

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
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:  
PERA-U-20-185-E  
:  
(PERA-R-3327-C)<sup>1</sup>  
:  
LACKAWANNA COUNTY :

**PROPOSED ORDER OF DISMISSAL**

On August 3, 2020, Lackawanna County (County or Employer) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board), as amended on September 17, 2020, seeking to exclude sergeants from a unit of prison guards, represented by the American Federation of State, County, and Municipal Employees, District Council 87 (AFSCME or Union), as supervisory employes, pursuant to Section 301(6) of the Public Employee Relations Act (PERA or Act).

On January 12, 2021, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on June 21, 2021, if necessary. The hearing was subsequently continued to September 22, 2021 at the County's request and without objection by AFSCME.

Hearings ensued, as scheduled on September 22, 2021, and on March 14, 2022, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.<sup>2</sup> AFSCME filed a post-hearing brief in support of its position on May 20, 2022. The County filed a post-hearing brief in support of its position on May 23, 2022.

The Hearing Examiner, on the basis of the testimony presented at the hearing, and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. I 5)<sup>3</sup>
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. I 5-6)
3. AFSCME is the exclusive bargaining representative for a unit certified as follows:

...all full-time and regular part-time guards (including sergeants), matrons, maintenance men, cooks, clerks, recreation

<sup>1</sup> The caption appears, as amended, by the hearing examiner.

<sup>2</sup> The second hearing date was originally scheduled for December 20, 2021, but was continued to March 14, 2022 at AFSCME's request and without objection by the County. In addition, the hearings were held virtually due to the ongoing Covid-19 pandemic.

<sup>3</sup> The transcript for the September 22, 2021 hearing has been designated as N.T. I, while the March 14, 2022 transcript has been designated as N.T. II.

director and excluding the warden, deputy warden, lieutenants and any other management level employes, supervisors, first level supervisors and confidential employes as defined in the Act.

(Joint Exhibit 2)

4. AFSCME and the County are parties to a collective bargaining agreement (CBA) effective January 1, 2018 to December 31, 2022. (Joint Exhibit 1)

5. In 1973, the parties litigated the issue of whether the sergeants at the County Jail were supervisors under the Act. The Board issued an Order and Notice of Election, finding that the sergeants were not supervisory employes within the meaning of the Act. Lackawanna County (County Jail), 3 PPER 266 (Order and Notice of Election, 1973). Instead, the Board concluded that the sergeants must be included in the bargaining unit, as they had no authority to effectively hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes in any non-routine manner requiring the use of independent judgment. *Id.* at 3 PPER 266. Likewise, the Board also found that the sergeants had no independent power to reward or sanction guards, but merely reported any disobedience to the warden. *Id.* In addition, the Board noted that if a guard had a grievance, the guard would take it to the warden, deputy warden, or a lieutenant, and not to the sergeants. *Id.* As a result, the Board opined that the sergeant position acted in the capacity of a "leadman" or "strawboss" since the authority to exercise the powers enumerated in Section 301(6) of the Act resided with the warden, deputy warden, and lieutenants. *Id.* at 3 PPER 267.

6. William Shanley has been the Deputy Warden of Security at the County Jail for approximately 19 months. He described his duties in this position as supervising 95 percent of the staff, making sure there is enough staff per shift to cover all work for the day, reviewing incident reports and "misconducts" of staff or inmates, performing investigatory procedures, and reviewing leave requests. He also previously served as Captain for approximately five years and Training Sergeant for 15 or 16 years. Shanley began working at the County Jail as a part-time corrections officer in 1992 before becoming full-time in 1994, and then becoming a sergeant in or about 1999. (N.T. I 11-12)

7. Shanley testified that in 1992, the County Jail had approximately 90 to 100 employes and about 115 or 120 inmates. He testified that the inmate population tripled to around 300 from 1992 to 1996. The County started building a new Jail in 1997 or 1998, which was able to hold 450 inmates once it was partially finished. Shanley claimed that once the new Jail was completely finished in 1999, it was able to hold 900 to 1,000 inmates. He also stated that the staff grew from about 100 to between 250 and 300 employes now. (N.T. I 14-16)

8. Shanley testified that once the County transitioned to the new Jail in 1999 or 2000, Warden Paul Jennings changed all the job descriptions, post orders, policies, and procedures. Shanley was a Training Sergeant at the time. He claimed that the sergeant position "became pretty much the lieutenant," and that any questions or correspondence between staff went directly from a corrections officer "to the first-line supervisor sergeant." (N.T. I 16-17)

9. Shanley testified that when he was a corrections officer at the old Jail, the sergeants would work with them. He described how the sergeants would relieve corrections officers when they went to lunch. He also indicated that sergeants would go on medical runs. Shanley claimed that once the County went to the new Jail, the sergeants became the corrections officers' bosses. He stated that Warden Jennings immediately "separated the sergeants from the [corrections] officers in complete responsibility of first-line supervisor," which happened by post order, job description, and daily operations of the prison. (N.T. I 17-18)

