergeants as a group, or as members of a panel that may include a line staff employee, provide a recommendation, and a captain or the chief makes the selection. In one case, a recommendation for a field-training officer position was rejected by the chief without explanation.

Adjust Grievances

Sergeants are not responsible for representing management in the formal grievance process (i.e., those involving alleged violations of the MOU). Only one sergeant testified he was expected to resolve an MOU-based grievance on an informal basis. Sergeants are expected to mediate and/or resolve disputes that arise among their subordinates. The focus is on "work environment" issues with the goal of building and maintaining the "team concept."

[10] FUPOA offered evidence that corporals are entrusted with lead officer duties in the absence of a sergeant. Evaluations are one responsibility that corporals are never assigned. Corporals' authority in the area of discipline is also circumscribed. For example, they lack independent authority to issue a written reprimand.

Sergeants are first responders to citizen complaints, including those alleging excessive use of force. They are expected to investigate and seek resolution of the matter informally. Should the complaint result in an internal investigation the sergeant might be expected to investigate and make a factual determination regarding the merits of the complaint. At one mid-size campus, a sergeant was expected to resolve verbal but not written citizen complaints.

Transfer, Lay Off, and Recall

There is no evidence sergeants have the authority to transfer, lay off, or recall employees, or to effectively recommend such.

ISSUE

Are police sergeants sufficiently invested with rank-and-file interests so as to warrant their inclusion in FUPOA's bargaining unit, or are they "supervisors" within the meaning of HEERA so as to preclude their inclusion in the unit?

CONCLUSIONS OF LAW

General Principles

FUPOA's petition relies on PERB Regulation 32781(a)(1), which permits a party to "add to the unit unrepresented classifications or positions." The petition is a proper procedure for seeking to add police sergeants to FUPOA's unit.

The HEERA permits the addition of employees performing supervisory functions to a unit of rank-and-file employees where such employees also perform rank-and-file work and are "sufficiently invested with rank-and-file interests to warrant their inclusion . . . ." (*Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California* (1983) PERB Decision No. 246b-H, p. 8.) At the same time, the higher education employer is entitled to a "cadre of employees whose loyalty will not be compromised by concurrent obligations to the interests of those employees who are

entitled to negotiate wage, hours, and terms and conditions of employment." (*Id.* at pp. 7-8.)[11] Which interest prevails depends on application of the statute's definition of supervisor set forth in section 3580.3.[12] The statute lists a set of functions determinative of supervisory status.

In construing section 3580.3, PERB applies the list of functions in a disjunctive manner. (*Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California, supra*, at p. 8.) If the higher education employer demonstrates that an employee meets one of the specified criteria *and* performs no rank-and-file work he/she is to be excluded from the unit. (*Ibid.*) The employer bears the burden of establishing the exclusionary claim. (*Id.* at p. 6; see also *Unit Determination for Employees of the California State University and Colleges* (1981) PERB Decision No. 176-H, pp. 8-9.)

Supervisors may be included in a rank-and-file unit if their performance of a supervisory function is only "sporadic and atypical." (*Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California*, *supra*, at p. 10.)

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[11] By virtue of article 6.5, HEERA provides limited statutory rights to supervisory employees, and denies their unions "rank-and-file" bargaining rights. (*The California State University* (1983) PERB Decision No. 351, p. 7.)

[12] Section 3580.3 provides:

> "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 such action, if, in connection with the foregoing, the exercise of such 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.

Employees who perform some supervisory functions may be included in the unit "if their exercise of authority does not require the use of independent judgment, but is merely routine or clerical in nature." (*Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California*, *supra*, at p. 10.)

> Independent judgment is indicated where the performance of the duties includes the opportunity to make a clear choice between two or more significant alternative courses of action and the power to make that choice is without broad review and approval. Such functions are characterized by significant autonomy and control over the decision-making or recommending processes. On the other hand, the exercise of authority is of a merely routine or clerical nature where the action is limited to choosing between two or more tightly directed and narrowly defined procedures. In addition, there may be substantial review or prior approval of the alleged supervisory act, either by specific action or existing policy, thereby precluding any finding of independent judgment.

(*Ibid.*; see also *The California State University, supra,* PERB Decision No. 351-H.)

Where supervisors perform rank-and-file work, the focus is on whether the control exercised pertains to "work processes as distinguished from personnel policies and practices." (*Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California*, *supra*, at p. 8.) The underlying concern is the potential for divided loyalties. (*Id.* at pp. 8-9.) Such potential is greatest when the employee exercises discretion over "personnel decisions on matters falling with the scope of representation." (*Id.* at p. 9.) If an employee performs some supervisory functions (which derive from "greater experience, technical expertise and knowledge of the employer's mission and tasks") but the bulk of the work is "substantially similar to those of their subordinates," inclusion in the unit may be granted. (*Ibid.*) Such workers are often called "lead" employees. (*Ibid.*)

Thus, the inquiry must focus on "the point at which the employees' supervisory obligation to the employer outweighs their entitlement to the rights afforded rank-and-file

employees." (*Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California, supra,* at p. 9.)

