

**DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT**

**FRATERNAL ORDER OF POLICE,
VERMILLION LODGE NO. 19, YANKTON
POLICE OFFICER'S ASSOCIATION**

HF No. 3 E, 2017/18

Petitioner,

v.

DECISION

CITY OF YANKTON, SOUTH DAKOTA,

Respondent.

This matter came before the Department of Labor and Regulation when Petitioner, Fraternal Order of Police, Vermillion Lodge No. 19, Yankton Police Officer's Association, filed a Petition for Election dated October 17, 2017, pursuant to SDCL 3-18-4. Petitioner seeks certification as the exclusive representative of a bargaining unit consisting of 25 employees of the Yankton Police Department.

Respondent, City of Yankton, South Dakota, filed an Answer to Petition for Election on November 6, 2017, objecting to Petitioner's certification and challenging the size of the bargaining unit. Respondent ultimately challenges the inclusion of five of its employees in the Petitioner's bargaining unit. As a result, a hearing was conducted on May 1, 2018, before Joe Thronson, Administrative Law Judge. Petitioner was represented by Tom Wilka. Respondent was represented by A. Stevenson Bogue.

ISSUES

ISSUE I: ARE SERGEANTS AND CORPORALS IN THE YANKTON POLICE DEPARTMENT BARRED FROM JOINING A UNION UNDER SDCL 3-18-1?

ISSUE II: ARE POLICE OFFICERS WHO ARE MEMBERS OF THE NATIONAL GUARD BARRED FROM JOINING A UNION UNDER SDCL 3-18-1?

FACTS

The Yankton Police Department is made up of twenty-five officers¹. The command structure of the Department consists of one chief of police followed by two lieutenants, four sergeants, one corporal, and twenty patrol officers and investigators. Further facts will be presented below.

ANALYSIS

ISSUE I: ARE SERGEANTS AND CORPORALS IN THE YANKTON POLICE DEPARTMENT BARRED FROM JOINING A UNION UNDER SDCL 3-18-1?

Formation of a public employee union is governed by SDCL 3-18-1. This statute also carves out several groups who are not eligible to join a public union. Among those are:

any other public employees having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or to effectively 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;"

SDCL 3-18-1(2)(2018).

South Dakota's exemption mirrors that of 29 U.S.C.A. § 152, the National Labor Relations Act (NLRA), which exempts supervisors from joining unions. The United States Supreme Court has noted "[e]mployees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise

¹ Since the hearing, the YPD has added several positions. The number of officers on the YPD is now twenty-eight.

of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’ *N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713, 121 S. Ct. 1861, 1867, 149 L. Ed. 2d 939 (2001)(quoting *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–574, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994). Further, “when [a party] seeks to attribute the conduct of certain employees to the employer by virtue of their supervisory status, this rule dictates that he bear the burden of proving supervisory status.” *Id.*, at 711.

At issue here is whether for purposes of SDCL 3-18-1, sergeants and corporals of the Yankton Police Department can be considered “supervisors.” If they may exercise independent judgment in any of the enumerated exceptions of SDCL 3-18-1, they are supervisors and therefore are ineligible to join a public union.

At the hearing, Chief of Police Paulsen testified that the YPD has one corporal and that the position is being eliminated. After the one individual leaves the force or is promoted, the position of corporal will no longer exist. Nonetheless, so long as this individual has the rank of corporal, the question of whether corporals are supervisors is ripe. For reasons that will be explained below, the Department finds that corporals in the YPD are not supervisors and therefore not precluded from joining a public employee union.

a. Layoffs and Grievances

It is uncontested the sergeants do not have the authority to lay off or recall employees. Neither are sergeants given the ability to adjust grievances.

b. Assignment

Sergeants in the YPD do not specifically assign tasks to patrol officers. Officers assigned to a given shift are responsible for patrolling the city of Yankton and performing any general duties related to enforcing city ordinances or state laws.

Sergeants also do not directly assign shifts. Sergeant Monty Rothenberger testified that when assigning schedules, it was common practice for officers to choose their shifts based on seniority. Initially, the most senior officer chooses first. The officers then rotate selection, so the second senior officer is given first selection for the next shift. Sergeant Rothenberger also testified that it was common practice for any officer to call in off duty officers in the event that extra officers were needed. Based on these facts, the Department finds that sergeants do not have the authority to assign specific duties to subordinate officers.

c. Direction of duties

When determining whether or not an employee has the power to direct subordinates, the National Labor Relations Boards has opined “[w]e agree with the circuit courts that have considered the issue and find that for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. *In Re Oakwood Healthcare, Inc.*, 348 NLRB 686, 691–92 (2006). Similarly, the Fifth Circuit Court of Appeals articulated the following to determine whether or not an employee exercises authority over other’s duties:

there must be a determination of status based upon the “nature” of the supervisory position and “how completely the responsibilities of the particular position identify the holder of the position with management,” all “because of the infinite possible variations in responsibilities enumerated in 2(11).”