10. Shanley testified that Janine Donatee became the Warden in 2004 or 2005 and created an organizational chart, which included the Warden, Deputy Warden for Security, then captains, lieutenants, sergeants, and corrections officers, in descending order. He testified that sergeants were responsible for corrections officers under the chart. (N.T. I 19-20)

11. Shanley testified that out of the current 250 County Jail employees, approximately 180 of them are corrections officers. (N.T. I 21-22)

12. Shanley testified that in 2006 or 2007, Vincent Mooney became the Interim Warden. Shanley described how Mooney required the sergeants to start carrying a diary, which was used for any reports, corrective behavior with staff, infractions, and a log of their daily tasks. Shanley explained that the diaries were then provided to the shift commander who would be in an office. Shanley stated that this was a big change, as the lieutenant would walk around supervising sergeants and corrections officers at the old facility, but now worked in an office with the phones, computers, and cameras. (N.T. I 22-23)

13. Shanley testified that, in the current structure of the County's Jail, the sergeants do not work side by side with the corrections officers. He claimed that the sergeants supervise the corrections officers. He acknowledged that the sergeants do enter every unit in the Jail. (N.T. I 23-24)

14. Shanley summarized the job duties of sergeants as being responsible for areas of the Jail. He testified that the sergeants make sure that all procedures are correctly performed by the corrections officers. He indicated that the sergeants sign the logbook, check locks just like any other employee, relock doors after leaving an area, and ensure that cameras and other equipment are functioning properly. He testified that sergeants also sometimes deal with simple complaints from the corrections officers, such as doors not closing correctly or maintenance needs. (N.T. I 25-26)

15. Shanley testified that sergeants do not need any type of approval from a higher-ranking officer before making corrections to how the corrections officers are performing their duties. He testified that the sergeants know the guidelines, rules, and regulations of the Jail well enough to simply make verbal corrections to the corrections officers and refer them to the appropriate post order or general order, which describes how to properly perform a task. (N.T. I 27-28)

16. Shanley testified the sergeants ensure that corrections officers comply with all laws, policies, procedures, post orders, and directives on a daily basis. (N.T. I 32-33)

17. Shanley testified that sergeants consult with assigned staff to review work requirements and provide direction, advice, and technical expertise. As an example, Shanley indicated that the sergeants receive reports from corrections officers on a daily basis regarding gang affiliations within the inmate populations and take those reports to the shift commander to see if there are better protocols or methods of operation. (N.T. I 33-34)

18. Shanley testified that, while the County Jail's training is overseen by a lieutenant, the sergeants are responsible for performing 90 percent of the training for corrections officers. He described how the sergeants provide training in CPR, first aid, defensive tactics, and report writing. He explained that the sergeants also conduct training for corrections trainees. He testified that the sergeant instructors have noticed shortcomings by the trainees over the years and reported them to the administration of the Jail or recommended those trainees not be retained as employees. He claimed that those recommendations have been followed 99 percent of the time. On cross-examination, he testified that, during the last four years, the County has decided not to retain four trainees. On redirect examination, he explained that after a sergeant reports a problem with a trainee, management will hold a meeting with the trainee and perform an investigation to determine if the alleged incident or misconduct by the trainee actually occurred. (N.T. I 34-35, 87-89, 165-166, 170-171)

19. Shanley testified that sergeants make recommendations to change procedures and programs. As an example, Shanley described how sergeants have the authority to recommend moving an inmate population from one unit to another so that maintenance can come in and fix cells that are not locking properly. He explained how the corrections officers would be the first employees to encounter the problem and report it to their zone sergeant. (N.T. I 35-36)

20. Shanley testified that sergeants receive complaints from inmates after the complaint is initially made to the corrections officers. He indicated that sergeants investigate the complaint and resolve the matter 90 percent of the time right then and there with the sergeant and corrections officer. He claimed that sergeants do not need any authorization from the shift commander to resolve a complaint. (N.T. I 36-38)

21. Shanley testified that sergeants conduct periodic inspections of the Jail while the corrections officers are making their rounds. He described how the sergeants check to ensure that all locking mechanisms are working properly and complaints are addressed. (N.T. I 38-39)

22. Shanley testified that the main function of the sergeant position is to oversee the supervision of a housing unit. He described how the sergeants tour their assigned area on a daily basis for eight hours to ensure that everything is functioning properly. (N.T. I 39-40)

23. Shanley testified that sergeants conduct searches for weapons, drug activity, and other contraband. He described how the sergeants choose the corrections officers in their zone to assist with the search and work with the shift commander to explain the procedures and equipment they might use. (N.T. I 43-44)

24. Shanley testified that sergeants coordinate inmate transports in conjunction with a lieutenant. As an example, he indicated that there have

been many emergency medical transports in recent years where the sergeant is responsible for getting two corrections officers to the armory area to be outfitted with the proper equipment to conduct the transport. He explained that the sergeants also complete paperwork in connection with this task and sign out the necessary items for use. (N.T. I 44)

