

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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PUBLIC EMPLOYMENT  
RELATIONS BOARD

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IN THE MATTER OF:	)	
	)	
CITY OF EAGLE GROVE,	)	
Public Employer,	)	
	)	
and	)	CASE NO. 8459
	)	
TEAMSTERS LOCAL 238,	)	
Petitioner.	)	
	)	

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DECISION AND ORDER

This case is before the Public Employment Relations Board (PERB or Board)<sup>1</sup> on a combined petition for bargaining unit determination and representative certification for a unit of police department employees in the City of Eagle Grove (the City) filed by the Teamsters Local 238 (the Union). The City and the Union agreed an appropriate bargaining unit should include police officers and police sergeants but exclude the police chief, the assistant police chief and all other City employees. PERB tentatively approved this bargaining unit.

After posting of a public notice that PERB had tentatively approved the agreed bargaining unit, the assistant police chief, Wayne Boyd, filed an objection to our proposed decision pursuant to PERB rule 621-4.2(6)(c). Boyd asserted that the assistant police chief position should be included in an appropriate

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<sup>1</sup> Board member Janelle Niebuhr takes no part in this decision.

bargaining unit determined pursuant to Iowa Code section 20.13 because the position is not within any of the exclusions listed in section 20.4.

We held an evidentiary hearing on the objection on February 3, 2012. William J. Sueppel appeared on behalf of the City and Jon Thomas appeared on behalf of the Union and Boyd.<sup>2</sup>

Based on the totality of the evidence submitted at the hearing, we make the following:

#### FINDINGS OF FACT

The City's police department "consists of the [p]olice [c]hief and such other law enforcement officers and personnel, whether full or part time, as may be authorized by the [c]ouncil." (Exhibit 2, Eagle Grove City Ordinances 30.02). Eagle Grove's mayor appoints the police chief and the police chief selects the other members of the police department. (Exhibit 2, Eagle Grove City Ordinances 30.06).

The police chief, Dan Carrigan, has been in his position for two years. Prior to this, he was the City's assistant police chief. As assistant chief, he was responsible for carrying out any chief duties that involved physical exertion because the chief at the time was disabled and office-bound.

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<sup>2</sup> Although the Union originally stipulated to excluding the assistant police chief from the bargaining unit, the Union supported the objection at the hearing and represented Boyd.

Now as chief, he fully assumes all chief duties and does not regularly delegate chief duties to the assistant chief.

Carrigan hired Wayne Boyd as the assistant chief in 2010. According to the job description, the assistant chief's role is to "consult with the [p]olice [c]hief determining overall plans and police operations." The job description states that in this position, "[s]upervision is exercised directly, or through subordinate supervisors, over all employees of the Department." Among other duties, the assistant chief, "[u]pon the [c]hief's absence or direction, directs, supervises and participates in law enforcement and protective service activities performed by the [p]olice [d]epartment including patrol, crime prevention and criminal investigation in an administrative position." He also is to "exercise[] field supervision over patrol units" and "respond[] to requests for police services on major incidents or where supervisory presence is desirable."

The job description characterizes the assistant chief position as being affiliated with management and designed to serve a supervisory role. However, in practice, the assistant chief performs duties similar to other officers and the chief retains authority over the department at all times.

Orders are always generated from the chief and the chief makes all major decisions concerning the department and personnel. Only the chief has budget and purchase authority for

the department. Sometimes the chief conveys orders directly to other employees and sometimes the assistant chief conveys the chief's orders to employees. The chief also provides a daily informal report on the department to the city administrator. The assistant chief joins this discussion if he is also on duty. If the chief is not on duty, the assistant chief gives the update. The chief and assistant chief jointly work on updating the department's policies and procedures manual. The assistant chief, along with the city administrator, also devised a plan to reduce employee overtime hours.

If the chief is not on duty, the assistant chief is considered the acting chief by other officers. However, even when the chief is not on duty, he remains on call. In this instance, the assistant chief handles routine issues such as schedule changes and authorization of overtime without contacting the chief. For any non-routine issues, the assistant chief contacts the chief, discusses the issues with him, and implements the response dictated by the chief. If the chief could not be reached for a non-routine issue, the mayor would make a decision on behalf of the chief after getting input from the assistant chief. When both the chief and the assistant chief are off duty, the lead sergeant handles routine scheduling and overtime matters.