> This point is not determined merely by quantitative analysis. Even though they spend part of their time performing the work of subordinates, their involvement in one or more supervisory functions may conflict with their participation in rank-and-file unit activity. The existence of such supervisory obligations precludes a finding that the disputed employees' duties, overall, are "substantially similar" to those of their subordinates.

(*Id.* at pp. 9-10.)

<u>*The California State University* Decision</u>

Subsequent to its University system-wide unit determinations in the early 1980s, PERB addressed the supervisor question for the California State University police system in the same context rendered here. The question was whether sergeants who perform patrolling and law enforcement functions (e.g., responding to complaints, taking reports, apprehending suspects) could be included in the rank-and-file unit. *The California State University*, *supra*, PERB Decision No. 351-H, held on the record produced there that sergeants should be included in the rank-and-file unit. PERB found that these "sergeants do not perform any of the enumerated supervisory functions to a degree sufficient to justify relinquishment of their entitlement to the rights afforded by HEERA." (*The California State University*, *supra*, at pp. 7-8.)

Similar to the record here, sergeants there served as watch commanders responsible for overseeing law enforcement activities for a particular shift. (*The California State University*, *supra*, at p. 2.) Staffing levels for the shifts were determined largely by the minimum staffing requirements set by policy. (*Id.* at p. 3.) Sergeants maintained minimum staffing through their authority to call in an off-duty officer to fill in for another absent due to illness or other cause, but this duty did not involve use of independent judgment. (*Id.* at p. 2.) Sergeants had authority to schedule personnel for special events and overtime, though such assignments were

often filled on a voluntary basis. (*Id.* at p. 2.) Their authority to assign particular tasks to patrol officers did not involve the use of independent judgment. (*Id.* at p. 9.) "Some" sergeants performed duties substantially similar to patrol officers, and this was particularly evident on graveyard shifts. (*Id.* at p. 3.) Sergeants were the highest ranking officer present on many shifts, though in a sergeant's absence the ranking officer would be designated the lead officer. (*Id.* at p. 4.)

Sergeants were not responsible for adjusting grievances, though they were expected to resolve low level disputes on an informal basis. (*The California State University*, *supra*, at pp. 9-11.)

Though they participated in hiring interview panels, sergeants had no effective authority to hire in terms of making independent, generally adopted recommendations. (*The California State University*, *supra*, at p. 8.)

Sergeants did not have effective authority to recommend discipline. (*The California State University*, *supra*, at pp. 11-12.) Nor did they conduct personnel evaluations on an independent basis. Lieutenants independently determined whether a new employee passed probation. (*Id.* at p. 12-13.) Sergeants had the authority to recommend discipline, though such a recommendation could easily be rejected by the command staff. (*Id.* at p. 2.) Sergeants were responsible for reviewing and correcting all incident reports, primarily for grammatical or spelling errors. There was no evidence that incident reports were ever used as basis for disciplinary action. (*Id.* at p. 3.)

The Parties' Contentions

Adopting the approach of *The California State University*, *supra*, FUPOA contends that University sergeants spend a substantial amount of their time doing the same protective and investigative duties performed by line staff officers, as supported by the fact that they are

assigned in the main to field operations. Even where sergeants are tasked with functions the University views as supervisory, such as assigning shifts, participating in the hiring process, handling grievances and the like, little independent judgment is applied in carrying out these functions, and much of the decision-making is driven by custom and practice.

The University asserts that supervisors may not be in a bargaining unit with rank-and-file employees, citing section 3580.5 as a "clear and unambiguous statutory determination" of this principle. The University relies on a non-precedential hearing officer decision from 1981 involving the same issue but a different petitioning union. The University asserts that FUPOA has failed to demonstrate that anything has materially changed from the state of affairs rendered in the 1981 decision.[13] The University's post-hearing brief offers no analysis of *The California State University* decision.

Applying *The California State University*, *supra*,—which addresses many of the same job characteristics distinguishing sergeants from rank-and-file officers—to the instant case renews the question whether there is potential for a conflict of interest as a result of uniting the two. The determination rests on a mixed fact-law question, one that is nonetheless primarily fact-driven.

University Sergeants' Performance of Supervisory Functions

University sergeants do perform law enforcement work similar to that of police officers. The majority of sergeants are patrol sergeants deployed in the field. It is routine for them to conduct investigations in the field and effectuate arrests and engage in other

[13] See *University of California and Statewide University Police Association*, PERB Case Number SF-UM-1-H (*University of California* (1981) PERB Decision No. HO-R-93-H [5 PERC ¶ 12126]). That decision predated *The California State University*, *supra*, and nothing in it commands preclusive effect in this matter. Moreover, a number of supervisory functions identified in that decision arguably could not be found now in light of the findings in *The California State University, supra,* case.

enforcement activities, even if they defer that work to a line officer who is available. Hence, they cannot be excluded based on a finding that they perform a single supervisory duty defined by the statute.

Much of the decision-making of the sergeants is related to the work processes of the department, derives simply from greater experience or technical expertise, or is dictated by custom and practice. Monitoring field work, leading by example, critiquing field work, reviewing incident reports for completeness and proper analysis of the elements of a crime, inspecting for uniform compliance, deploying officers to focus on an ongoing crime pattern, scheduling of work, maintaining minimum staffing levels, assigning officers to special events, granting leaves and overtime, and reviewing timesheets, all involve discretion to some extent, but not the application of independent judgment as that phrase is employed under the HEERA. Under the criterion of "responsibly assign and direct," the work of sergeants is similar to that found non-supervisory under *The California State University, supra.*[14]

Unlike their counterparts at the California State University, however, sergeants perform supervisory work on more than a sporadic or atypical basis, requiring the weighing of supervisory interests against rank-and-file interests. University sergeants have independent authority to impose formal discipline, albeit at the lowest level, through written reprimands. As an extension of their responsibility for daily oversight, they are expected to identify patterns of dereliction of duty, such as tardiness, poor report writing and the like, and take corrective action. Such action involves verbal counseling, and in more severe cases, the

[14] The sergeant's discretion in assigning officers to particular assignments based on their aptitude or expertise derived from prior experience, or ordering officers en masse to respond in a mutual aid situation, is a task-oriented function that does not extend to determining the overall scope of an officer's duties. Officers rotate through shifts on a regular basis without differentiation in terms of the role they serve. The particular discretion exercised here is similar to, but distinct from assigning officers to specialty positions, which is treated separately, below.

implementation of a performance improvement plan. Sergeants are expected to determine if an officer is unfit to report for duty and send them home, even though they do not impose suspensions for such malfeasance. In addition, though falling short of having the effective authority to recommend discipline in more serious matters, sergeants are assigned to investigate and make factual determinations of misconduct in internal affairs complaints, including those made by citizens.

University sergeants are tasked with closely monitoring probationary employees as they undergo field training. They determine if performance deficiencies render the employee unqualified to pass probation. Thus, in this circumscribed yet significant area of discretion, they have effective authority to terminate subordinate employees.

University sergeants have nearly complete responsibility for evaluating the officers under their charge. They are expected to observe and catalog the performance of the officers on a continuous basis so as to be able to complete detailed evaluation forms. Though in many cases the evaluations are subject to substantial review prior to issuance, this does not preclude a finding of independent judgment, because the command staff reviewing the documents lacks sufficient personal knowledge of the performance of the officers so as to meaningfully determine the ratings required in the evaluation. Obtaining a meets-expectations rating is a prerequisite to a merit pay increase, which clearly relates to personnel administration as opposed to mere work processes.

The record is not definitive in terms of whether sergeants have the ability to effectively recommend candidates for employment, largely because the process varies from department to department. It is probably true at one or more campuses, but not so at others. At one campus, the sergeant is the lowest ranking member of a panel composed solely of command staff; at another, the sergeant is the highest ranking member of a panel which serves primarily to rank

candidates but where the command staff gives greater weight to the sergeant's input. Regardless, delegation of responsibility for awarding specialty assignments at some campuses and the sergeants' ability to effectively recommend such assignments at others are factors consistent with the level of supervisory authority viewed by the University as appropriate for discharge by sergeants. Specialty assignments offer monetary stipends as well as experience useful in competing for promotional opportunities.

FUPOA placed much emphasis during the hearing on the fact that in the absence of a sergeant on a particular shift, a corporal or police officer in charge bears much of the same responsibility as the regular patrol sergeant. However, these duties, such as maintaining minimum staffing, are not supervisory functions within the meaning of the statute, as noted above.

Based on the foregoing, I find that the record supports the University's claim that there are multiple areas in which University sergeants exercise independent judgment in matters defined as supervisorial work under the statute. These functions relate to the job security of line officers or directly affect wages, such that a significant potential for a conflict of interest exists between line officers and management.

Sergeants may be presumed to have significant affinities with their subordinates because they spend a majority of their work time devoted to a common purpose and their relationship with the officers is to a degree less formal than the relationship officers have with the command staff. This compatibility supports their inclusion in the unit. However, for purposes of the statute and regardless of the sergeants' subjective views, management is entitled to the loyalty of this first line of supervisors because sergeants are decision-makers in matters affecting the officers' employment relationship with the University. These decisions are made regularly, not sporadically.

On balance, sergeants should be excluded from the rank-and-file unit in order to allow the University to effectively achieve its mission without undue conflict of interest. The performance of the several supervisory functions noted precludes a finding that the work of sergeants is substantially similar to police officers.

Accordingly, I find that the University has met its burden of demonstrating that sergeants are supervisors within the meaning of section 3580.3 and must be excluded from the unit.

PROPOSED ORDER

For the reasons set for the above, it is hereby ordered that the petition of Federated University Police Officers' Association to add sergeants to the bargaining unit of police officers is dismissed.

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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a), 32130; see also Gov. Code, sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission

before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c), (d); see also Cal. Code Regs., tit. 8, secs. 32090, 32130.)

Donn Ginoza
Administrative Law Judge