N. L. R. B. v. Sec. Guard Serv., Inc., 384 F.2d 143, 148 (5th Cir. 1967)

In this case, nothing in the YPD policy manual specifically indicates that a sergeant shall be disciplined for the actions of patrol officers during his/her shift. Second, Respondents have not demonstrated that sergeants’ duties vary significantly from other patrol officers on a given shift, such that would clearly delineate them from patrol officers and identify them as supervisors. Sergeants do not exercise any authority over the direction of patrol officers.

d. Hiring

It is undisputed that sergeants are involved in the hiring of new officers. The question is whether their involvement is merely routing or requires the use of independent judgment. “The power to effectively recommend a hire, as used in Section 2(11) [of the NLRA], contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process.” *J.C. Penney Corp., Inc. & Local 3, United Storeworkers, Retail, Wholesale & Dep’t Store Union, United Food & Commercial Workers Union*, 347 NLRB 127, 129 (2006). “Instead, the Board analyzes supervisory status by determining whether an individual’s hiring recommendations are in fact effective. Accordingly, the Board examines the amount of weight the employer affords the recommendation.” *Your Pub. Radio Corp. Employer & Screen Actors Guild*, 200 L.R.R.M. (BNA) ¶ 1055 (N.L.R.B. July 7, 2014). “Specifically, the Board has found recommendations effective when ‘management is prepared to

implement the recommendation without an independent investigation of the relevant circumstances.” Id. (quoting *Chevron USA*, 309 NLRB 61, 65 (1992)).

Here, the YPD has developed a three-step process in hiring officers. The first step involves the administration of a standardized test which is scored by the Department. Chief Paulsen testified that the test was purchased by an outside company and officers do not have any discretion in scoring the test. Along with the standardized test, candidates are subjected to a battery of physical tests. Based on the scoring of these two tests, successful candidates attend an informal interview before an interview group which includes one patrol officer and one sergeant. The testimony established that both members’ recommendations were weighed equally. Candidates who pass the informal interview then move on to the formal interview process. Each candidate is then formally interviewed by a five-person panel consisting of four sergeants and one lieutenant. Each panel member’s score is weighed equally. Based on the scoring of the formal interviews, the chief of police selects the candidate with the highest score for hire and then conducts a background check on that candidate. In the event that the high scorer does not pass the background check, the chief then moves on to the next highest scoring candidate.

Respondent argues that the sergeants’ participation in the hiring process satisfies one of the criterion which classify them as supervisors under SDCL 3-18-1. The Petition counters that the sergeants’ role in the hiring process is largely administrative and that the ultimate authority rests with the chief of police. It is clear that, during the first step of the hiring process, candidates are selected largely on the basis of a standardized test. No member of the police force has any discretion in the

scoring of this test. During the second phase, sergeants are part of a two-person team that informally interviews candidates. Candidates who are selected at this stage then move on to a formal interview. At the third stage, the interviewing and scoring is completed by four sergeants and one lieutenant. The chief of police then offers a candidate with the highest score, as determined by the second group, the position. The only time the chief ever declines to hire the candidate with the highest score would be if that candidate would fail a background check. If that would occur, the chief would go to the second highest scoring candidate. Thus, the chief makes no independent inquiry into the recommendations of the interviewing committee's recommendation and relies solely on its scoring.

Petitioner argues that this is insufficient to establish that sergeants possess independent authority because the chief of police is not bound by the recommendations and could choose to not follow them. However, the rule as established by the NLRB is not that management must follow the recommendations of supervisors but only that they do so without further inquiry. It is enough that the Chief relies on the recommendation of the third hiring group without independently vetting the candidates beyond performing a background check. (See *Usf Reddaway, Inc. & Teamsters Local 962, Affiliated with the Int'l Bhd. of Teamsters, Petitioner*, 349 NLRB 329, 340 (2007)). The Department finds that Respondent has met its burden of showing that sergeants within the YPD possess supervisory authority with regard to hiring of officers.

e. Transfer

Chief Paulsen testified that while sergeants do not have a say in whether an officer moves from one department to another, sergeants do have the authority to adjust

schedules of men within their unit. However, even in that event, the testimony established that sergeants must obtain the approval of a higher ranked officer to approve a schedule change. This is insufficient to establish supervisory authority.

f. Power to Suspend

“For the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.” *Passavant Health Center*, 284 N.L.R.B. No. 62 (July 9, 1987). *Waverly-Cedar Falls Health Care Ctr., Inc. v. N.L.R.B.*, 933 F.2d 626, 630 (8th Cir. 1991)

Pursuant to department policy, sergeants may suspend an officer for 24 hours based on a major policy infraction. Sergeants may also issue a written or verbal reprimand or issue a counseling session. Beyond that, any further discipline must come from higher up. Sergeants may provide a recommendation to a superior officer on what to do but it is in no way binding. One example provided by Chief Paulsen involved an occasion in which a sergeant recommended that an officer be terminated for an infraction. However, the sergeant’s superior officer disagreed after an investigation and did not discharge the offending officer.