The chief seeks input from the assistant chief and other officers on most department issues but the chief works more closely with the assistant chief on personnel matters. The assistant chief gives suggestions on discipline issues and helps implement the chief's discipline decisions. For example, on one occasion, the assistant chief observed that an officer left a gun unattended. The assistant chief contacted the chief, who was on vacation, informed him of the infraction, and discussed the incident with the city administrator. The assistant chief and chief discussed potential disciplinary action. The assistant chief recommended the officer be given a one day suspension. The chief originally felt harsher discipline was necessary, but after some consideration, the chief agreed with the assistant chief's recommendation.

Like the other officers, both the chief and the assistant chief regularly perform patrols during their shifts. The chief has assigned special routine duties to the assistant chief and other officers. For example, the assistant chief performs payroll functions and assigns officers to vehicles. Other officers have been assigned to set the work schedule for officers or to handle technology issues for the department.

#### CONCLUSIONS OF LAW

The assistant chief's objection asserts that his position is not excluded from collective bargaining by section 20.4 and

that it should be included within an appropriate unit determined in accordance with section 20.13. At hearing the parties disputed only whether the assistant chief is excluded by section 20.4(2). This section provides in applicable part,

The following public employees shall be excluded from the provisions of this chapter:

. . .

2. Representatives of a public employer, including the administrative officer, director or chief executive officer of a public employer or major division thereof as well as the officer's deputy, first assistant and any supervisory employees.

Iowa Code § 20.4(2) (2011). The City contends the assistant chief is excluded as a "representative of a public employer" because he is a "deputy," "first assistant," or "supervisory employee" under this section.

The Iowa Public Employment Relations Act is written in broad terms to allow a large number of public employees to be eligible for coverage under its provisions. *Iowa Association of School Boards v. PERB*, 400 N.W.2d 571, 576 (Iowa 1987). Accordingly, the Board interprets section 20.4 exclusions narrowly to accomplish this objective. *Id.*; *Council Bluffs Community School District & Communications Workers of America Local 7103*, 03 PERB 6514, 6516 & 6536, at 21 (affirmed by *Council Bluffs Community School District v. PERB*, Case no. CVCV086308 (Pottawattamie County 2004)). The City, as the party

asserting the exclusion, bears the burden of establishing that the exclusion applies. *City of Iowa City & AFSCME Local 183*, 02 PERB 6353 at 5.

Deputy or First Assistant

Section 20.4(2) excludes as "representatives of the public employer," the "administrative officer, director or chief executive officer" of major divisions of the public employer, as well as the "deputy" and "first assistant" to these positions. Iowa Code § 20.4(2). The City asserts the chief is the "administrative officer, director or chief executive officer" of a major division of the City and the assistant chief is his "deputy" or "first assistant" and therefore is excluded as a "representative of a public employer." We need not decide whether the City has established that the chief is an "administrative officer, director, or chief executive officer" and whether the police department is a "major division" because we conclude the City has failed to prove the assistant chief meets the definition of "deputy" or "first assistant."

To establish the assistant chief is a "deputy," the City must prove two elements:

First, there must be proof that the employee at issue is "a substitute with power to act; [or] a second-in command or assistant who usually takes charge when his superior is absent." *Dubuque County & Teamsters Locals*, 421, 844, & 147, 76 PERB 831, at 4. Second, the employee must be that single individual who possesses the official's full range of authority when

the official is absent. *Lyon County & International Brotherhood of Painters and Allied Trades, Local No. 246, AFL-CIO, 80 H.O. 1621, at 26.*

*Clay County & International Union of Operating Engineers, Local 234, 11 PERB 8290 at 9.*

The assistant chief is considered by others to be "the acting chief" when the chief is absent. He is viewed as the second-in-command and is treated as such by the chief, other officers and the city administrator. In the chief's absence, the assistant chief handles scheduling matters and other routine issues that the chief handles when he is on duty. He updates the city administrator on department issues when the chief is not on duty. We conclude from these findings that the City established the first required element, that the assistant chief is "a second-in command or assistant who usually takes charge when his superior is absent."

