

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-017-13

(PETITION FOR UNIT CLARIFICATION)

CITY OF PORTLAND,	)	
	)	
Petitioner,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
	)	AND ORDER
PORTLAND POLICE COMMANDING	)	
OFFICERS ASSOCIATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

On May 1, 2013, the City of Portland (City) filed a petition for unit clarification with the Board. The Portland Police Commanding Officers' Association (Association) filed timely objections and a hearing was held before Administrative Law Judge Wendy Greenwald on September 10-13, 2013, in Salem, Oregon. The record closed on November 29, 2013, following receipt of the post-hearing briefs. The matter was then transferred to the Board for decision.

Mark P. Amberg, Senior Deputy City Attorney, City of Portland, Portland, Oregon, represented Petitioner.

Henry J. Kaplan, Partner, Bennett, Hartman, Morris and Kaplan, LLP, Portland, Oregon, represented Respondent.

The City filed this petition for unit clarification under OAR 115-025-0005(2),<sup>1</sup> contending that every employee in the existing Association-represented bargaining unit should be “clarified” out of the unit because they are all “supervisory employees” under ORS 243.650(23), and thus are not “public employees” for the purposes of coverage under the Public Employee Collective Bargaining Act (PECBA). The Association disagrees, arguing that the members of the existing unit do not meet the statutory definition of supervisory employees.

The issue is:

Are lieutenants, captains and commanders excluded from the Association bargaining unit because they are supervisory employees within the meaning of ORS 243.650(23)?

For the reasons set forth below, we conclude that commanders and captains serving as Reporting Unit (RU) managers are supervisors and should be excluded from the Association bargaining unit.<sup>2</sup> However, based on the record before us, the lieutenants and captains who are not serving as RU managers do not meet the statutory definition of supervisory employees, and are appropriately included in the bargaining unit.

#### FINDINGS OF FACT

1. The City is a public employer and the Association is a labor organization.
2. The Association is the exclusive representative of a bargaining unit of City employees who work in the Portland Police Bureau (PPB). The existing bargaining unit consists of:

All commanding officers employed in the Police Bureau of the City of Portland, excluding confidential and supervisory employees as defined in ORS 243.650(6) and (23).

3. The bargaining unit was first formed in 1988, in response to the concerns of commanding officers who believed that they could not “hire, promote, transfer, discipline, reward, reassign, and ha[d] little control over providing enhanced training or travel opportunities to subordinates.”

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<sup>1</sup>OAR 115-025-0005(2) states in relevant part:

“When the issue raised by the clarification petition is one of public employee status under ORS 243.650(6), (16), or (23), the petition may be filed at any time; except that where a position sought to be excluded is expressly by title included within the unit description, a petition may be filed only during the open period provided for in OAR 115-025-0015(4).”

<sup>2</sup>The term Reporting Unit is explained in more detail below, beginning with Finding of Fact 13.

4. The first collective bargaining agreement was signed in 1991. Since 1991, the City and the Association have been parties to a series of collective bargaining agreements, the most recent of which expired June 30, 2013 (Contract).

5. Article 1 of the Contract contains the recognition clause, which states that:

“The City recognizes the Association as the sole and exclusive bargaining agent for the purposes of establishing salaries, wages, hours, and other conditions of employment for all commanding officers employed in the Police Bureau of the City of Portland, excluding confidential and supervisory employees as defined in ORS 243.650(6) and (23).

“The parties agree that the ranking commanding officers assigned to the Personnel and Internal Affairs Divisions are confidential and excluded. With the exception of Articles 30 and 31, these commanding officers shall receive all the benefits of this collective bargaining agreement. It is also agreed that the Deputy Chief(s) and the Assistant Chief(s) are supervisory employees. As used in this agreement the terms ‘commanding officer’ or ‘commanding officers’ refers to any Lieutenant, Captain, or Commander who is a member of the bargaining unit.” (Emphasis in the original.)

6. At the time of the hearing, the Association’s bargaining unit included 31 lieutenants, 8 captains, and 5 commanders.<sup>3</sup>

#### PPB Structure

7. As of August 15, 2013, the PPB employed approximately 1,168 employees; including 943 sworn employees and 226 non-sworn employees.

8. The sworn employees operate under a paramilitary structure, and are organized according to rank. Sworn employees may hold the rank of police officer, detective, criminalist, sergeant, lieutenant, captain, commander, assistant chief, or chief of police.

9. The Portland Police Association (PPA) represents the sworn employees of the PPB below the rank of lieutenant. The District Council of Trade Unions (DCTU) represents many of the non-sworn employees in the PPB.

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<sup>3</sup>At the time of the hearing, several Association-represented captain positions were vacant. In addition, both parties agree that the captain in charge of the Professional Standards Division (Cpt. David Famous) and the Personnel Division lieutenant (currently Lt. Morgan, previously Lt. Elmore) are excluded from the bargaining unit as confidential employees.

10. Michael Reese is the current Chief of Police.

11. The PPB is divided into three separate branches: Operations, Services and Investigations. Each branch is lead by an assistant chief. Assistant Chief (AC) Lawrence O’Dea leads the Operations Branch, AC Michael Crebs leads the Services Branch, and AC Donna Henderson leads the Investigations Branch. The Chief and the Assistant Chiefs are supervisory employees and have always been excluded from the Association bargaining unit.

12. Within the Operations Division, there are three separate precincts that provide police coverage to different geographic areas within the City: the Central, North and East Precinct. Each precinct is located in a separate building within those geographic areas, with each precinct overseen by a precinct commander and a precinct captain. The precinct commanders report to Operations AC O’Dea.

13. Structurally, the PPB is divided into separate “Reporting Units,” commonly referred to as RUs. Each RU is responsible for a particular area of operations. Each precinct is an independent RU, as are the 16 divisions of the PPB: the Personnel Division, Professional Standards Division, Property/Evidence Division, Records Division, Strategic Services Division, Tactical Operations Division, Traffic Division, Training Division, Transit Police Division, Youth Services Division, Information Technology Division, Drugs and Vice Division, Family Services Division, Fiscal Services Division, Forensic Evidence Division, and the Detective Division.

14. The RUs are each led by a designated “RU manager” who reports to the assistant chief that supervises the particular RU. A majority of RU managers are captains, but the RU managers for the three precincts and two divisions (Detective and Transit Division) are commanders. In addition, the RU managers for the Property/Evidence, Fiscal Services, and Personnel Divisions are non-sworn administrators.

15. Each RU is further divided into smaller components, with staff assigned to specific teams or units with a particular substantive area of responsibility. For example, the Detective Division is divided into 11 teams with responsibility for investigating cases in nine different general categories of alleged crime, including: homicides, missing persons, assaults, cold cases, robbery, human trafficking, sex crimes, burglary, and white collar crimes. A sergeant leads each of these teams. Three lieutenants in turn oversee three or four teams each. The lieutenants report to the Detective Division commander, Commander Burke.

16. The Training Division, led by Captain Bryan Parman, the RU manager, is similarly divided into three branches with responsibility for providing training in different substantive areas (*e.g.*, responsibility for the Field Training and Evaluation Program or the training Academy). A lieutenant oversees each of these three subdivisions and the officers, sergeants, and non-sworn employees assigned to them.

17. Some subdivisions of the PPB report directly to the Chief of Police and are not included in a particular RU. These subdivisions include the Public Information Unit, the Adjutant, the PPB Advisory Committees, the Criminal Intelligence Unit (CIU), and the Sunshine Division.

18. The PPB maintains several “specialty units,” the assigned employees of which receive specialized training and are responsible for unique areas of law enforcement activities. Several of these specialty units are led by lieutenants, including the CIU, Special Emergency Response Team (SERT), Explosives Disposal Unit (EDU), Gang Enforcement Team, Gun Task Force, Air Support Unit, Behavioral Health Unit, Rapid Response Team, and three Neighborhood Response Teams. With the exception of the CIU, all of these specialty units are housed under either the Investigations or Operations Branches, and are contained within an individual RU that is managed by a captain or commander.

19. The PPB maintains a Manual of Policy and Procedure (Manual) that provides detailed guidance on a wide variety of subjects, including certain conditions of employment for PPB employees that are not established by collective bargaining agreements. At the time of the hearing, the PPB was operating under a Manual last updated in January 2010. The Manual is over 600 pages long. All PPB employees are expected to follow the policies and procedures set forth in this document.

20. PPB precincts operate 24 hours per day, 365 days a year. To provide full coverage, precincts run three overlapping 10-hour shifts. Although there is some variation between the precincts, generally day shifts run from 7:00 a.m. to 5:00 p.m.; afternoon shifts from 4:00 p.m. to 2:00 a.m.; and night shifts from 10:00 p.m. to 8:00 a.m.

21. Association-represented employees occasionally serve in a higher classification when a senior ranking officer is on leave, at training, or otherwise unavailable. Employees also perform work out of their classification during the time that it takes to fill a vacancy through the City’s internal hiring process. For example, a lieutenant may work as a captain or a captain may work as a commander. If these assignments exceed three consecutive days, Article 2 of the Contract requires that the employee working out of class receive additional compensation.

#### Duties and Position Descriptions for Bargaining Unit Members

22. Consistent with the paramilitary structure that it employs, the PPB affords higher ranking sworn employees a greater level of authority and responsibility with each rank achieved. However, there are significant gradations of responsibility and authority within each rank depending on the division in which the employee works. Certain lieutenants, for example, do not directly oversee any employees, although others may oversee an entire shift. Most captains serve as RU managers, and therefore have enhanced authority under the PPB’s structure and Manual, while precinct captains have less authority because there is a commander above them in the chain of command who serves as the RU manager.

23. Despite the differences in job duties for employees of the same rank, there is only one position description for each of the three classifications represented by the Association. Each position description, however, acknowledges that there are differences in the work performed by employees within the same classification, stating that “[n]ot all the work performed is specifically described. Not all tasks are done at all work locations.”

### Lieutenants

24. The position description for the Police Lieutenant classification provides, in relevant part:

**“Class Summary:**

“This is supervisory and limited administrative police work. Employees occupying positions of this class are responsible for performing supervisory and limited administrative duties of a line or staff nature. Some positions of this class may serve as a commander of a precinct on an assigned shift in the absence of a Captain or may assist a Captain with the administration and supervision of subordinates. Some positions may serve as supervisors of units designed to support and augment field operations. Some positions may perform specialized administrative duties designed to improve effectiveness of the entire Bureau and reports to a Deputy Chief or the Chief. Work is performed with considerable independence within the guidelines of Bureau policies and under the direction of a superior officer. Work is reviewed for accomplishments of objectives and for effective law enforcement services provided by the unit supervised.

**“Examples of Work:**

“Commands a unit or an assigned shift; acts as second in command to a Police Captain, or serves as an Aide to a Deputy Police Chief.

“Plans, organizes, and assigns work to subordinate officers; prepares plans for handling special events.

“Reviews reports of subordinate officers and takes corrective action, where necessary, to insure [*sic*] compliance with departmental rules and regulations and with effective law enforcement practices and procedures.

“Studies law enforcement problems and recommends actions for more effective law enforcement programs; keeps Police Sergeants and other subordinate personnel informed of new laws, court decisions, Police Bureau policies and problems.

“Prepares or supervises the preparation of records and reports, and prepares official departmental correspondence.

“Coordinates the work of a support unit with the appropriate line division(s), and devises procedures and methods to increase the efficiency of the unit.

“Establishes and maintains communications with community organizations and other groups.

“Participates in the personnel processes; makes recommendations on appointments, promotions, transfers, disciplinary actions, and discharges; and prepares or reviews the preparation of work and time records.

“Reviews the effectiveness of a police unit and administers a program to develop and improve the unit through guidance, instruction, and encouragement of participation in the training programs.

**“Not all the work performed is specifically described. Not all tasks are done at all work locations.”** (Emphasis in original.)

25. At the time of the hearing, the Association represented lieutenants in the following divisions: Family Services (1), Central Precinct (4), East Precinct (4), North Precinct (3), Chief’s office (3), Youth Services (1), Detective (3), Tactical Operations (3), CIU (1), Traffic (1), Training (2), Professional Standards (2), Transit (1), Drugs and Vice (1), and Strategic Services (1).<sup>4</sup>

26. In the chief’s office, one lieutenant serves as the adjutant for the chief, and two serve as executive officers for two of the assistant chiefs. Lt. Mike Marshman, the chief’s adjutant, spends a great deal of time attending meetings with the chief or on the chief’s behalf, taking notes, and following up on action items from those meetings. He also aids in communication between the chief and various departments within the City and outside of the City. Lt. Kaer, the executive officer in the Operations Division, primarily reviews policies and standard operating procedures, reviews findings on internal investigations, monitors staffing levels at the precincts, and reviews “after-action” reports.<sup>5</sup> These particular lieutenants do not directly oversee any employees.

27. Each precinct has one lieutenant assigned to each of the three shifts who leads that particular shift. This lieutenant works an assigned shift, Monday through Friday. Many of the precinct lieutenants oversee multiple sergeants who in turn generally oversee multiple police officers. However, much of the precinct lieutenants’ time is spent filling out paperwork (including, among other things, budget requests, overtime forms, “findings” for RU managers, and procurement requests) and attending community and PPB meetings. In addition, precinct lieutenants also conduct patrols and respond to, and often direct, significant tactical operations.

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<sup>4</sup>There was limited testimony concerning the specific job duties and actual examples of the exercise of authority held by the lieutenants. The City did not call any bargaining unit employees as witnesses, and the Association called only three lieutenants from two of the divisions. However, from the limited evidence in the record, we conclude that the daily activities and authority of lieutenants vary widely depending on their position.

<sup>5</sup>An “after-action” report is a document created after a significant event involving police personnel, including but not limited to situations where force is used, where there is damage to City property or injuries to PPB employees, or where special tactical units, such as SERT, have been used. These reports summarize the events and include an after-the-fact critique of the event and recommendations on how the situation could have been handled more effectively, if applicable. The reports do not contain disciplinary recommendations. These reports are often reviewed by all sworn staff in the chain of command, up to the assistant chief of the applicable division.

28. In the Detective Division, the three lieutenants are not expected to make case assignments. Instead, each lieutenant has different types of criminal investigations that they are responsible for overseeing. The sergeants generally assign cases, while the lieutenants coordinate among the division, the District Attorney's office, the Internal Affairs Division, and other groups to ensure that the work is being accomplished in the appropriate manner. Lieutenants also review and forward warrants to the District Attorney's office.

29. Some lieutenants draft performance evaluations for sworn and non-sworn employees. However, sworn employees only receive evaluations when they are on initial or promotional probation, and lieutenants in some divisions do not evaluate non-sworn employees.

### Captains

30. The position description for the Police Captain classification provides, in relevant part:

#### **Class Summary:**

“This is a police command classification. Employees occupying positions of this class are responsible for serving as the commanding officer of a service branch division within the Police Bureau. Service Divisions exist to support the work of the primary core operational and investigative divisions. Work involves planning, organizing, staffing, directing, and controlling work of assigned units to accomplish immediate supporting objectives as well as to reach long-range community policing goals. Duties include preparing and revising plans, which have significant [e]ffect on Bureau policies and strategies. Work is performed independently within bureau policies but involves interpretation of policies under limited direction of a supervisor.

“This level is distinguished from the Police Lieutenant by the greater complexity and scope of support operations directed and the responsibility for long-range planning. Through appointment by the Police Chief, employees of this class may serve in special assignments as a[n] Assistant Police Chief or Police Commander. In all assignments, work is reviewed through conferences and reports for effectiveness of area administered.

“In addition to the above, Captains may also be assigned to precincts to augment the day-to-day work of Precinct Commanders as well as serving as acting Commanders in their absence.

#### **Examples of Work:**

“Plans and develops program objectives, operational goals; implements and adjusts, if necessary, to meet changing conditions.

“Meets and deals with officials and citizens on program administration matters; serves as a member of law enforcement committees, boards, and ad hoc groups.

“Reviews budget proposals and justifications to insure correct priorities and effectiveness.

“Plans, coordinates, directs, controls, evaluates, and reports on assigned responsibilities; identifies problems and prepares recommendations for resolution.

“Supervises professional, technical, clerical personnel, and subordinate supervisors and administrators; evaluates force strength to assign, reassign, or request personnel and equipment to meet priorities; meets with labor organizations to resolve grievances; recommends and administers approved discipline.

“Not all the work performed is specifically described. Not all tasks are done at all work locations.”

31. At the time of the hearing, the Association represented six captains who were serving as RU managers in the Records, Forensics, Drugs and Vice, Training, Youth Services, and Tactical Operations Divisions. Several RU manager/captain positions were vacant at the time of the hearing.

32. In addition to captains who serve as RU managers, the Association represents four captain positions that are not classified as RU managers: the North, Central and East precinct captains, and the captain that will be assigned to oversee reform efforts coming as a result of a settlement agreement with the United States Department of Justice (the DOJ captain). At the time of the hearing, the Central precinct and DOJ captain positions were vacant.

33. Captains typically work day shifts, Monday through Friday, but are expected to be available after hours for emergencies.

### Commanders

34. The position description for the Police Commander classification provides, in relevant part:

#### **“Class Summary:**

“This is a senior command assignment. Employees in this assignment are responsible for serving as the commanding officer of the Police Bureau’s core primary operational (Precincts) and investigative (Detectives) divisions within the Police Bureau and hold the rank of Captain. Work involves planning, organizing, staffing, directing and controlling work of these assigned core function units to accomplish immediate objectives as well as to reach long-range community policing goals. Work also involves providing regular input and assistance to the Police Chief’s executive team in the areas of strategic, emergent and organizational planning. Generally Police Commanders are responsible for divisions that perform the Bureau’s primary core operational and investigative responsibilities.