In addition, a sergeant’s authority to suspend is not unique to that position. The evidence indicated that on occasions, there may be no sergeant on duty during a particular shift. The senior patrol officer then acts as the supervisor and has the same authority to suspend and recommend as a sergeant. No serious punishment may be

given except by a higher officer. Even when a sergeant recommends a particular form of discipline, no action is taken without a further investigation. Under these facts, Respondent has failed to prove that sergeants have any power to suspend an officer for misconduct. Therefore, sergeants do not have the authority to discipline patrol officers.

g. Promotion

There was no evidence presented that sergeants play any role in an officer moving up ranks within the department or moving to another division, such as detective. Respondents contend that sergeants have the power to promote because they administer the testing for inclusion on the special response team (SRT). While Chief testified that a place on the SRT team is highly desirable within the force, it cannot be considered a promotion. First, there is no extra pay or tangible benefit for an officer joining the SRT. Second, the SRT is not exclusively a unit of the Yankton Police Department. Rather, SRT members are called from various agencies county-wide include the sheriff's office, emergency medical technicians, and at one time, a member of the Department of Game Fish and Parks.

h. Reward

Respondents present two examples of sergeants granting rewards. First, a sergeant may nominate an officer for the community officer of the year award. Second, sergeants may also nominate a fellow officer for a department commendation. These two examples are insufficient to establish that sergeants have any authority to reward subordinates for purposes of the law. Officer of the year is an award given by the local Lion's Club and is not exclusive of the Yankton Police Department. Beyond a recommendation, sergeants have no authority to direct the recipient of this award. The

same is true for the commendation in which a sergeant's role is limited to merely recommending. In addition, any officer may also recommend a fellow officer for a commendation.

i. Corporals

Respondent argues that corporals are not eligible to belong to a union because they also possess the authority of a supervisor. The Department's analysis of sergeants' roles within the Yankton Police Department also apply to corporals. However, while sergeants exercise authority in effectively recommending the hiring of personnel, corporals do not. Corporals participate in the informal interview of candidates who meet the threshold scores on the written and physical exams. Corporals do not participate in the final formal interviews. Unlike sergeants in the final phase of the hiring process, there is no evidence that corporals' recommendations are given any weight in the final decision to hire.

ISSUE II: ARE POLICE OFFICERS WHO ARE MEMBERS OF THE NATIONAL GUARD EXCLUDED FROM JOINING A PUBLIC-SECTOR UNION BY SDCL 3-18-1?

Respondent argues that by its plain language, SDCL 3-18-1(5) explicitly exempts "Commissioned and enlisted personnel of the South Dakota National Guard." Petitioners counter that this exclusion is only meant to apply to members of the national guard while they are actively performing duties in the guard. Respondents argue that as the language of the statute is unambiguous, there is no need for statutory interpretation. Petitioner counters that to interpret this section as Respondent does leads to absurd results. "[R]esorting to legislative history is justified only when legislation is ambiguous, or its literal meaning is absurd or unreasonable."

Expungement of Oliver, 2012 S.D. 9, ¶ 6, 810 N.W.2d 350, 352 (quoting *In re Famous Brands, Inc.*, 347 N.W.2d 882, 885 (S.D.1984)).

While the language of the statute is unambiguous, Respondent's interpretation of the SDCL 3-18-1(5) is unreasonable. It is unlikely that the legislature intended to bar all national guard members from joining a public-sector union simply because they also belong to the national guard. If such a result were true, then inclusion in any of the other categories in SDCL 3-18-1 would also preclude membership in a union regardless of whether the association in question was actually related to the nature of the individual's employment. Indeed, such an interpretation could have a chilling effect on employees joining the national guard as they would be forced to choose between guard service and joining a public-sector union.

Petitioner also argues that Respondent's interpretation of SDCL 3-18-1 violates the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Since the Department finds that SDCL 3-18-1(5) does not preclude police officers from joining a union based only national guard membership, it will not consider this argument, except to note that Department would likely not have jurisdiction to enforce a claim under USERRA. An individual's remedy for violation of that statute is through federal court. 38 U.S.C.A. § 4323 (West)(see also *Marion v. Cty. of Los Angeles*, No. CV0904361MMMRZX, 2009 WL 10670589, at *4 (C.D. Cal. Oct. 8, 2009) for USERRA purposes, a municipality is considered a private employer.))

CONCLUSION AND ORDER

For purposes of membership, sergeants of the Yankton Police Department are precluded from becoming a member of the proposed union. Corporals in the YPD are not excluded from joining the union. Members of the police force who are also members of the national guard are also not precluded from joining the union.

Representative for Petitioner shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Respondent may submit proposed Findings of Fact and Conclusions of Law within 10 days after receipt of Petitioner's submission. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Respondent shall submit such stipulation together with an Order consistent with this Decision.

Dated this 9th Day of August, 2018

SOUTH DAKOTA DEPARTMENT OF LABOR
& REGULATION

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge