STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

THE CALIFORNIA STATE UNIVERSITY, Employer, and STATEWIDE UNIVERSITY POLICE ASSOCIATION, Employee Organization.	)	Case No. LA-UM-252-H (LA-HR-8) Requests for Reconsideration and Judicial Review PERB Decision No. 351-H PERB Decision No. 351a-H May 30, 1984

Appearances; William B. Haughton, Attorney for The California State University.

Before Tovar, Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: The California State University (CSU or University) requests reconsideration of Decision No. 351-H of the Public Employment Relations Board (PERB or Board) wherein the Board found the Supervising Public Safety Officers I (sergeants) not to be supervisory employees under section 3580.3 of the Higher Education Employer-Employee Relations Act (HEERA).[1] The University also requests that the Board join in judicial review of its decision.

[1]HEERA is codified at Government Code section 3560 et seq. 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

DISCUSSION

A. Request for Reconsideration

PERB rule 32410(a) provides that any party to a decision of the Board may, because of extraordinary circumstances, file a request to reconsider that decision.[2] In making such a request in the instant case, the University claims that the Board reached erroneous conclusions from the evidence presented, and that an agreement reached subsequent to the Board's decision mandates the exclusion of sergeants from the established unit.

We find each of the University's arguments to be without merit.

> 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. With respect to faculty or academic employees, any department chair, head of a similar academic unit or program, or other employee who performs the foregoing duties primarily in the interest of and on behalf of the members of the academic department, unit or program, shall not be deemed a supervisory employee solely because of such duties . . . . Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

2pERB rules are codified at California Administrative Code, title 8, section 31001 et seq.

As a preliminary issue, it is noted that CSU's reconsideration request asks for "reconsideration by the full Board of the decision made . . . by two members of a three-member panel."

PERB rule 32410(a), which contemplates reconsideration, directs only that "Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision." Since, considered in its common vernacular, reconsider means to review a previous matter, the implication is that the same body that first issued the decision would review it and rule again.

We also note that Government Code subsection 3541(c) establishes that, while PERB may delegate its powers to any group of three or more Board members, "Nothing shall preclude any board member from participating in any case pending before the board." Interpreting this statutory language as providing that any Board member, on his or her own initiative, may well have authority to enter into a reconsideration issue, we do not find any reason to allow a party to override the Board's decision to assign a particular case to a three-member panel. We, therefore, rest on the Board's authority to panel its decisions and find that the parties' right to petition for reconsideration does not extend farther than reexamination by the original panel.

The main thrust of CSU's reconsideration request is to reargue the significance of those facts appearing in the record which support its position that the sergeants are supervisors. However, the Board's decision is based on its consideration of the totality of evidence presented. Notwithstanding specific instances where a sergeant's disciplinary recommendation was upheld, the record as a whole amply supports the Board's finding that the process by which discipline was imposed did not invest sergeants with the authority to discipline or to effectively recommend the discipline of other employees. Indeed, the decision refers to action taken within disciplinary guidelines, a sergeant's discussion with a lieutenant before issuing a reprimand, disciplinary decisions reached by consensus and joint recommendations of discipline by the sergeant and lieutenant.

The Board found from the evidence that sergeants did not exercise independent judgment when administering disciplinary action. Rather, discipline was ordered in accordance with a sergeant's recommendation only to the extent that, upon review, the sergeant's recommendation conformed to the superior's opinion. We find lacking the critical element of autonomy and control which the Board has consistently demanded to establish supervisory status. Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California Pursuant to

Chapter 744 of Statutes of 1978 (Higher Education Employer-Employee Relations Act) (3/8/83) PERB Decision No. 246b-H. Having reached the ultimate factual conclusion that the sergeants possess no effective disciplinary authority, we find that the University has failed to demonstrate the sort of extraordinary circumstances which justify the grant of reconsideration. Rio Hondo Community College District (5/16/83) PERB Decision No. 279a.

The Board is not persuaded by CSU's citation to Eastern Greyhound Lines v. NLRB (6th Cir. 1964) 337 F.2d 84 [57 LRRM 2241] and its claim that the Board erred in regarding those instances where sergeants' specific recommendations were altered by their superiors as calling into question whether sergeants were truly vested with disciplinary authority. The Greyhound court found the disputed employees in that case to be supervisors based, in part, on its view that the recommendation remained effective if some discipline was meted out. However, that conclusion has by no means been universally adopted. (See, for example, Bodolay Packaging Machinery, Inc. (1982) 263 NLRB 320 [111 LRRM 1180].) Indeed, this is so because the factual determination of supervisory status involves the review of a myriad of job duties that are never identical. In the instant case, for example, including the 59 sergeants in the supervisory cadre would have resulted in approximately 100 individuals directing a nonsupervisory work force numbering

197. In contrast, the 121 dispatchers determined to be supervisors in Greyhound directed the daily bus operation of some 3,000 drivers. That fact alone is sufficient to distinguish Greyhound from the case before us and, thus, to seriously limit its precedential value. As has been observed, gradations in the degree of authority over fellow employees is so infinite and subtle that a large measure of informed discretion and expertise is necessarily involved in determining supervisory status. Laborers & Hod Carriers v. NLRB (9th Cir. 1977) 564 P.2d 838 [97 LRRM 2287]; Mon River Towing, Inc. v. NLRB (3rd Cir. 1969) 421 P.2d 1 [73 LRRM 2081]; NLRB v. Swift & Co. (1st Cir. 1961) 292 F.2d 561 [48 LRRM 2695]. Based on the facts in the instant case, the Board was well within its authority to view the subsequent adjustment of the type of discipline as "raising a question" as to the effectiveness of the sergeants' recommendations.

Similarly, focusing in on the majority's opinion requiring that sergeants' disciplinary authority be "sufficiently autonomous," CSU contends that the chief's review of the recommendations does not undercut the employee's supervisory status. Again, cases cited in CSU's exceptions are not controlling in that the factual circumstances vary greatly from the instant case. Based on the facts in this case, the Board's reference to instances where review of the recommendation was undertaken simply indicates one factor that belies the

assertion that sergeants mete out discipline. Reference to review of disciplinary recommendations was considered along with the references noted above to depict a process where sergeants' recommendations were not, in effect, decisions carrying with it authority to discipline.

CSU also contends that the Board erred in concluding that the sergeants' authority to resolve informal disputes or grievances did not satisfy the statutory directive to adjust employee grievances in the interest of the employer. In its request, CSU quotes at length from Warner Company v. NLRB (3d Cir. 1966) 365 F.2d 435 [63 LRRM 2189] wherein the court, rejecting a distinction between processing minor complaints and adjustment of grievances, found the employees in question "do resolve disputes over working conditions on behalf of their employer, exercising independent judgment, and thus 'adjust grievances' for the purposes of the Act."

Contrary to the argument presumably raised by citation to this case, the Board's decision does not rest on a distinction between informal and formal dispute resolution techniques.

Specifically, the Board reached the following conclusion:

> We do not dispute the hearing officer's finding that the sergeants frequently resolve the informal disputes or grievances of the officers. However, we do not view this function as satisfying the statutory directive to adjust employee grievances in the interest of the employer. In other words, the sergeants' adjustments of these day-to-day work disputes are not based on an obligation or allegiance to the employer.

> Efforts to resolve problems in an informal manner spring from the employees' common goal of insuring a congenial, smooth functioning work environment. The sergeants' involvement in this process poses no conflict with the officers' negotiating relationship with management.
>
> As to the University's established grievance procedure which purports to invest sergeants with first level authority to adjust certain types of grievances, we find no evidence to substantiate the claim that the sergeants have so acted. We decline to conclude that the University has satisfied its evidentiary burden where no evidence establishes that the sergeants regularly act in this capacity. The mere potential to do so, like a job description, is insufficient to remove the sergeants from HEERA's collective bargaining scheme. (Footnote omitted.) (Emphasis added.)

While the Board admittedly discusses the informal grievances separately from the formal grievances, the pertinent factor was that the evidence indicated that the day-to-day disputes were reconciled by sergeants, not as agents for the employer, but as co-workers concerned with reducing disruption of the work environment. The case upon which CSU relies cannot be read to mean that all informal dispute resolution reveals supervisory status. Warner merely requires that the Board not automatically discount informal grievance procedures. The Board's opinion conforms to this rule of law.

CSU's reconsideration request is also based on a memorandum of understanding (MOU) which, it contends, requires that the officers must exhaust the informal review procedure by appealing to the immediate supervisor, the sergeant.

Specifically, CSU asserts that the sergeant has been designated as the officers' "immediate supervisor" and, pursuant to Article 7.7 of the MOU, resort to informal review by one's "immediate supervisor" involves the sergeants in adjusting disputes in the interest of management.

The parties' MOU indeed does establish an informal review procedure involving presentation of complaints to the "immediate supervisor." However, Article 7.4 defines immediate supervisor as "the appropriate nonbargaining unit supervisory or management person to whom the employee is accountable." (Emphasis supplied.) Contrary to CSU's assertion, the parties' agreement does not designate sergeants as immediate supervisors. Moreover, we note that at level II, the formal grievance level, the employee is directed to file the complaint with the director of public safety or the chief. In this chain of command, lieutenants are conspicuously absent.

In any event, the parties' MOU does not alter the Board's determination that sergeants, whose duties were examined and documented in the course of the instant proceeding which predated the MOU's existence, are employees covered by HEERA. Even if there has been a change in circumstance since the Board's hearing, it is not pertinent to the decision already rendered by the Board.

B. Request for Judicial Review

Subsection 3564(a) of HEERA provides as to judicial review of a unit determination as follows:

> (a) No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board . . . agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint.

PERB rule 32500(c) permits the Board to join in a request for judicial review or to "decline to join, at its discretion."

Believing the majority's decision to be well-founded, we find the University's request to be no more than disagreement with the Board's exercise of its statutory authority. Thus, CSU's request for judicial review is denied, there appearing no ground for considering this case to be one of "special importance." San Diego Unified School District (10/27/81) PERB Order No. JR-10.

ORDER

The University's request for reconsideration and for judicial review of PERB Decision No. 351-H, Case No. LA-UM-252-H, is hereby DENIED.

Member Burt joined in this Decision. Member Tovar's dissent begins on page 11.

TOVAR, dissenting: As I did in the original decision in this case, I again differ with my colleagues and would grant the request for reconsideration filed by the California State University (CSU or University). In my original dissent, which I incorporate by reference herein, I concluded that Sergeants were supervisors because the evidence indicated that they performed important supervisory functions and exercised control over work processes and administrative and personnel matters, and that they did so on behalf of the employer.

Initially, I take exception to the majority's statement that Board rule 32410(a) implies that "the same body that first issued the decision would review it and rule again" and their conclusion that CSU's petition for reconsideration permits reexamination only by the original panel. This interpretation of the above-mentioned Board rule is inaccurate. In fact, the Board adopted an informal policy to have the same panel that participated in the initial case handle the request for reconsideration for practical reasons — it would be more expedient to assign the case to the panel most familiar with the transcript and exhibits in the case. However, Government Code subsection 3541(c) establishes that nothing shall preclude any Board member from participating in any case pending before the Board. The Board's informal policy does not preclude the full Board from examining the reconsideration or any one member not in the original panel from participating therein as

is his/her statutory right. Although I consider CSU's request appropriate and one which the Board may consider, ultimately, the Board is not obligated to adopt such a request since it is still the Board's prerogative to determine how to panel a particular case.

Reconsideration is appropriate in the instant case for two principal reasons.

First, the majority reached erroneous conclusions from the evidence presented. My colleagues claim to base their decision on a "totality" of the evidence presented, yet they focus almost exclusively on the issue of the Sergeants' ability to effectively recommend disciplinary action, and totally disregard the evidence indicating indicia of supervisory status. It is well established that the language of section 3580.3 is to be read in the disjunctive, with the existence of any one of the statutory powers, regardless of the frequency of its exercise, being sufficient to confer supervisory status upon the employee. Pacific Intermountain Express Co. v. NLRB (1969) 174 NLRB No. 68 [71 LRRM 2551, 2552].

The majority has simply and erroneously ignored the testimony contrary to its conclusion.

The evidence in the instant case demonstrating supervisory status includes the fact that Sergeants make performance evaluations of the officers they supervise which are considered in personnel and promotional matters. The performance evaluations made by the Sergeants of the officers are rarely,

if ever, changed when reviewed by the Lieutenant or Chief. There was testimony that Sergeants have access to personnel files and have traveled to other jurisdictions on behalf of management to make inquiries and an assessment of whether an officer candidate should be hired. The testimony indicated that the Sergeants' recommendation not to hire a particular candidate was followed by the Chief. Sergeants write commendations and place them in the personnel files of the officers they feel are deserving. They attend management-staff meetings along with Lieutenants and Chiefs where budget and personnel policies and practices are discussed.[1] In short, in every way they are seen as part of the management team by themselves, the officers they supervise, and their superiors. Thus, any one of these duties vests Sergeants with supervisory status which, of necessity, precludes their participation in the rank and file unit.

Even when you examine the disciplinary issue, the record indicates that there were at least 36 separate disciplinary

---

[1]See for example, Pacific Intermountain Express Co. v. NLRB, supra, where the Court of Appeals held that the NLRB was not warranted in finding that the employer violated the LMRA when it refused to bargain with the union certified for the unit of line dispatchers since line dispatchers are supervisors within the meaning of the LMRA. The dispatchers participated in managerial supervisory meetings, they assigned drivers and scheduled departures and they approved driver pay claims, granted drivers time off and suspended intoxicated or otherwise unfit drivers.

recommendations ranging from discharge to suspensions to written and oral reprimand which, in my opinion, constitute significant evidence of the Sergeants' authority to effectively recommend discipline. It seems the majority would have the Sergeants make the sole and final decision on what discipline to impose before accepting the fact that they are supervisors.[2]

I agree with CSU that Eastern Greyhound Lines v. NLRB (6th Cir. 1964) 337 F.2d 84 [57 LRRM 2241] is viable precedent which is applicable to the facts in this case. I believe that the Sergeant's recommendation for discipline remains effective if some discipline is meted out even though it might not be exactly the recommendation made by the Sergeant.

The majority attempts to limit the precedential value of this decision by pointing to the differences in ratio of supervisor to employees between the two cases. However, the majority fails to state how the ratio differential alone is sufficient to distinguish these two cases.

The majority seems to feel that Sergeants undertake to resolve daily gripes in order to foster some sort of

---

2See, for example, Maine Yankee Atomic Power Company v. National Labor Relations Board (1980) 79 NLRB 1311 [104 LRRM 2903] where shift operating supervisors were found to be supervisors within the meaning of Section 2(11) of the LMRA despite the fact that they didn't sufficiently possess the power to hire, transfer, suspend, layoff, recall, promote, discharge, reward and discipline other employees or "effectively" to recommend such action.

camaraderie, and have taken it upon themselves to perform these tasks, sua sponte, for their own benefit. In fact, Sergeants attempt to informally resolve these disputes on behalf of the employer, and must take special supervisory courses in order to play that role. Sergeants are required to successfully complete 80 hours of supervisory training as prescribed by the California Commission on Peace Officers Standards and Training within the first year of employment. Sergeants specifically receive training in "handling complaints and grievances," "theories of management," "supervisory styles," and "personnel performance appraisal," among other categories. Further, Sergeants are paid more than officers as a result of the additional supervisory duties they have. The initial dissent and the record also details the Sergeants' responsibility to assign duties, approve overtime duty and pay and make shift assignments. These same duties have been found sufficient to vest other employees with supervisory status.

In Maine Yankee Atomic Powers Co. v. NLRB, supra, the U.S. Court of Appeals reversed the NLRB and found shift operating supervisors to be supervisors because they

> . . . have the authority to direct control room operators with whom they work face-to-face and other operators who manipulate auxiliary controls in plant on directions from, and in coordination with, actions being taken in control room, (2) is "directly responsible" for performance of his department and is held "fully

> accountable and responsible" for performance and work product of other employees, (3) ensures that numerous gauges in control room are monitored accurately, responding efficiently to many warning signals and alarms, (4) is responsible for taking, on his own initiative, proper corrective measures in event of emergency where prior consultation with plant shift superintendent is not possible, (5) is placed frequently in charge of work crews on spare shift, and (6) is salaried at rate approximately 17 percent higher than straight-time operators and is invited to attend management meetings.

Similarly, in the instant case, Sergeants are the watch commanders for the different shifts. They are generally responsible for deploying personnel as needed for special events or overtime work. Particular work assignments are frequently scheduled on a volunteer basis. If no volunteers are available, Sergeants have authority to assign the tasks as they see fit. On some campuses, patrol areas or beats are assigned to officers by Sergeants.

At each of the campuses, minimum staffing requirements have been established for the work shifts. In general, a Sergeant can decide, without prior approval, to call in an off-duty officer if someone fails to report to work or to require overtime in order to maintain the minimum staffing requirements. Sergeants have authority to approve overtime and require documentation of sick leave. They are paid at a higher level than the officers whom they supervise and they attend management staff meetings.

Again, it is these supervisory duties of Sergeants involving control over the work processes and administrative and personnel matters which preclude a finding that the disputed employees' duties are "substantially similar" to those of their subordinates. See Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory of the University of California Pursuant to Chapter 744 of the Statutes of 1978 (Higher Education Employer-Employee Relations Act) (3/8/83) PERB Decision No. 246b-H.

The second reason I would grant the request for reconsideration is that the Memorandum of Understanding (MOU) subsequently entered into by the parties does not apply to Sergeants. Article 22.1 of the MOU specifies in pertinent part that "the salary schedule that pertains to the bargaining unit employees and this Agreement shall be found in Appendix A and incorporated in this Agreement by reference." The salary schedule (Appendix A) covering those employees in the unit include only the investigator and public safety officer titles. Sergeants are neither; they are Public Safety Officers I clearly demonstrating that they are not in the rank and file unit. The MOU thereby codifies the established past practice of Sergeants being viewed by all concerned as being higher-paid members of the management team, who have not been and continue not to be considered part of the rank and file unit.

The majority suggests that judicial review is not appropriate because CSU could ultimately appeal the Board's decision by making a technical refusal to bargain. I would join CSU in its request for judicial review because I don't think the Board should encourage any of the parties to refuse to negotiate in good faith as a means of challenging the Board's decision. If the majority's decision is well reasoned or well founded as they claim, they should welcome judicial review.