“This level is distinguished from the Police Captain classification by greater complexity typically due to such factors as larger staff size, core primary

operational or investigative responsibilities as opposed to support or specialized responsibilities, diversity of area served, police first-response responsibilities, scope of operations, responsibility for long-range planning, and fostering relationships to secure cooperation and coordination within the community. It is further distinguished by providing regular input and assistance to the Police Chief's executive team in the areas of strategic, emergent, and organizational planning. Work is performed under general policy direction. Notwithstanding the above, the commanding officer of the Transit Division shall be designated as a Police Commander using this premium assignment, due to the scope and complexity of the work assigned to that position, provided that position is assigned to a member of the Portland Police Bureau.

"Responsibilities are broad in scope, allow for a higher degree of program and administrative discretion, and are evaluated in terms of the overall effectiveness of program or unit performance.

"(Note: This is a premium pay assignment from the rank of Police Captain. Assignments are made at the sole discretion of the Police Chief. Employees so assigned may be removed from the position without a statement of cause and shall have no appeal rights.)

**Examples of Work:**

"Plans and develops program, goals and objectives; implements and adjusts, if necessary, to meet changing conditions; enforces and interprets bureau policies, rules, and regulations; reviews precinct and bureau-wide operations and recommends and implements policy changes.

"Meets and deals with officials and citizens on special community, project or program administration matters.

"Plans, develops and implements strategies; coordinates, directs and controls operations involving a number of divisions, units, and/or other bureaus and agencies such as dignitary security, emergency occurrences or large-scale tactical situations.

"Plans, coordinates, directs, controls, evaluates, and reports on assigned responsibilities; identifies problems and takes appropriate action for resolution.

"Develops budget proposals and justifications to ensure correct priorities and effectiveness.

"Provides insight and recommendations in a structured and regular format to Police Chief's executive team regarding major issues such as strategic planning, policy direction, major incident planning and response, organizational structure and labor matters.

"Supervises professional, technical, clerical personnel and subordinate supervisors and administrators; evaluates force strength to assign, reassign or request personnel and equipment to meet priorities; meets with labor organizations to resolve grievances; recommends and administers approved discipline.

“Manages complex policy review/development projects and other long term or complex projects assigned by Assistant Chief which have significant effect on the bureau and community.

“Prepares and administers complex intergovernmental agreements and leads multi-jurisdictional teams composed of both local and federal law enforcement personnel.

“Represent[s] the senior leadership of the bureau out in the community.

“Not all the work performed is specifically described. Not all tasks are done at all work locations.”

35. At the time of the hearing, the Association represented five commanders, all of whom served as RU managers in the following positions: North Precinct Commander, East Precinct Commander, Central Precinct Commander, Transit Division Commander, and Detective Division Commander.

36. Commanders work day shifts, Monday through Friday, but are expected to be available after hours should issues arise that require their attention.

#### PPB Hiring Process

37. The City uses different processes for hiring sworn and non-sworn employees, and the involvement of Association-represented employees in those processes varies accordingly. The City’s Bureau of Human Resources (BHR) is very involved in the hiring process.

#### *Hiring of Sworn Employees*

38. The PPB fills all vacancies for sworn positions above the rank of police officer by internal promotion, as discussed in more detail below.<sup>6</sup> Thus, the only hiring decisions involving external applicants for sworn positions are for new police officers. The hiring process for new police officers requires candidates to pass a written test, a physical agility test, and a background check. Members of the Association bargaining unit have little to no involvement in these stages of the process.

39. If candidates pass the initial requirements, they then proceed to an interview. The PPB typically forms an interview committee of three to five PPB employees. Association-represented employees occasionally sit on these interview panels, as do sergeants, non-sworn staff, and citizen representatives. Lower ranking commanding officers serve on interview panels more frequently than do captains and commanders serving as RU managers.

40. The committee then ranks potential candidates, and submits the list to the chief. Each member of the interview panel’s recommendation on a candidate counts equally, regardless of rank or position.

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<sup>6</sup>There was testimony regarding one exception to this practice, but both parties agree that the City chooses to promote from within its ranks of current employees.

41. The chief or his or her designee makes the final hiring decision, based in part on the recommendation of the interview panel.

#### *Hiring of Non-Sworn Employees*

42. The hiring process varies for non-sworn employees, depending on whether the vacancy is for a DCTU-represented position, the nature of the particular position to be filled, and the division of the PPB involved. The level of involvement of Association-represented employees varies accordingly.

43. In most situations, the PPB fills vacancies in non-sworn positions represented by the DCTU with internal candidates based on seniority or an existing layoff recall list, as required by the applicable collective bargaining agreement. In such cases, the BHR conducts the hiring process and Association-represented employees do not have discretion or authority to make hiring decisions, or to effectively recommend hiring decisions. The majority of non-sworn vacancies are filled using this method.<sup>7</sup>

44. If no current or laid off employee with reinstatement rights applies for the vacant position or if the position is non-represented, then the PPB may conduct an external hiring process. However, some of these positions may have an existing hire list from previous applicant pools, and the BHR will provide the RU manager with a list of the top two candidates from the existing list. The RU manager may then choose the preferred candidate from that list.

45. In situations where a hire list does not exist, RU managers have the authority to work with BHR to initiate and help design the application and interview process, and ultimately select their preferred candidate and make the hiring decision. The RU manager may delegate some or all authority to make the selection, but there is no evidence concerning whether or how often such delegations occur.

46. There is no evidence in the record that captains or lieutenants who are not RU managers have authority to hire or effectively recommend the hiring of non-sworn employees. They may be asked for input on hiring decisions and they may serve on interview panels, but when serving on interview panels, all panel members have an equal vote in the process.

47. After a hiring decision is made, offer letters for non-sworn employees are signed by a BHR representative and the appropriate RU manager, whether that be a captain, commander, or non-sworn administrator.

#### PPB Promotion Process

48. When a promotional opportunity in a sworn position arises, only internal candidates are considered. The promotion process varies by the rank of the promotional position.

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<sup>7</sup>AC Crebs estimated that these procedures are followed for non-sworn vacancies approximately 75% of the time. This is consistent with the testimony of Association witnesses, who testified that they rarely, if ever, participated in the hiring process for non-sworn employees.

49. Employees seeking promotion to the rank of lieutenant or captain go through an “assessment center” process. The PPB utilizes assessors who are not City employees, including other law enforcement agencies, social service agencies, and citizen members. The candidate for promotion undergoes the required testing on various subjects, which may include written tests prepared by subject matter experts within the PPB. Association-represented employees often serve as subject-matter experts in creating tests.

50. Upon successful completion of the testing process, the RU managers (be they a captain or commander) are then asked to provide recommendations to the chief on whether particular candidates should or should not be promoted. The chief makes the final decision on who is eligible for promotion, but considers the recommendations of the RU managers.

51. There was no specific evidence of how often Chief Reese did or did not follow RU managers’ recommendations that an employee should be promoted. However, he could not recall promoting an employee where the RU manager recommended against promotion.

52. A ranked “eligibility list” of qualified promotional candidates is then created for the classification. This list may contain multiple candidates from the same RU, or candidates from a number of RUs. RU managers do not rank the eligible candidates; they merely make a “do promote” or “do not promote” recommendation.

53. If an eligibility list contains multiple candidates who are qualified for promotion, the chief selects the successful candidate from the list. The chief may fill future promotional opportunities from the remaining names on the list without going through the assessment center process again.

54. For promotions to the rank of sergeant or detective, employees take a written exam. If they pass that exam, they then undergo the assessment center process. Employees seeking promotion to the rank of criminalists only take a written exam, with no assessment center process.

55. Candidates who pass the assessment center process then go through a “360 review” process where multiple people who work with the employees regularly are offered the opportunity to provide input on whether the candidate should be promoted. Association-represented lieutenants, captains and commanders are afforded the opportunity to provide their input and recommendations on a candidate, as are officers, sergeants and non-sworn staff. In prior years, this process has been contracted out to an outside vendor. Recently, however, the process has been handled internally due to budgetary reasons.

56. Association-represented employees who are not RU managers may be asked to offer input during the review process, but the record does not establish that decisions makers follow these recommendations with any regularity.

## PPB Disciplinary Process

57. The PPB has a detailed set of procedures in the Manual that addresses situations that may require investigation and corrective action for employees. The particular process utilized depends on the nature of the issue to be addressed, the severity of the possible disciplinary action being contemplated, and the source of the complaint being investigated. These processes and procedures are set forth in detail in PPB Policies 330.00 (Internal Affairs, Complaint Investigation Process), 335.00 (Use of Force Boards), 336.00 (Performance Review Boards), 341.00 (Discipline Process), 342.00 (Performance Deficiencies), and 343.00 (Criminal Investigations of PPB Employees).

58. An investigation into potential misconduct or performance deficiencies may be initiated by an external citizen complaint or an internal complaint from another PPB employee. PPB employees may initiate an investigation by submitting their concerns to the next person above them in the chain of command.

59. Internal complaints may be submitted directly to Internal Affairs Division (IAD), or they may be passed up to the RU managers, who may initiate the disciplinary process by referring the issue to IAD, or in certain circumstances, by conducting an investigation within the RU. Most issues involving alleged misconduct by an employee within an RU will be referred to IAD for investigation. IAD is part of the Professional Standards Division, and maintains several investigators to gather evidence, interview witnesses, and prepare summaries of the investigation results. Captain Famous is the RU Manager for the Professional Standards Division. The Personnel Division is also very involved in the processing of potential disciplinary situations.

60. Citizen complaints regarding minor issues that would not warrant disciplinary action may be treated as a “service complaint.” Service complaints are generally investigated and handled by RU managers with non-disciplinary debriefings or clarification of expectations.

61. RU managers may also be responsible for investigating and dealing with performance deficiencies within their RU, in accordance with Policy and Procedure 342.00 in the Manual. However, IAD also conducts some performance investigations. Performance deficiencies may lead to discipline or other non-disciplinary actions.

62. If allegations are made against a PPB employee that potentially involves criminal misconduct, the Detective Division investigates the complaint.

63. In addition to IAD, the City also maintains three separate committees that review potential disciplinary situations based on the nature of the complaints, the severity of the possible discipline, or both. These committees include the Police Review Board (PRB), the Independent Police Review Division (IPR), and the Collision Review Board (CRB).

64. The PRB is an advisory committee that reports to the chief. It is comprised of six voting and six advisory members. The six voting members include the three assistant chiefs, with the Services Branch AC as the chair; one citizen member; one peer member of the same rank as the employee whose conduct is at issue before the PRB; and the employee’s RU Manager. The

advisory members include the manager of the Office of Accountability and Professional Standards; the Review Board Coordinator; a representative from the BHR; a representative from the City Attorney's Office; the IAD Manager; and the Independent Police Review Division Director. During the presentation of the case before the PRB, representatives from the Training Division, the investigating division (IAD, Detective Division, or the Precinct), and the employee's labor organization may be present.

65. The PRB reviews any investigations resulting in a sustained finding where the proposed discipline is a suspension or greater, all controverted investigation findings, investigations into serious uses of force and officer-involved shootings, completed Equal Employment Opportunity investigations, and other situations where review is requested by the chief or an assistant chief.

66. The Discipline Coordinator within the Standards and Accountability department of the Professional Standards Division also serves as the coordinator for the PRB. Christopher Paille, a non-sworn employee, currently holds this position.

67. The IPR is "responsible for receiving and numbering citizen complaints regarding allegations of misconduct against members of the Bureau, monitoring [IAD] investigations of citizen complaints, coordinating appeals of Bureau findings of citizen complaints, and recommending changes in police practice and policy."

68. The IPR is not part of the PPB. Rather, the IPR Director reports directly to elected officials. The IPR may conduct its own initial investigation and findings or it can send the case to IAD for review. Depending on the outcome of these investigations, the IPR can dismiss a complaint, make recommendations to the Chief on a course of action, and can recommend that a complaint goes to the PRB.

69. All automobile collisions are reviewed by the CRB. The CRB examines the collision and determines whether it was preventable and whether an employee was at fault. This process yields recommendations that can result in discipline, command counseling, training recommendations, or other actions.

70. When an investigation is completed by IAD or within the RU, the investigatory documents such as transcripts of interviews, statements, investigative summaries, and related documents or evidence are compiled and sent to the Professional Standards captain who reviews them to ensure that the investigation was complete and fair. Upon approval of the investigation, the RU manager is assigned to draft "findings" based on the results of the investigation. The RU manager may delegate this task to a captain or lieutenant. The RU manager or their designee will review all of the evidence and information gathered by IAD or the relevant investigator, and make assessments of whether any alleged misconduct is sustained or exonerated, or whether the employee's conduct was within policy.

71. The chief, an assistant chief, the Professional Standards captain, or the IPR may disagree with the RU manager's findings and send the matter to the PRB. Chief Reese has overturned an RU manager's findings in the past.

72. If the matter is not sent to PRB, the findings may also recommend a possible disciplinary action, up to a letter of reprimand. If the matter is referred to the PRB, RU managers or their designee will present their findings to the PRB for review. These findings do not include a recommended disciplinary action. The PRB will issue its own recommendation for disciplinary action to the chief if appropriate.

73. Once the findings are completed, they are reviewed by the Professional Standards captain, the IPR director, and the RU manager (if that person did not draft the findings). These individuals may concur with the findings, request more investigation, or controvert the results. On the form, they may make comments and suggest additional actions, such as training, debriefing, or sending the matter to the PRB. The findings are then sent to the assistant chief that supervises the involved employee for review and approval.

74. If the assistant chief agrees with the findings and a recommendation of discipline (up to a letter of reprimand), then the RU manager may draft a proposed letter of reprimand, often with the assistance of BHR and the City attorney's office. After the employee receives the proposed discipline, the employee may request a due process meeting with the assistant chief to offer a response and any mitigating information. After the due process meeting, the chief or assistant chief makes the final decision on whether the RU manager's proposed discipline will be followed or not. If an employee does not request the due process meeting, the proposed discipline becomes final and the RU manager and a BHR representative sign the disciplinary document and issue it to the employee.

75. Captains and commanders serving as RU managers only have the authority to issue proposed written reprimands to subordinate employees; they do not have authority to issue economic sanctions or to terminate employees. The chief and the mayor are the ultimate decision makers when it comes to discipline involving economic sanctions or terminations.

76. In ten recent situations where Association-represented employees recommended a specific disciplinary action and a due process meeting was requested, those recommendations were followed by the chief or the assistant chief only three times.

77. According to a recent PPB conducted review, in the past 22 months the chief followed the full PRB's disciplinary recommendations in approximately 72 percent of the cases. There is no evidence as to whether Association-represented employees serving on the PRB concurred or disagreed with those recommendations.

78. Lieutenants and captains who are not RU managers do not have the authority to issue discipline. They may issue command counseling, conduct debriefings, or place employees on a work plan, but these actions are not considered discipline under the City's policies and collective bargaining agreements. In many cases, the decision to issue command counseling or conduct a debriefing is a result of a separate process such as the CRB, IPR, or PRB. After one of these processes is completed, a lieutenant or captain may then be assigned to talk to the employee and issue the counseling letter. Commanding officers may not conduct a debriefing or command counseling until the appropriate process is completed.

79. Sworn PPB employees only receive performance evaluations when they are on probation, either as a new hire or after a promotion. Probationary performance evaluations are initially drafted by the employee's immediate superior, and then reviewed by the next person in the chain of command. For example, a probationary sergeant's performance evaluation would be conducted by a lieutenant (or non-sworn administrator in certain divisions), and reviewed by a captain or commander to whom the lieutenant reports. The forms allow the evaluating officer to rate the employee as Acceptable, Needs Improvement, Unacceptable, or Not Observed. There is space on the form to provide specific narrative comments concerning the employee.

80. The employee conducting the probationary evaluation does not have authority to terminate a probationary new hire or to restore a newly promoted employee to the employee's previous rank. However, the evaluating employee may recommend that the employee not pass probation. Captain Bryan Parman, the Training Division RU manager, makes recommendations to the chief about when new officer recruits should be removed during the probationary period. Captain Parman's recommendations are based in part on the recommendations from Field Training Officers (FTO), Training Division sergeants, training officers and lieutenants. The chief makes the final decision, but Captain Parman's recommendations have almost always been followed.

81. RU managers and some lieutenants perform annual evaluations for non-sworn staff. A negative evaluation may result in a non-sworn employee not receiving a merit step increase, but there is no evidence that this has ever happened.

#### Authority to Suspend Employees

82. As stated above, Association-represented employees do not have the authority to suspend employees without pay. However, they may temporarily relieve a subordinate PPB employee from duty with pay under limited circumstances, consistent with PPB policies.

83. Under PPB Policy 330.00, certain PPB personnel may take a non-disciplinary "temporary personnel action" by relieving an employee from duty with pay

"if the alleged conduct is so serious in nature that prompt action is necessary to protect the public, the member, or the Bureau, or when it is reasonable to question the member's mental, physical, or emotional ability to properly and safely pursue his/her normal duties and responsibilities."

84. A commanding officer that is not serving as an RU manager must first consult with the RU manager or an assistant chief before relieving an employee from duty. In addition, the policy requires notification to the Personnel manager as soon as possible, and the chief must approve the relief from duty before the start of the employee's next shift. The policy lists several factors that might lead to an employee being relieved from duty, including:

- “a. The likelihood of criminal charges against the member.
- “b. The member’s ability to effectively continue performance of duty.
- “c. Involvement in alleged serious misconduct.
- “d. Potential or actual bringing of extreme discredit to the Bureau.”

This authority is not limited to commanding officers, but could also be exercised by a sergeant or non-sworn administrator. It is rare for this authority to be exercised.

85. In addition, under PPB Policy and Procedure 210.23, employees involved in a lethal use of force situation are automatically placed on paid administrative leave and removed from duty. This is considered non-disciplinary and the removal from duty is non-discretionary.

86. Captains who do not serve as an RU manager do not have the authority to suspend an employee without checking with the RU manager or BHR. If someone comes in and appears unfit for duty, they may initiate the process by contacting the appropriate people.

87. The record does not establish that any of the Association-represented commanding officers have exercised any authority to remove an employee from duty with pay or effectively recommended the removal of an employee.

#### PPB Process for Employee Transfers

88. The authority to grant voluntary or involuntary transfers between divisions lies with the AC of the transferring department, as set forth in PPB Procedure 060.40. No Association member has the authority to approve or effectuate such inter-division transfers without the applicable AC’s agreement. In most, but not all cases, RU managers may block a transfer into their division if they do not believe that the employee would be a good fit.

89. Association members receive transfer requests from lower ranking employees and can pass the requests to the AC or next person in the chain of command for review. The AC will generally solicit the recommendation of the non-sworn staff, sergeants, lieutenants, captains, and commanders whose units would be involved in the potential transfer to determine whether a transfer would be acceptable and a good fit. These recommendations are not always followed.

#### Authority of Association Members to Reward Employees

90. Association-represented employees may, per BHR policies, give what are commonly called “coffee cards” to employees. These cards may have a value of up to \$50. The authority to give a “coffee card” is not limited to Association-represented employees, but may also be given by sergeants, other non-sworn employees, and any City employee with a “procurement card.” Captain Parman testified that he has never given any employee a coffee card and Lieutenant Steinbronn testified that she has given out coffee cards, but paid for them out of her own pocket. No evidence was presented concerning the frequency or typical basis for issuance of these coffee cards.

91. Lieutenant Steinbronn “guess[ed]” that she had “the power” to select a high-performing employee over “a person that calls in sick all the time” for purposes of attending a desired training.

92. Commanding officers, sergeants and some non-sworn employees may issue commendation letters to employees. Often, commendations for actions that impact a large portion of the PPB are submitted to the chief or an assistant chief for review and signature.

93. Under PPB Policy 210.90, which sets forth an internal process for issuing special commendations or awards, any PPB employee may nominate another employee for an award by submitting a nomination to the employee’s RU manager. The RU manager then passes the nomination to the AC, and the award is considered by the Review Board Coordinator and then the Employee Assistance Program Awards Facilitator. The nomination, if sufficient, is then advanced to the full Award Committee, who may recommend to the chief that the award be granted. The chief has the final decision on whether any award under this Policy is issued.

#### Authority of Association-Represented Employees to Assign and Responsibly Direct Employees

94. RU managers can assign and reassign work within their RU, reassign employees within their division (so long as the reassignment is consistent with any applicable collective bargaining agreements), and modify the priorities of the division and assign staff accordingly. For example, in the Training Division, there are three lieutenant positions with different substantive areas of responsibility. Captain Parman, the RU manager for the division, has the authority to assign employees among these three positions as he sees fit.

95. Commander Burke, the RU manager for the Detective Division, confirmed that decisions to reassign employees within that division were his to make. Former Detective Division RU manager Ferraris also confirmed that when he served in that position, he had the authority to reassign sergeants to different substantive areas or shifts within the division, and that he had the authority to reassign an employee to a specialty unit within his RU.

96. However, any reassignments must be consistent with the requirements of any applicable collective bargaining agreement. For example, an in-unit reassignment of sworn employees represented by the PPA that involved a change in shift and days off would have to be consistent with the seniority based shift bidding procedures in the PPA collective bargaining agreement.

97. Lieutenants and captains who do not serve as RU managers cannot grant a reassignment even within their shift or unit without the RU manager’s agreement. They may only pass on requests for a reassignment to the RU manager and, when asked, provide their input on whether the reassignment would be appropriate.

98. Pursuant to PPB Policy and Procedure 060.00, RU managers may also draft division or precinct orders, as well as standard operating procedures (SOPs) that apply within their RU. These orders

“may be for information purposes or may be SOPs, which spell out procedures to be followed in handling specific problems or functions of a recurring nature and which are not covered by directives or Special Orders. They are derived from Bureau policies, procedures and command guidance, but are more detailed in content and application. SOPs may be used as a vehicle for contingency planning.”

99. RU managers also exercise authority to approve work-out-of-class assignments, so long as the approval is consistent with the terms of the PPA and DCTU collective bargaining agreements. The forms required to document work-out-of-class assignments are signed by RU managers.

100. Some lieutenants do not have any employees that directly report to them. For example, Lieutenants Derek Rodriguez, Jeffrey Kaer, and Mike Marshman do not have any employees that directly report to them. In addition, Force Inspector Lieutenant Jim Dakin has no employees that report to him. However, other lieutenants have multiple sergeants and police officers, and in some cases non-sworn employees, who report directly to them. Non-sworn administrators often supervise non-sworn employees.

101. Although lieutenants oversee each shift within the precincts and oversee specialty units, they do not generally assign cases, assign the patrol area to an officer, or assign the majority of day-to-day work for line staff. In many areas involving sworn employees, staffing decisions are guided by minimum staffing requirements that are set by policy. Sergeants and officers who are represented by the PPA select their shifts by seniority, and sergeants generally determine the geographic area they will work in on a given day.

102. Under the PPB's paramilitary structure, a lieutenant or other higher ranking officer may modify the assignments made by a sergeant or lower ranking officer, but this rarely occurs. Some lieutenants do not believe that they have the authority to modify a sergeant's assignments. Others testified that they could not adjust the workload of non-sworn employees without obtaining approval of a superior.

103. Sergeants, lieutenants, captains, and commanders (and even lower-ranking employees) may authorize overtime to meet minimum staffing requirements. This most often occurs when employees call in sick, and the position must be filled to ensure staffing standards are met. Many overtime assignments within precincts are done by seniority through an established overtime list.

104. Some lieutenants grant vacation and other leave requests if the request does not incur overtime, as is generally required by collective bargaining agreements. If granting a request would involve incurring overtime, lieutenants are generally required to obtain approval of a superior before granting the request.

## PPB Layoff and Recall Procedures

105. The parties stipulated that Association members do not have any role in the layoff or recall of employees.

## Adjustment of Grievances

106. Under the collective bargaining agreement between the PPA and the City, grievances are initially required to be filed with the PPA employee's "immediate supervisor outside of the bargaining unit." Ostensibly, this would include lieutenants, captains and commanders in the Association bargaining unit. However, the parties agree that the general practice is for grievances to be filed with PPB personnel outside of the Association bargaining unit.

107. Association-represented employees have, on rare occasions, received copies of grievances filed by employees. In addition, commanding officers have been called on as a source of information when the City investigates the merits of a grievance. However, grievance responses are typically processed through BHR and the chief's office.

108. The record does not establish that any Association member has ever sustained, or granted the relief requested, in a grievance. That authority lies with the BHR and the chief's office.

## CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. Commanders and captains serving as RU managers are "supervisory employees" within the meaning of ORS 243.650(23) and are not appropriately included in the Association bargaining unit. The remaining employees in the existing unit are not "supervisory employees" within the meaning of the statute and are appropriately included in the Association bargaining unit.

## Legal Standards

Under the PECBA, "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. However, under ORS 243.650(19), "supervisory employees" are not "public employees" and they cannot be appropriately included in a bargaining unit. *Office and Professional Employees International Union, Local #11 v. City of Hillsboro*, Case No. RC-4-99, 18 PECBR 269, 274-75 (1999).

A supervisory employee is defined under ORS 243.650(23) as:

“any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.”

This Board assesses whether an employee has authority under the specific criteria set out in the statute to determine supervisory status.<sup>8</sup>

This definition, which mirrors the definition of supervisor under the National Labor Relations Act (NLRA), has largely remained unchanged since the PECBA’s enactment in 1973, with one exception relevant to this case. In 1995, the legislature amended the statute to eliminate the following sentence: “However, the exercise of any function of authority enumerated in this subsection shall not necessarily require the conclusion that the individual so exercising that function is a supervisor \* \* \*.”<sup>9</sup> The deletion of this sentence ensured that the enumerated supervisory functions would be read in the disjunctive, which is how the NLRA had been interpreted by the National Labor Relations Board (NLRB) and federal courts. The result is that, if an otherwise “public employee” has authority under one of the 12 statutory criteria, the employee is a “supervisory employee” and not covered by the PECBA.

Since the passage of the 1995 amendments, this Board has consistently explained that “supervisory-employee” status requires the resolution of three questions, each of which must be answered in the affirmative for an employee to be deemed a supervisory employee: (1) does the employee have the authority to take action (or to effectively recommend action be taken) in any of the 12 listed activities; (2) does the exercise of that authority require “the use of independent judgment”; and (3) does the employee hold the authority in the interest of management. *See Deschutes County Sheriff’s Association v. Deschutes County*, Case No. UC-62-94, 16 PECBR 328, 339 (1996) (citing to *NLRB v. Security Guard Service*, 384 F2d 143, 66 LRRM 2247, 2248 (5<sup>th</sup> Cir. 1967)). For an employee to effectively recommend actions, their

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<sup>8</sup>A putative supervisor’s particular title or, in this case, an employee’s rank under a paramilitary organizational structure, is not dispositive of supervisory status under the PECBA.

<sup>9</sup>The 1995 amendments also added the following sentence: “Notwithstanding the provisions of this subsection, no nurse, charge nurse or similar nursing position shall be deemed to be supervisory unless such position has traditionally been classified as supervisory.” This amendment appears to be a response to *N.L.R.B. v. Health Care & Ret. Corp. of Am.*, 511 US 571, 573-74, 114 S Ct 1778, 1780, (1994), in which the Supreme Court of the United States determined that the charge nurses at issue in that case were “supervisors” within the meaning of the NLRA. Because charge nurses are not at issue here, this statutory change is not relevant to this case.

Additionally, after this petition was filed, the legislature passed SB 1518 (effective March 3, 2014), which modified the definition of “supervisory employee” in ORS 243.650(23) by specifying that firefighters who assign, transfer, or direct work of other employees, but do not have authority to hire, discharge, or impose economic discipline on those employees, are not supervisory employees. Like the 1995 “charge nurse” proviso, the “firefighter” amendment does not affect this petition.

position must be given “substantial credence” “more often than not.” *Oregon AFSCME, Council 75 v. Benton County*, Case No. C-210-82, 7 PECBR 5973, 5986 (1983). Evidence of an effective recommendation can be found by the lack of any independent review or investigation of the recommendation by a higher level supervisor. *American Federation of State, County and Municipal Employees, Council 75 v. Lane County Sheriff’s Office*, Case No. C-281-79, 5 PECBR 4507, 4517 (1981).

Because the City filed this unit clarification petition under OAR 115-025-0005(2), the hearing is considered “investigatory” and, under our current rules “[t]here is no burden of proof” on either party. OAR 115-010-0070(5)(a).<sup>10</sup> Nevertheless, because a “supervisory employee” is a statutory exclusion from the otherwise broadly defined term “public employee,” there must be sufficient evidence establishing that the statutory exclusion applies before we will conclude that an otherwise “public employee” is a “supervisory employee.” Mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a supervisor. Accordingly, in the absence of detailed, specific evidence establishing that a putative supervisor has authority under the statutory indicia, we will conclude that the employee is a “public employee” covered by the PECBA and not a “supervisory employee” under ORS 243.650(23).

The City contends that currently the lieutenants, captains and commanders represented by the Association are all supervisory employees, and thus, should be removed from the Association’s bargaining unit. This would leave the bargaining unit without any employees for the Association to represent. The Association asserts that all of the bargaining unit members are appropriately included in the unit, as they are not supervisory employees. Before applying the legal principles to the disputed positions, we note that this case involves 44 putative supervisory employees, grouped within three separate ranks with common job descriptions. The parties acknowledge, however, that the authority and day-to-day responsibilities of many of the Association-represented employees vary significantly based on numerous factors, including the division, unit, or precinct in which the employee works and the amount of authority delegated to the employee by the next person in the chain of command. Thus, we do not determine “supervisory-employee” status based solely on rank or classification, as advocated by the City. Rather, after reviewing the record, there is one common factor that consistently predicted the level of supervisory authority held by the Association-represented employees: namely, whether the employee was an RU manager. As discussed more fully below, the witness testimony and the documentary evidence submitted by the parties confirmed that a clear line exists in the PPB’s structure between RU managers and commanding officers who are not RU managers. Accordingly, we will analyze the statutory indicia for RU managers and non-RU managers as two distinct groups. With that framework in mind, we turn to the disputed positions in this case.

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<sup>10</sup>Footnote 18 in *American Federation of State, County And Municipal Employees, Local 1085 v. State of Oregon, Department of Justice*, Case No. UC-003-10, 24 PECBR 893, 924 n 18 (2012), stated that “[t]he party asserting an individual’s supervisory status has the burden of proving it.” (Citing *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995)). That case, however, like this one, involved a unit clarification petition. As set forth above, under our current rules “[t]here is no burden of proof” in unit clarification matters. OAR 115-010-0070(5)(a). Therefore, we disavow that footnote, which is at odds with OAR 115-010-0070(5)(a).

## Analysis: RU Managers

### Authority to Hire Employees

The PPB uses different hiring processes to fill sworn and non-sworn positions. Therefore, we will separately analyze RU managers' involvement in the hiring process for each type of vacancy. We begin by addressing RU managers' involvement in the hiring of sworn employees.

The City only hires new sworn employees into the entry-level position of police officer. All vacancies above the rank of police officer are filled by internal promotion.<sup>11</sup> RU managers do not have of the authority to hire new police officers, and are only minimally involved in the interview process. The chief of police makes the ultimate decision on whom is hired. Thus, we conclude that RU managers do not have actual authority to directly hire sworn employees.

This conclusion, however, does not end our inquiry regarding sworn employees. We must next examine whether RU managers have the authority to effectively recommend the hiring of sworn employees. Here, the only role RU managers play in recommending the hiring of sworn employees is occasionally sitting on interview panels, along with civilians, non-sworn employees, and non-supervisory sworn employees. Although the chief considers the recommendation of the hiring committee as a whole, each member's vote counts equally. RU managers' votes are not entitled to any special treatment or weight. We have previously held that participation as a member of a hiring panel, when the employee's individual vote carries the same weight as other members of the panel, does not establish that a potential supervisor has the authority to effectively recommend the hiring of employees. *See City of Union v. Laborers' International Union of North America, Local 121*, Case No. UC-9-08, 22 PECBR 872, 887 (2008). Further, the chief conducts an independent review and investigation of the recommendations of the hiring panel before deciding whom to hire. Consequently, we conclude that RU managers do not have the authority to effectively recommend the hiring of sworn personnel. *See Lane County Sheriff's Office*, 5 PECBR at 4517 (a subsequent independent investigation reflects a lack of effective recommendation).

With respect to the hiring of non-sworn employees, we conclude that in certain circumstances, RU managers have actual authority to make hiring decisions for certain non-sworn personnel. For example, if no current or laid-off employee with reinstatement rights applies for a vacant non-sworn position, or if the position is non-represented, then the PPB may conduct an external hiring process. If there is no existing "hire list" for the vacancy, RU managers work with the BHR to initiate and help design the application and interview process, and ultimately select their preferred candidate and make the hiring decision. If there is an existing hire list from previous applicant pools, the BHR will provide the RU manager with a list of the top two candidates from the list. The RU manager, as the individual responsible for the overall performance of the RU, may then choose their preferred candidate from the list. RU

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<sup>11</sup>We address the authority to "promote" under that statutory criterion below.

managers use their independent judgment in choosing whom to hire, and that decision is not so limited by policy that it is of a merely routine or clerical nature. Accordingly, we conclude that commanders and captains who serve as RU managers have the authority in the interest of management to hire employees, and that the exercise of that authority requires independent judgment.

As set forth above, this conclusion is sufficient to establish that RU managers are “supervisory employees.” Nevertheless, we will address two additional criteria under ORS 243.650(23).

#### Authority to “Assign” and “Responsibly to Direct” Employees

This Board has not explained in great detail how we analyze or define the statutory terms “assign” and “responsibly to direct” under ORS 243.650(23). These two factors have frequently been analyzed together with little discussion, likely because the authority to hire, fire, promote and discipline employees has generally been the dispositive factors in most of our cases. Thus, we find our prior cases of limited utility in the present matter, and we take this opportunity to clarify the meaning of these indicia and how they are to be applied.

To clarify the meaning of the terms “assign” and “responsibly to direct,” we must interpret the relevant portions of ORS 243.650(23). When we interpret and apply statutes, our goal is to determine and give effect to the legislature’s intent. ORS 174.020. To accomplish this goal, we apply the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as subsequently modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). We first review the text and context of the statute. We may then review any relevant legislative history offered by the parties. If we are unable to determine the legislature’s intent, we then apply maxims of statutory construction. *Id.*

As explained above, the 12 statutory indicia are listed disjunctively, and the terms “assign” and “responsibly to direct” are separated by two other statutory indicia in ORS 243.650(23). Thus, the structure and context of the statute distinguish “assign” and “responsibly to direct.” Therefore, we conclude that the term “assign” and “responsibly to direct” are distinct terms with distinct meanings that must be addressed separately. This approach is consistent with the approach taken by the NLRB. *See Oakwood Healthcare, Inc., and International Union, United Automobile Aerospace and Agriculture Implement Workers of America, AFL-CIO*, 348 NLRB 686, 688-89, 180 LRRM 1257 (2006).

We first address the meaning of the term “assign,” as that word is used in ORS 243.650(23). When we analyze the text and context of a statutory term, we normally give the term its normal meaning. *PGE*, 317 Or at 611. To determine the normal meaning of words, we, like the courts, often look to the dictionary. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10, 25 PECBR 325, 345 (2012), *citing to State v. Ausmus*, 336 Or 493, 504, 85 P3d 864 (2003). The dictionary defines the term “assign,” in pertinent part, as “2a: to appoint (one) to a post or duty.” *Webster’s Third New Int’l Dictionary* 132 (unabridged ed 2002). The NLRB relied on an earlier

yet nearly identical version of this same dictionary in its discussion defining the term “assign” in *Oakwood Healthcare*, stating:

“The ordinary meaning of the term ‘assign’ is ‘to appoint to a post or duty.’ *Webster’s Third New International Dictionary* 132 (1981). Because this function shares with other [Section] 2(11) functions—i.e., hire, transfer, suspension, layoff, recall, promotion, discharge, reward, or discipline—the common trait of affecting a term or condition of employment, we construe the term ‘assign’ to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. \* \* \*

“The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’ \* \* \* In sum, to ‘assign’ for purposes of Section 2(11) refers to the \* \* \* designation of significant overall duties to an employee, not to the \* \* \* instruction that the employee perform a discrete task.” *Oakwood Healthcare, Inc.*, 348 NLRB at 689.

We find this definition consistent with the text and context of ORS 243.650(23), and will apply it in our analysis of the Association-represented employees’ authority to assign work.

With these standards in mind, we review the evidence first to determine whether RU managers have the authority to assign or effectively recommend the assignment of employees under ORS 243.650(23), and, if so, whether such assignments require the use of independent judgment. The City witnesses testified, in conclusory terms, that all commanding officers have broad authority to assign employees. This evidence, in the absence of additional, specific evidence of the authority to assign or effectively recommend the assignment of employees, is not sufficient to establish supervisory status.

However, RU managers testified that they have authority to assign and reassign people to different areas of responsibility within the RUs that they oversee to ensure that the division’s goals are accomplished, so long as those reassignments do not violate the terms of any collective bargaining agreement. For example, in the Detective Division, a sergeant or officer working the homicide caseload could be reassigned to work the burglary caseload should the RU manager determine that was appropriate. Additionally, in the Training Division, Captain Parman conceded that he could reassign lieutenants within his RU to different substantive assignments.

The record also establishes that this authority is held in the interest of the employer and requires the use of independent judgment. RU managers must make a management-based assessment to assign subordinate employees in a manner that accomplishes the overall objectives

of the RU, as determined by the RU manager. Additionally, these assignments require the use of independent judgment, based on individualized assessments by RU managers on the needs of the RUs and the skills of the subordinate employees. Although there are some restrictions on what assignments and reassignments an RU manager may make, these limitations are not of such a nature as to render the assignments to be of a mere routine or clerical nature. Therefore, we find that there is sufficient evidence that RU managers have the authority to assign employees to render them supervisors under ORS 243.650(23).

We now turn to the factor of “responsibly to direct.” Again, we find guidance in the NLRB’s decision in *Oakwood Healthcare, Inc.*, which held that for putative supervisors to meet this criterion, they must have employees under them and decide “what job shall be undertaken next or who shall do it.” *Oakwood Healthcare, Inc.*, 348 NLRB at 691. The direction must also be both “responsible” and carried out with “independent judgment.” The NLRB explained further that for direction to be “responsible,” the employee who is directing the work must be accountable for the success or failure of those whom they are directing:

“We 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. \* \* \*

“Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Oakwood Healthcare, Inc.*, 348 NLRB at 691-92.

We agree generally with the NLRB’s approach as described above, and in particular with the conclusion that the term “responsibly to direct” requires that a putative supervisor must be accountable (such that some adverse consequence may befall the supervisor) should the employees that they allegedly direct fail to adequately perform their duties.

Here, RU managers clearly have people working under them, for whom they prioritize the jobs to be undertaken and decide who shall undertake them. In addition, RU managers acknowledged that ultimately it is their responsibility to ensure that their individual divisions meet PPB standards. Should the division fail to meet these standards, RU managers understand that they may be held accountable to the chief of police and the assistant chief of their branch for this failure, such that an adverse consequence may befall RU managers. Therefore, although it is a close call, we conclude that the RU managers do have sufficient authority “responsibly to direct” the work of employees.

In sum, we have concluded that RU managers have sufficient supervisory authority in three separate areas under ORS 243.650(23): authority to hire employees, authority to assign employees, and authority responsibly to direct employees. Moreover, the authority in those three

areas is held in the interest of the employer, and the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment. As a result and because satisfying even one criterion would mean that RU managers are “supervisory employees” under that statute, we conclude that the RU managers are supervisory employees under the PECBA and cannot be included in the Association bargaining unit. Having reached this conclusion, it is not necessary to determine whether RU managers have supervisory authority under the remaining statutory indicia. We now turn our attention to the remaining Association-represented employees who are not RU managers.

### **Analysis: Bargaining Unit Employees Not Serving as RU Managers**

#### Authority to Discipline and Discharge Employees

Non-RU managers have no authority to discharge or suspend employees without pay. The chief of police and the mayor retain that authority. And unlike RU managers, lieutenants and captains not serving as RU managers cannot issue proposed letters of reprimand. The only authority to take actions that could even arguably be considered disciplinary that these employees maintain is the authority to issue “command counseling” and conduct “debriefings.” The City asserts that this is sufficient to establish authority to discipline employees. Yet, under the City’s policies and applicable collective bargaining agreements, such actions do not constitute discipline. Further, the decision to issue command counseling or conduct debriefings is not usually made by commanding officers. That decision is normally made by an established PPB body such as the CRB or PRB. In those cases, the commanding officers merely implement the decision made by others. Therefore, we conclude that non-RU managers do not have authority to discipline or discharge employees. In addition, the record does not establish that these employees can effectively recommend that employees be disciplined or discharged.

#### Authority to Suspend Employees

It is undisputed that non-RU managers lack the authority to suspend employees without pay, or to effectively recommend such action. Moreover, assuming, *arguendo*, that sending an employee home on paid leave amounts to “suspending” that employee, Chief Reese testified that there were only two narrow circumstances where such action is permitted: (1) a deadly-force incident; and (2) where immediate action is necessary “to protect the public.” Chief Reese acknowledged, however, that no discretion is involved in either circumstance because these actions are required by PPB policies. Moreover, with respect to the latter, Reese acknowledged that a “sergeant” or “anybody” has authority to send someone home, and that “everybody’s got the responsibility to do that equally.” Reese also indicated that non-RU managers could only take that action *after* getting approval from an RU manager or an assistant chief.

Consequently, on this record, we conclude that non-RU managers lack the authority to suspend employees.<sup>12</sup> Specifically, with respect to an employee involved in a deadly-force

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<sup>12</sup>Again, this analysis assumes that “suspend” may be understood to include sending an employee home on paid leave.

incident, the record establishes that it is required for that employee to be sent home on paid leave. There is no discretion or independent judgment involved. Likewise, any authority held by a non-RU manager to send an employee home “to protect the public” does not require the use of independent judgment, as the action is not discretionary. Moreover, the record does not establish that non-RU managers have the authority, in the first instance, to send an employee home “to protect the public” because they must first receive the approval of an RU manager or assistant chief. The record also does not establish that non-RU managers may “effectively recommend” such action. Furthermore, as also confirmed by Chief Reese, the authority is not exercised in the interest of management, but rather is an obligation equally shared by “everybody.”

### Authority to Hire Employees

We concluded that RU managers have sufficient hiring authority to render them supervisors because they make hiring decisions for non-sworn positions, but the record does not support the same finding with regard to the captains and lieutenants who do not serve as RU managers. Rather, the only role for non-RU managers in the hiring process is serving as members of interview panels and occasionally providing their opinion on potential candidates. The record does not establish that they actually make any hiring decisions or that their limited input amounts to an effective recommendation to hire employees. As a result, we conclude that commanding officers who do not serve as RU managers have insufficient authority to hire or effectively recommend the hiring of non-sworn employees to render them supervisory employees under the statute.

### Authority to Transfer Employees

Lieutenants and captains in non-RU manager positions have no authority to transfer employees.<sup>13</sup> At most, they act as a conduit for transfer requests by passing those requests up the chain of command. In some instances, these commanding officers may be asked their opinion on whether a transfer would be a good idea, but ultimately, all transfer requests must be approved by an assistant chief or the chief of police. Thus, non-RU managers have no authority to transfer employees. There is also no specific evidence that any “transfer” recommendations by these employees are regularly followed by decision makers. Accordingly we do not conclude that they effectively recommend the transfer of employees.

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<sup>13</sup>In its brief, the City contends that non-RU managers have the authority to “transfer” an employee by assigning that employee to a specialty unit within that employee’s existing RU. We address that purported authority under the appropriate statutory criterion of “assign.”

<sup>13</sup>In its brief, the City contends that non-RU managers have the authority to “transfer” an employee by assigning that employee to a specialty unit within that employee’s existing RU. We address that purported authority under the appropriate statutory criterion of “assign.”

### Authority to Promote Employees<sup>14</sup>

The chief of police retains the authority to promote sworn employees based on the complex testing, assessment center, and interview process employed by the City. Captains and lieutenants in non-RU manager positions have very limited involvement in this process. They may on occasion serve on interview panels or as subject matter experts when promotional exams are created. When serving on promotional interview panels, these commanding officers' votes do not carry any more weight than other panelists. And although captains and lieutenants may occasionally be asked for their opinion on whether or not an employee should be promoted, there is no evidence that these recommendations are followed with any regularity. As a result, based on the record before us, RU managers do not have the authority to promote or to effectively recommend the promotion of employees.

### Authority to Reward Employees

With respect to the authority to reward employees, the City did not identify any specific supervisory authority held by captains who do not serve as RU managers. Instead, the City referred back to its argument concerning the authority of commanders to reward employees, without acknowledging that some captains do not serve as RU managers. In its brief, the City acknowledged that there was no direct testimony on the authority of captains and commanders to reward employees, but nevertheless contended that they may reward employees because they "conduct formal annual performance evaluations" of non-sworn employees. According to the City, that evaluation is a "reward" because the evaluation may determine whether the non-sworn employee receives a step increase in pay, so long as the employee is not at the top step.

We disagree with the City that the authority to "evaluate" an employee is synonymous with the authority to "reward" an employee. As a mere matter of word usage, "evaluate" does not mean "reward," and the legislature did not include the authority to "evaluate" an employee as a statutory criterion for a supervisory employee. We decline to insert an additional statutory criterion, as the City's contention would effectively have us do.

However, the City separately asserted that lieutenants had the authority to "reward" high-performing employees by granting them the first opportunity to attend a "training session" or by issuing them a "coffee card." Its assertion relies on testimony by Lt. Steinbronn, a non-RU manager, that she considers it a "privilege" to send an employee who is doing "a great job" to a training session over an employee who does not "call[] in sick all the time," and that she "guess[es]" that she has that "power." Even assuming that giving a training-session preference constitutes a "reward" within the meaning of ORS 243.650(23), Lt. Steinbronn's "guess" that she has that power is insufficient to establish that she has such authority, or that she may effectively recommend as much. Additionally, the record does not establish that other non-RU managers have this authority (or the authority to effectively recommend).

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<sup>14</sup>During the hearing, there was little to no evidence provided concerning the promotion of non-sworn employees. As a result, we will focus solely on the promotion of sworn employees under this particular factor.

With respect to the authority to “reward” employees by way of giving a coffee card, Lt. Steinbronn testified that she had given out such cards, but always paid for them out of her own pocket. This does not constitute supervisory authority in the interest of the employer, but merely establishes one employee expressing personal gratitude toward another. Although there was testimony that other non-RU managers could also give a coworker a coffee card, such gift-giving is not limited to Association-represented employees; rather, lower-ranking employees, other non-sworn employees, and any City employee with a “procurement” card can all give out coffee cards, subject to BHR Citywide policies. No evidence was presented concerning the frequency or typical basis for issuance of these coffee cards. On this record, we do not conclude that giving a coffee card establishes supervisory authority, in the interest of the employer, to “reward” subordinate employees, or that the exercise of that authority requires the use of independent judgment.

Finally, the City argues that non-RU managers have authority to assign employees to specialty units as a form of reward. Although the City acknowledges that this is an assignment, it states that it also has an element of “reward.” We disagree with the proposition that we should conflate the distinct statutory criteria by finding that certain authority has “elements” of other criteria. Instead, we address below this purported authority to “assign” under the proper statutory criterion. For these reasons, we conclude that non-RU managers do not have the authority to reward or effectively recommend the rewarding of employees.

#### Authority to Adjust Grievances

The collective bargaining agreement with the PPA states that the first step of the grievance procedure for sworn employees below the rank of lieutenant is with that employee’s immediate supervisor outside of the PPA bargaining unit. As a result, per the terms of the PPA contract, Association-represented commanding officers can and on rare occasions have *received* grievances filed by PPA-represented employees. However, there is insufficient evidence in the record that any employee in the Association bargaining unit has ever *adjusted* a grievance. Rather, the evidence in the record demonstrates that the practice at the City is for grievances to be handled by the chief’s office and the BHR. To be a supervisory employee, the employee must have some actual authority to affirmatively adjust a grievance, or to effectively recommend the adjustment of a grievance. *The Dalles Police Association v. City of the Dalles*, Case No. UC-7-08, 22 PECBR 995, 1007 (2009). We have no evidence of this type of authority in the present matter. As a result, we conclude that commanding officers do not have the authority to adjust grievances or effectively recommend the adjustment of grievances.

#### Authority to Layoff and Recall Employees

The parties stipulated that no Association-represented employees have the authority to layoff or recall employees, or to effectively recommend these actions.

#### Authority to Assign Employees

The City asserts generally that captains and lieutenants who do not serve as RU managers have nearly unfettered discretion to assign work to lower-ranking employees. However, other

than these conclusory statements, there was insufficient specific evidence confirming these assertions to support a finding that these employees have the requisite authority to assign or effectively recommend the assignment of employees, as defined above. To the contrary, the evidence establishes that the captains and lieutenants not serving as RU managers spend a significant amount of time attending meetings, filling out paperwork, and coordinating between various departments within the PPB. Much of this work is administrative in nature. Lieutenants also spend a significant amount of time patrolling in certain assignments, and responding to significant tactical events alongside of bargaining unit members.

The City asserted specifically that lieutenants could assign employees to specialty units such as the Neighborhood Response Teams. They cite to the testimony of Lt. Steinbronn, who stated that she had “a lot of say” in who gets assigned to those specialty units that she oversaw. However, she also testified that she would have a conversation with a captain and commander where she would explain to them the reason for her recommendation before any decision was made. She did not testify, nor did any RU manager testify, that she had the actual authority to make the final decision to assign an employee to a specialty unit. Further, there was not any testimony or other evidence about how often those recommendations were or were not followed. The record also does not establish that other non-RU managers (beyond Lt. Steinbronn) had this authority. Thus, we do not conclude from this limited evidence that lieutenants have the authority to assign or to effectively recommend assigning employees to specialty units.

Chief Reese testified that the authority of commanding officers to *assign* overtime was done according to the parties’ collective bargaining agreement. Chief Reese likewise confirmed that the use of overtime for purposes of attending court was not discretionary and did not involve independent judgment. Accordingly, we conclude that any authority to assign overtime does not require the use of independent judgment. Additionally, the authority to assign overtime is even further limited by City policies, and largely driven by minimum staffing requirements and other factors that the lieutenants and captains do not control. This further supports our conclusion that any assignment of overtime by non-RU managers does not require the use of independent judgment. For these reasons, we conclude that captains and lieutenants who are not RU managers lack the necessary authority to assign or effectively recommend the assignment of employees.

#### Authority “Responsibly to Direct” Employees

Finally, we examine whether non-RU managers have the authority to responsibly direct employees. It is undisputed that captains and lieutenants not serving as RU managers have employees working under them. However, the evidence on the authority of these employees to direct employees (as defined above) was conclusory in nature and lacked specific details or examples of the exercise of this authority. As a result, the actual extent of non-RU managers’ authority to direct employees is unclear, as is whether any such authority requires the use of independent judgment, so as to render non-RU managers supervisory employees. Additionally, the non-RU managers do not have the same level of accountability to their supervisors should the employees that they purportedly direct fail to perform as expected. Above, we concluded that although it was a close call, RU managers have the authority “responsibly to direct” employees because RU managers acknowledged that they were ultimately accountable to the chief or assistant chiefs for the success or failure of their RU. We have no such acknowledgment in the

case of non-RU managers, or other evidence establishing that adverse consequences would befall non-RU managers in the event that any direction was not followed by subordinate employees. As a result, we conclude that non-RU managers do not have the authority “responsibly to direct” the work of employees sufficient to render them supervisory employees under ORS 243.650(23).

### CONCLUSION

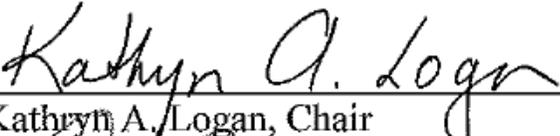
Association-represented employees who serve as RU managers have authority in the interest of the employer to hire, assign, and responsibly to direct employees, and the exercise of that authority requires the use of independent judgment. Consequently, we conclude that they are supervisory employees under the PECBA and cannot be appropriately included in the Association bargaining unit. However, lieutenants and captains who do not serve as RU managers lack the necessary authority to take or effectively recommend actions in any of the areas enumerated by the statute.<sup>15</sup> Accordingly, Association-represented employees who do not serve as RU managers are not supervisory employees within the meaning of the PECBA and are appropriately included in the Association bargaining unit.<sup>16</sup>

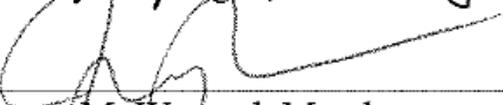
### ORDER

1. The bargaining unit represented by the Association is clarified to exclude all captains and commanders serving as RU managers.

2. The portion of the petition pertaining to lieutenants and captains not serving as RU managers is dismissed.

DATED this 28 day of April, 2014.

  
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Kathryn A. Logan, Chair

  
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Jason M. Weyand, Member

  
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Adam E. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>15</sup>As set forth above, to have the necessary statutory authority in any of the 12 enumerated areas, the authority must be held in the interest of the employer, and the exercise of that authority must require the use of independent judgment.

<sup>16</sup>The Association noted in its brief that some members of the Association bargaining unit more closely resemble the definition of “managerial employee” under ORS 243.650(16) than they do supervisory employees. Under the PECBA, however, a managerial employee is *an employee of the State of Oregon*, not the City.