25. Shanley testified that another main function of the sergeants is to review logs, records, reports, and documentation prepared by the corrections officers in their specific zone or area. For example, the sergeants are responsible for tracking everything that occurs in the Jail through a logbook, including broken items, fixed items, removal of an inmate from the unit, the inmate count, medical emergencies, meal times, trays, and medication times. He described how sergeants are also responsible for keeping track of necessary equipment, such as tasers, handcuffs and shackles. (N.T. I 45-47)

26. Shanley testified that sergeants are responsible for reviewing paperwork completed by corrections officers in their specific zone or area for misconduct incidents to make sure paperwork is completed properly before it is passed on to the lieutenant. He indicated that sergeants decide if anything needs to be changed before it is submitted into the computer system or provided to the lieutenant. (N.T. I 47-48)

27. Shanley testified that the sergeants do not work side by side with the corrections officers. Instead, he asserted that the sergeants oversee the corrections officers by working side by side and making sure that the procedures and job functions are done correctly. (N.T. I 49)

28. Shanley testified that the sergeants have not performed any of the job duties of corrections officers in many years. He explained that the only time it would be appropriate for a sergeant to perform the job duties of a corrections officer would be in the case of an emergency situation where staff is running low. (N.T. I 49-50)

29. Shanley testified regarding an alleged incident in 2013 in which the County sent a sergeant and a corrections officer on an inmate transport instead of two corrections officers. AFSCME filed a grievance, protesting the use of a sergeant and alleging a violation of the CBA. Shanley testified that he was president of the Union at the time. He explained that the Union's position was that, while there may be times to send a sergeant or "supervisor" on a transport, the County was required to send two corrections officers as well. Shanley indicated that the parties resolved the grievance at step 3 of the procedure in favor of the Union's position. (N.T. I 50-55, 100; County Exhibit 5)

30. Shanley testified that sergeants, lieutenants, and captains are referred to throughout the Jail as "white shirts," which corresponds with the alleged supervisory level color of their uniform tops. He indicated that the corrections officers wear the same black cargo pants as the "white shirts," but with gray shirts. (N.T. I 56-57)

31. Shanley testified that sergeants also differ from corrections officers based on the equipment they carry. For example, sergeants carry a radio with four channels, as opposed to the two-channel radios the corrections officers use. Shanley explained that the sergeants have an additional channel, which is just for communication among sergeants and potentially with lieutenants, along with a channel to reach maintenance,

while the corrections officers use a channel that is heard by everyone. The second channel for the corrections officers is simply there in case the first channel fails. (N.T. I 57-58)<sup>4</sup>

32. Shanley testified that sergeants also have access to a pepper ball launcher in the shift commander's office, along with tasers and camera equipment. He indicated that some sergeants carry tasers on their person. He further testified that the sergeants carry different keys than the corrections officers as well. Corrections officers need approval from a sergeant or higher-ranking officer to get access to the tasers. (N.T. I 59-60)

33. Shanley testified that sergeants are responsible for responding to Code Blue calls, which he described as emergencies. Shanley explained that it could be a medical emergency, a fight, or a call for assistance from the corrections officers. According to Shanley, the sergeant's role is to take over the incident and communicate directly with the workforce and/or the inmate. He stated that Code Blues happen every day at the Jail. (N.T. I 63-64)

34. Shanley testified that sergeants are responsible for directing the corrections officers during the use of a restraint chair. He explained that the restraint chair is a piece of equipment utilized to prevent an inmate from hurting themselves or others. The chair functions by strapping the inmate across the chest, over the arms and legs, and across the head and shoulder areas. Shanley indicated that the sergeants choose which corrections officers are responsible for which limb or area of the person being restrained, inspect the locking mechanisms, and contact the medical nurse to ensure that the chair is being used safely. (N.T. 64-65)

35. Shanley testified that use of the restraint chair is a common occurrence at the Jail. He testified that the sergeants are also responsible for completing the appropriate paperwork for usage of the restraint chair. (N.T. I 65)

36. Shanley testified that sergeants are responsible for cell extractions, which are planned uses of force in situations where an inmate is blocking a camera, refusing to obey an order or fighting with the cellmate. Shanley described how sergeants gather a cell extraction team of corrections officers, brief them on their responsibilities, and verify if there are any injuries afterwards. He indicated that the sergeants are also responsible for completing paperwork after the extraction. He claimed that cell extractions are common at the Jail. (N.T. I 66-67)

37. Shanley testified that sergeants have access to everything in the County's offender management system except for medical information. He explained that the offender management system is a database that holds all information regarding the inmates, including their names, addresses, charges, and where they are housed. He indicated that corrections officers also have access to the system and input drafts, which the sergeants review and make changes to, if necessary, before notifying the lieutenant that it can be uploaded into the system as a permanent document. (N.T. I 67-68)

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<sup>4</sup> The record shows that lieutenants are also known as shift commanders. (N.T. I 58).

38. Shanley testified that corrections officers submit leave requests to the Administrative Sergeant and the shift commander for that shift. He explained how the County has three shifts at the Jail, day shift, night shift, and midnight or overnight shift, which have a maximum allotment of five, four, and three vacation days, respectively. He indicated that the Administrative Sergeant keeps track of how many leave requests have been submitted for each shift, so that the County will know when it reaches the maximum allotment. He stated that final approval of the leave request is always reviewed by the shift commander or lieutenant. On cross-examination, he acknowledged that sergeants do not have the authority to mandate a corrections officer to stay on after his or her shift and work the next shift. He testified that any mandating of that sort must be done by the shift commander or above. He further testified that, although the lieutenant or a higher-ranking officer might make exceptions to the maximum allotment for leave requests, the Administrative Sergeant does not have that authority. (N.T. I 69-73, 114, 152)

39. Shanley testified that the lieutenants perform annual employe evaluations for the corrections officers on their respective shifts. He claimed that the lieutenants solicit input from the sergeants in connection with the evaluations. He testified that, when he was the Training Sergeant, the lieutenants accepted his evaluations of the corrections officers 100 percent of the time. He testified that sergeants also make recommendations to the lieutenants for the prison assignments of the corrections officers. On cross-examination, he acknowledged that sergeants do not fill out the employe evaluation forms or respond to grievances. (N.T. I 73-75, 93-94, 124-125, 129-130)

40. Shanley testified that the County uses employe evaluations as one of the main factors in selecting corrections officers for promotion to the sergeant position. He described how the County also weighs the individual's resume heavily in the promotions process. (N.T. I 75-76)

41. Shanley testified that sergeants play a role in the County's disciplinary process. He testified that their primary disciplinary role is to make a verbal warning or correction. He indicated that, in most of those cases, the sergeant makes a decision to not take it any further. He explained that the only time the sergeants take any further action is when they have to write an incident report. At that point, he acknowledged that the sergeants are just giving facts about what happened to the lieutenant or shift commander. On cross-examination, he testified that, while sergeants provide verbal corrections to the officers, the sergeants are not the individuals who issue verbal warnings, which is referenced as step 1 of 5 in the CBA disciplinary process. He also testified that, during his many years as a sergeant, he issued discipline to a corrections officer on only two occasions in 2001 or 2002. He explained that he requested a one-day suspension in both instances, but the officers only received a written reprimand. (N.T. I 77-80, 158-159, 178-180; Joint Exhibit 1)

42. Shanley testified that in serious cases of insubordination where a corrections officer refuses to make the sergeant's corrections, the sergeant is required to report it to the shift commander, who then reports it to the deputy warden, and then a due process hearing ensues before the warden. (N.T. I 80-81)

43. Shanley testified that sergeants are paid more than corrections officers pursuant to the collective bargaining agreement. He indicated that

the difference in salary is due to the increase in responsibilities for the sergeant position. (N.T. I 82-83; Joint Exhibit 1)

44. On cross-examination, Shanley testified that there are times when the Administrative Sergeant and the Training Sergeant, which are the only two bid positions for the sergeant rank, perform more administrative and training duties than their regular sergeant duties of overseeing and touring a zone. He testified that the sergeants may consult with or provide information to the lieutenant or shift commander regarding the daily assignments of corrections officers, which the lieutenant then uses to assign the staff. He stated that the lieutenant actually makes the assignments with the recommendation and assistance of the sergeant who works underneath that shift commander. He acknowledged that the shift commander has the discretion to accept the sergeant's recommendations or reject them. (N.T. I 114-115, 142-144)

45. On cross-examination, Shanley testified that sergeants have the authority, along with the lieutenants, captains, and other higher-ranking officers, to lock down the Jail after receiving reports of an incident, such as an inmate having a weapon. He testified that lockdowns are not a daily occurrence. (N.T. I 146-147)

46. On cross-examination, Shanley testified that there are currently 13 sergeants at the County Jail. He claimed that approximately half of them were promoted to the sergeant rank within the last five years. He testified that seniority is a factor for promotions under the CBA, along with an officer's resume, work performance, evaluations, and any potential discipline. He indicated that the warden directs a captain to interview applicants and provide him with the top three candidates based on those interviews. He also described how he might, as deputy warden, seek input from others during the process, including the sergeants. The warden then reviews the recommendations and provides his selection to human resources. (N.T. I 154-158, 174)

47. Timothy Betti has been the Warden at the County Jail for five years. In this position, he is responsible for overseeing the entire facility, including security operations and budgetary matters. He directly supervises Deputy Warden Shanley. Prior to being Warden, Betti worked as the Assistant Warden of Treatment from 2004 to 2012. He also served as Director of Clinical Services from 1998 to 2004 and Director of Records and Systems from 1995 to 1998. He was the Population Control Officer from 1992 to 1995. (N.T. I 181-183)

48. By email dated September 24, 2018, Betti requested from the Training Lieutenant and Training Sergeant, Bob Brown and David Pigga, respectively, assessments of the 10 part-time cadets currently in a training class, as the County had five full-time vacancies. Betti wanted to move people to full-time as quickly as possible. (N.T. I 183-185; County Exhibit 6)

49. Betti testified that Brown and Pigga both provided him with a list ranking the top cadets, which was used to move individuals into full-time positions. He testified that he always looks for feedback from the individuals who are training the cadets or probationary employees to see how they are doing. He indicated that he has sought the opinions of the sergeants providing the training to cadets in deciding whether or not the County should retain certain individuals. He stated that the sergeants'



opinions impact the County's decision on whether to retain someone. (N.T. 187-189, 198, 205, 210)

50. Betti testified that the sergeants coordinate removal of inmates from the restraint chair. He testified that the sergeants assemble the team of corrections officers for the removal, while the lieutenant approves the removal. He explained that the sergeant is not physically engaged with the inmate during the removal process. He described how the sergeant instead supervises the corrections officers, who actually perform the removal. He indicated that the lieutenant is usually not present for the removal. (N.T. I 190-194; County Exhibit 7)

51. On cross-examination, Betti testified that after he received the feedback from the Training Lieutenant and Training Sergeant in September 2018 regarding the part-time cadets, the information was forwarded to the County's Deputy Director of Human Resources, Justin MacGregor. At that point, MacGregor conducted behavioral based interviews with those candidates, along with Betti and the Deputy Warden, which resulted in one candidate being not retained. (N.T. I 217-219)

52. On cross-examination, Betti estimated that the County goes through the process of deciding whether or not to retain cadets once or twice per year on average. He also estimated that it usually involves between about 5 and 15 people in each class. He testified that he does not always ask the Training Sergeant to provide him with recommendations or assessments of those candidates. He acknowledged that the September 2018 example was a special situation because the County had more staff members hired than full-time spots. He explained that the number of vacancies usually matches the number of people hired, so the County assumes that if everyone makes it through the class they will end up as probationary employees. (N.T. I 220-221)

53. In opposition to the County's Petition for Unit Clarification, the Union introduced the testimony of Alex Schimelfenig, who has worked for the County for 11 years. He was initially hired as a corrections officer and was promoted to the sergeant rank in 2018. His shift is 11:00 p.m. to 7:00 a.m., and he has been working the overnight shift since he was promoted in 2018. He reports to his shift commander or the lieutenant on his shift. (N.T. II 6-7)

54. Schimelfenig testified that, as a sergeant, he still has to perform the duties of a corrections officer when necessary, such as during staffing shortages or when corrections officers have questions about how to do their jobs. He described how sergeants sometimes have to assist with escorting inmates and conduct searches of cells or people, which are also duties of the corrections officers. He explained that sergeants are also responsible for filling a spot when there are no corrections officers available, such as a temporary relief situation. He estimated that sergeants spend about 25 to 40 percent of their time filling in for or performing corrections officer duties. On cross-examination, he acknowledged that there is probably a difference between the occurrence of staffing shortages on his overnight shift, as opposed to the other shifts, because the overnight shift has limited staff working. (N.T. II 9-12, 38)

55. Schimelfenig testified that he spends most of his time, as a sergeant, touring his zone and seeing if the corrections officers need assistance in any of their assigned stations. He testified that he also spends about 15 to 20 percent of his time conducting training in use of force

incidents, such as less-than-lethal defensive tactics and chemical agents. He described how the training can be for cadets in their initial phase of employment or for any other staff on an annual basis. He explained that sergeants, lieutenants, and corrections officers all conduct training based on the specific knowledge or proficiency of the individuals. (N.T. II 12-14)

56. Schimelfenig testified that he does not have any responsibility for evaluating cadets and their performance when he is conducting their training. He testified that the Training Lieutenant and the Training Sergeant share that responsibility. He explained that the bid position of Training Sergeant simply entails supplemental training duties, in addition to that Sergeant's regular duties. He indicated that corrections officers also train cadets and fill out evaluation forms when cadets shadow them as part of their initial training. (N.T. II 14-15)

57. Schimelfenig testified that he has written one incident report regarding a cadet's performance during training in 2021. He testified that the cadet was not retained as an employe by the County. He explained that he did not participate in or attend any meetings regarding whether the cadet was going to be retained or whether there were any problems with his training. (N.T. II 17-18)

58. Schimelfenig testified that he recalled a few cadets not being retained by the County over the past ten years. He testified that the sergeants are not involved with or even informed of the decision. He did not make any recommendation about whether to retain the cadet from the 2021 incident report. (N.T. II 18-19)

59. Schimelfenig testified that he has never disciplined or made a recommendation for discipline of any corrections officers at the Jail. Nor has he ever made a recommendation for promotion or demotion. (N.T. II 19-20)

60. Schimelfenig testified that, pursuant to the CBA, the sergeants participate in evaluations of the corrections officers with the lieutenant. He explained that the lieutenant asks for opinions and recommendations from the sergeants, and the lieutenant signs the forms. He stated that the sergeants do not sign the forms and only sometimes meet with the lieutenant and the corrections officers to review the forms, depending on availability. He testified that the evaluations are supposed to be conducted annually, but they have only been performed in the last couple years. He estimated that he spends a very insignificant amount of time participating in the evaluations, maybe five percent of his time. On cross-examination, he testified that the sergeants are not provided with a copy of the corrections officers' evaluations. (N.T. II 20-21, 48)

61. Schimelfenig testified that the shift commander or lieutenant decides what the corrections officer assignments will be for each shift. He testified that he has made recommendations regarding the assignments to the lieutenant if the lieutenant asks for it, but stated that the lieutenant does not ask for recommendations very often. He explained that sometimes the shift assignments remain in place for weeks or months at a time or get changed without the solicitation of his opinions. (N.T. II 22-24)

62. Schimelfenig testified that, as a sergeant, he does not have authority to approve leave requests for corrections officers or mandate that the corrections officers stay on for the next shift. He testified that he has corrected or made suggestions to the corrections officers during his

shift. He explained that if his suggestions are not followed, he reports it to the shift commander. He indicated that he does not have authority to issue discipline if his suggestions are not followed. He does not make any recommendation to the shift commander regarding what should be done about the infractions. He described how he does not correct or make suggestions to the corrections officers very often. He testified that it is not a daily occurrence. He estimated that it may be monthly or every few months that he makes suggestions. (N.T. II 25-27, 58)

63. Schimelfenig testified that his paperwork amounts to, at most, five percent of his job duties. He testified that the paperwork consists of incident reports, as well as equipment verification or inventory, such as firearms and kitchen supplies. He described how the shift commander, and not the sergeants, has to approve call offs by the corrections officers. He indicated that he is not involved in the hiring process for cadets in any way. (N.T. II 27-28)

64. Schimelfenig testified that during Code Blue calls, restraint processes, or any type of incident, the sergeants still need to seek approval of the shift commander after resolution, even when they make decisions instantly during the event. He explained that when there is any type of delay, the shift commander gives the order to put someone in the restraint chair. He described how he physically plays a role in that process about 25 percent of the time since he works on the overnight shift. He estimated that the need to put someone in the restraint chair happens at least a few times every month. (N.T. II 29-31)

65. Schimelfenig testified that every officer involved in a use-of-force incident is obligated to fill out an incident report per County policy. He described how he will sometimes proofread the incident reports of the corrections officers before they are submitted to the lieutenant. He explained that he does so when the corrections officers request it. He estimated that happens about 50 percent of the time. He testified that he has suggested the corrections officers make changes to grammatical errors or to make the reports look more professional. (N.T. II 33-34)

66. The Union also introduced the testimony of Walter Mills in opposition to the County's Petition for Unit Clarification. Mills testified that he began working for the County in 2014 when he was hired as a cadet. He then became a corrections officer before being promoted to sergeant in 2019. He initially worked the 7:00 a.m. to 3:00 p.m. shift as a sergeant, but subsequently began working the 3:00 p.m. to 11:00 p.m. shift. He returned to the 7:00 a.m. to 3:00 p.m. shift in January 2022 where he currently remains. (N.T. II 69-71)

67. Mills testified that, as a sergeant, he is responsible for touring the units he is assigned with the corrections officers. He also described performing strip searches, transporting inmates, and conducting body scans. He explained that he is responsible for performing the duties of the corrections officers, along with additional assignments, such as paperwork in connection with cell extractions. He testified that his job changed when he was promoted from corrections officer to sergeant because he was given additional responsibilities. He indicated that he actually deals with the inmates more as a sergeant because of how often they demand to speak to a sergeant. (N.T. II 72-74)

68. Mills described several examples of the paperwork he is responsible for as a sergeant. He explained that he enters notes into the computer system to document the outcome of any situation. He testified that he does an incident report in connection with events like cell extractions and restraint chair placements, as well as paperwork documenting who was involved. He testified that the paperwork does not make up a large part of his daily assignments, as opposed to being out in his zone. (N.T. II 74-75)

69. Mills estimated that he spends approximately 45 to 50 percent of his time performing the same duties as corrections officers. He described how the day and night shifts are different than the overnight shift, as the Jail is very busy with court, recreation, visits, and escorting inmates during the day. He explained how there have been days where he spent the entire time using the body scanner because he was the only one who knew how to use the device. He testified that, on the night shift, the lieutenants are in complete control and that there is very little input from the sergeants. He indicated that, during the night shift, he assists the corrections officers in performing numerous cell searches. He also relieves the corrections officers throughout these shifts. (N.T. II 75-77)

70. Mills testified that the Administrative Sergeant does not have the authority to approve any leave requests. He explained that, generally, he must submit leave requests to the Administrative Sergeant, who then must submit it to the Lieutenant for approval. He described how vacation days must be initially submitted to the Administrative Sergeant. He indicated that everything else, such as personal or sick days, must be submitted directly to the Lieutenant. (N.T. II 78-79)

71. Mills testified that he has made corrections to the way the corrections officers perform their duties. He described how sometimes the lieutenants see a problem on camera and direct the sergeants to correct the officers. He testified that he has never been involved in recommending discipline. (N.T. II 82-83)

72. Mills testified that the shift commander or lieutenant decides what assignments the corrections officers work for each shift. He testified that he once made a recommendation to change a corrections officer's work assignment, but it was ignored. He indicated that he has only made such a recommendation on one or two occasions during his time as a sergeant. (N.T. II 83-84)

73. Mills testified that he is not responsible for taking call offs by the corrections officers. He explained that those calls must go to the lieutenant or shift commander. He testified that he does not approve any leave requests, nor is he involved in any way with hiring cadets. He stated that he is not involved with decisions to promote or demote any employees, nor has he ever made any such recommendations. (N.T. II 85-86)

74. Mills testified that he does not perform employee evaluations, nor has he ever been asked his opinion on any evaluations. (N.T. II 86-87)

75. Mills testified that he is responsible for placing someone in a restraint chair. He explained that, during the day shift, there are a lot of experienced corrections officers, so he usually just oversees that the process is done correctly. He described how, on the night shift, there are less experienced officers working, so he actually participates in the chair placement about 70 percent of the time. (N.T. II 88-89, 92-93)

76. Mills testified that, as a sergeant, he is responsible for touring at least one unit per day, which includes going through the unit and ensuring that the corrections officers are performing their rounds properly. He described how he also performs tours for the corrections officers when they are busy writing reports or going to lunch. He does these tours several times a day regardless of whether he is working the day or night shift. (N.T. II 94-95, 99-100)

77. On cross examination, Mills testified that he spends the majority of his time speaking to inmates. (N.T. II 102)

#### DISCUSSION

The County has petitioned to exclude the sergeant position from the bargaining unit as a supervisory employe pursuant to Section 301(6) of the Act. AFSCME opposes the petition on the grounds that the sergeant is not a supervisory employe and should therefore remain included in the bargaining unit. As the party seeking to exclude the sergeant position from the unit, the County has the burden of proving by substantial evidence that the asserted statutory exclusions apply. Westmoreland County v. PLRB, 991 A.2d 976 (Pa. Cmwlth. 2010) *alloc. denied* 17 A.3d 1256 (Pa. 2011). The Board reviews actual job duties and will only consider written job descriptions to corroborate testimony of actual duties. *Id.* at 980.

Section 301(6) of PERA provides as follows:

“Supervisor” means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

43 P.S. § 1101.301(6).

In Abington Heights School District, 42 PPER 18 (Final Order, 2011), the Board quoted Luzerne County Community College, 37 PPER 47 (Final Order, 2006) and opined as follows:

Employes must be excluded from the bargaining unit as supervisory if they have the authority to perform one or more of the functions listed in Section 301(6), actually exercise such authority and use independent judgment in exercising that authority. McKeesport Area School District, 14 PPER ¶ 14165 (Final Order, 1983). It must also be noted that Section 604(5) of PERA provides that the Board, in making supervisory determinations, “may take into consideration the extent to which supervisory and nonsupervisory functions are performed.” 43 P.S. § 1101.604(5). The Board, with appellate court approval, has looked to the extent to which supervisory duties are performed and concluded that employes who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are not supervisors within the meaning of PERA. West Perry School District v. PLRB, 752 A.2d 462 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 795 A.2d 984 (2000; State

System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999); Independent Association of Pennsylvania Liquor Control Board Employees v. PLRB, 409 A.2d 532 (Pa. Cmwlth. 1980). Conversely, where the employe performs predominantly supervisory duties, that employe is excluded from the rank and file unit as supervisory. AFSCME v. PLRB, 342 A.2d 155 (Pa. Cmwlth. 1975).

As a result, the Board in Abington Heights School District, *supra*, went on to hold that, absent evidence an employe spends a majority of his or her time performing supervisory duties, there is not sufficient evidence to show that the position in question should be excluded as supervisory under Section 301(6) of PERA.

As a preliminary matter, it is well settled that a lack of asserted change in job duties will bar subsequent unit clarification proceedings where the status of employes was previously litigated and there was a factual resolution of the dispute on the record. Northeastern Educational Intermediate Unit 19, 11 PPER ¶ 11232 (Nisi Order of Unit Clarification, 1980). As previously set forth above, the parties already litigated the issue of whether the sergeants at the County Jail were supervisors under the Act in 1973, and the Board concluded they were not. In an apparent effort to demonstrate a change in job duties since that time, the County points to several alleged factors in its post-hearing brief to overcome this obstacle. Specifically, the County relies on an increase in inmates and staff, along with the new facility, which the County built in or around 1999, as well as numerous changes in the administration of the Jail and the sergeant job description. However, the initial inquiry in cases of this nature is to determine whether the job duties, relied on by the Board in concluding that the sergeants, at the time, were not supervisors within the meaning of Section 301(6) of the Act, have changed into supervisory duties. In the Matter of the Employes of Monroe County, 51 PPER 10 (Proposed Order of Dismissal, 2019). The change in the staffing complement, inmate population, location, and command structure of the Jail is of no consequence; the focus is on the job duties. *Id.* And, the record here shows that the job duties of the sergeant position have not changed in any meaningful way since the original adjudication in 1973.