Turning to the second element, we note the assistant chief's authority to carry out the chief's responsibilities in the chief's absence is limited to handling schedule changes, authorizing overtime, and giving the daily department update to the city administrator. The chief is always on call, even when he is off duty or on vacation. He is contacted to make any non-routine decisions concerning the department and personnel. If the chief cannot be reached, the mayor would make the decision on behalf of the chief, not the assistant chief. There were no

scenarios presented where the assistant chief has made or could make a non-routine decision on behalf of the chief. In the chief's absence, only the mayor could exercise the chief's full authority. We therefore conclude the City failed to establish the second required element, that the assistant chief "is the single individual who possesses the official's full range of authority when the official is absent." The assistant chief is thus not excluded as a "deputy" within the meaning of section 20.4(2).

We next consider whether the assistant chief is a "first assistant" within the meaning of section 20.4(2). Chapter 20 of the Iowa Code does not define "first assistant." In *Lyon County & International Brotherhood of Painters & Allied Trades, Local 246*, the administrative law judge interpreted the terms "first" and "assistant." *Lyon County*, 80 H.O. 1621 at 27. He stated,

"Assistant" is defined as:

One who assists: helper; also: an auxiliary device or substance.

The verb "assist" is, in turn, defined as:

1. to give support or aid
2. to be present as a spectator
3. to give usual supplementary support or aid to . . . .

"Assistant," therefore, would appear to mean one who gives support or aid to the head of a major division. When the term is considered in light of [the] requirement that the statutory exclusions of representatives of public employers be limited to

individuals actually involved in the public employer's managerial hierarchy, it would appear that the statute demands that the support or aid the employee gives must be in relation to the managerial responsibilities performed by the [administrative officer]. However, the statutory exclusion is further limited to the "First" assistant. The adjective "first" is defined as:

Preceding all others in time, order, or importance as a: earliest, b: being the lowest forward gear or speed of a motor vehicle, c: relating to or having the highest or most prominent part among a group of similar voices or instruments in con[c]certed or assembled music.

Thus, the term "first" limits the "first assistant" exclusion to that employee whose role in aiding the [administrative officer] with his or her managerial responsibilities is greater than that of any other employee in the division.

*Id.* at 27-28 (quoting *Webster's New Collegiate Dictionary* (1975)). The PERB board later approved and applied this definition of "first assistant." See *Jasper County & AFSCME Iowa Council 61*, 05 PERB 6766 & 6782 at 16.

While PERB has not thoroughly discussed what qualifies as "managerial responsibility" under this view of the first assistant exclusion, we take guidance from Board cases which have considered employer claims that certain employees are excluded from the coverage of the statute on the basis of their so-called "managerial" status. See, e.g., *Davenport Community School District & Davenport Education Association*, 75 PERB 72, at 17 (excluding as "managerial" certain employees who were

significantly, rather than merely peripherally, involved in formulating, determining and effectuating the employer's educational policies and programs and who, although not necessarily serving as supervisors in the employer's hierarchical structure, nonetheless acted as representatives of the employer in the promulgation and implementation of policy); *Council Bluffs Community School District & Communications Workers of America Local 7103*, 03 PERB 6414, 6516 & 6536 at 24 (affirmed by *Council Bluffs Community School District v. PERB*, Case no. CVCV086308 (Pottawattamie County 2004)) (referring to "managerial" employees as only those who represent management's interests by taking or recommending discretionary actions that effectively control or implement employer policy or who exercise discretion in formulating, determining and effectuating such policy).

We view the record here as insufficient to establish the existence of such managerial responsibility in the chief. While there is evidence he "updates" the police department's policies and procedures manual, the record reveals virtually nothing about what this function actually entails, and falls short of demonstrating the chief's effective control or implementation, or his discretionary formulation, determination or promulgation of employer policy. On this record it is equally possible that this "updating" is merely a ministerial function. Similarly,

while the record indicates that the chief has "budget authority" for the department, thus possibly suggesting a policymaking role, without evidence concerning the actual nature and scope of this function we are unable to conclude that it amounts to real managerial responsibility. It necessarily follows that in the absence of a showing that the chief actually shoulders managerial responsibilities, we cannot conclude that the assistant chief aids or assists the chief in his performance of those responsibilities, much less that the assistant chief's role in that regard is greater than that of any other employee.

We consequently conclude that the assistant chief is not properly excluded from the bargaining unit on the basis of being the "first assistant" to the chief, even assuming (without deciding) that the chief is the "administrative officer, director, or chief administrative officer" of a "major division" of the City.

Supervisory Employee

The City also contends the assistant chief is excluded as a "supervisory employee" pursuant to section 20.4(2). "Supervisory employees" is another category of "representatives of a public employer" excluded from chapter 20 coverage.

"Supervisory employee" means any individual having authority in the interest of the public employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other public employees, or the responsibility to direct them, or to

adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Iowa Code § 20.4(2). This requires proof that the employee (1) has authority, (2) to use independent judgment, (3) in performing supervisory functions, (4) in the interest of management. *City of Davenport v. PERB*, 264 N.W.2d 307 at 314 (Iowa 1978). Proof that an employee has the authority to perform any one of the listed supervisory functions is sufficient to make the employee a supervisor under the statute but the authority must be real and not simply on paper. *Id.* "However, it is the existence of the power and not its exercise which is determinative." *Id.* Nonetheless, the statute requires "evidence of actual supervisory authority 'visibly translated into tangible examples.'" *Id.* (quoting *Oil, Chemical & Atomic Workers Int. U. v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971)). The supervisory responsibilities must demonstrate that the position is substantially identified with management. *Id.* The employee must not merely "serve[] as a conduit for orders emanating from superiors . . . ." *Id.* Supervisory status is determined by the position's function in the normal course of affairs and supervisory responsibility on a temporary basis or in isolated circumstances does not exclude the employee from

chapter 20 coverage. *Id.* at 314-15. The title of a position has little bearing on our analysis. *Id.* at 314.

An employee who makes effective recommendations concerning one of the listed supervisory functions is also excluded as a supervisory employee. "Effective recommendation" is "one which under normal policy and circumstances, is made at the chief executive level or below and is adopted by higher authority without independent review or de novo consideration as a matter of course." *Id.* at 321; see *Davenport Community School District & Davenport Education Association*, 75 PERB 72 at 8.

Even though the assistant chief's job description states that the position "supervises" others, as noted above, we look beyond the position's responsibilities on paper to other evidence showing the actual existence of supervisory authority. There was no evidence which so much as suggests that the assistant chief has actual authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or adjust grievances of other employees. The assistant chief is involved with assigning, disciplining, and directing other officers, but this involvement does not meet our standards for supervisory status. His assignment of patrol cars to officers is a routine task and he merely serves as a conduit for the chief when assigning other duties to officers. Although the chief seeks the assistant chief's opinion on discipline matters, it is

undisputed that the assistant chief has no authority to independently impose discipline.

The assistant chief's responsibilities also do not include providing supervisory "effective recommendations." Even though the chief seeks input from the assistant chief, this input has not been shown to be an effective recommendation under the statute. For example, the assistant chief's recommendation that the officer who left a gun unattended be suspended was followed, but only after the chief's independent review and de novo consideration. Therefore, we conclude the assistant chief is not excluded as a "supervisory employee."

Based on the totality of the evidence submitted, we conclude the City failed to establish that the assistant chief is excluded from chapter 20 coverage either as a "deputy" or "first assistant" to the Chief, or as a "supervisory employee" within the meaning of section 20.4(2). The City does not offer any other arguments as to why the assistant chief's inclusion within a bargaining unit of the City's other police officers is inappropriate. We therefore sustain Boyd's objection. The following unit is determined to be one appropriate for purposes of collective bargaining within the meaning of section 20.13:

INCLUDED: Assistant Police Chief, Police Sergeants, and all full-time Police Officers.

EXCLUDED: Chief of Police and all other City employees.

This decision constitutes final agency action on the unit determination aspects of the Union's combined petition. In reference to the petition's request for representative certification pursuant to Iowa Code section 20.14, the Union has submitted the required evidence showing that thirty percent of the employees in the bargaining unit set forth above are members of the Union or have authorized it to represent them for the purposes of collective bargaining.

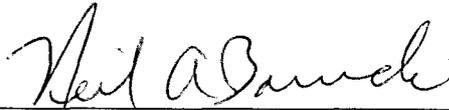
ORDER

IT IS HEREBY ORDERED that an employee representative certification election be conducted under the supervision and direction of the Public Employment Relations Board, at a time and place to be determined by the Board. Eligible to vote are all employees in the above-described bargaining unit who were employed during the payroll period immediately preceding the date below and who are also employed in the bargaining unit on the date of the election.

IT IS FURTHER ORDERED that the Public Employer submit to the Board, within seven days, an alphabetical list of the names, addresses, and job classifications of all eligible voters in the unit described above.

DATED at Des Moines, Iowa, this 18th of April, 2012.

  
James R. Riordan, Chairman

  
Neil A. Barrick, Board Member

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