In the Board's 1973 Order and Notice of Election, the Board found that a sergeant is "in charge" of each of the three shifts at the Jail, the sergeants worked alongside the guards on each shift, the sergeants had to report any disobedience or difficulties with the guards to the warden, and the guards would take their grievances to the warden, assistant warden, or lieutenant, not the sergeants. Lackawanna County (County Jail), 3 PPER at 266. Likewise, the Board found that the sergeants had no authority to effectively hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes in any non-routine manner requiring the use of independent judgment. *Id.* The County has failed to demonstrate any change in the sergeants' duties since that time, which would rise to the level of supervisory status under the Act, and therefore, the Petition for Unit Clarification must be dismissed.

At the hearing, the County relied heavily on the testimony of its Deputy Warden, William Shanley. He claimed that, while the sergeants would work with the corrections officers at the old Jail, that is not the situation now. He maintained that the sergeants have not performed any of the job duties of the corrections officers for many years. This testimony was expressly contradicted by the Union's witnesses, Sergeants Alex Schimelfenig

and Walter Mills, who both asserted that the sergeants still must perform the duties of the corrections officers on a daily basis. In fact, the testimony of Schimelfenig and Mills reveals that performing the duties of the corrections officers is no small part of their jobs as sergeants. On this point, the testimony of Schimelfenig and Mills has been specifically credited over the testimony of Shanley based on my observation of the witnesses. What is more, Shanley's testimony on its own was insufficient to justify a supervisory exclusion under the Act.

First of all, Shanley described sergeant duties of signing the logbooks, checking locks, relocking doors, ensuring that cameras and other equipment are functioning properly, touring the Jail, receiving and resolving complaints by inmates, conducting inspections and searches, tracking and reviewing logs and reports, reviewing paperwork, wearing white uniform shirts, having access to information in the computer system, being paid more than corrections officers, carrying radios, weapons and keys, and conducting training.<sup>5</sup> However, none of these alleged job duties is sufficient to support a supervisory exclusion pursuant to the Act. Furthermore, Shanley readily conceded that the sergeants have no authority to discipline any employes, as they do not even have authority to issue verbal warnings, which are the first step of the disciplinary process under the CBA. Instead, Shanley acknowledged that sergeants simply report facts or alleged misconduct to the lieutenants, which falls far short of the necessary authority to support a supervisory exclusion. In its post-hearing brief, the County places great emphasis on the alleged duty of sergeants to "correct" the corrections officers in their daily tasks, so that the corrections officers perform their jobs in accordance with all laws, regulations, and policies of the County. Nevertheless, while the sergeants do make corrections or suggestions to the corrections officers in this regard, they have no authority to sanction the corrections officers in the case of disobedience and must report the problem up the chain of command, which was the same situation in 1973 when the issue was initially litigated. To that end, Schimelfenig and Mills both testified credibly that they have never disciplined or made a recommendation for discipline of any corrections officers at the Jail. Even Shanley, who insisted that the sergeants have authority to issue discipline, admitted that during his many years as a sergeant, he only recommended discipline on two occasions sometime in 2001 or 2002, but his recommendations were not accepted.

In addition, the record is completely devoid of any evidence whatsoever that the sergeants have any authority to transfer, suspend, layoff, recall, or discharge other employes or to effectively recommend such actions. The County argues that the sergeants do have authority to hire, promote, assign, reward, and responsibly direct other employes. Once again, however, the County's argument is unavailing. At best, the record shows a mere division of labor, and not supervisory authority.

The County points to the testimony of its Warden Timothy Betti as support for the notion that the sergeants effectively recommend hiring and/or promotions, as Betti testified about a September 2018 incident where the Training Sergeant provided him with a list ranking the top cadets to move several of them into full-time positions. However, Betti conceded that this

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<sup>5</sup> Of course, the record shows only that sergeants help to resolve complaints by inmates, and not by the corrections officers or any other employes, either formally in the case of a grievance or informally prior to a grievance being filed.

was a special situation because the County had more staff hired than full-time spots available and that he does not always seek recommendations or assessments from the Training Sergeant. As such, it can hardly be concluded that the sergeants perform such duties predominantly or for a substantial portion of their work time, even if those duties were supervisory in nature. Moreover, these duties were only performed by the Training Sergeant, and not the other 12 employes holding a sergeant rank. In addition, Betti acknowledged that the Training Lieutenant also provided a list ranking the top cadets and that the information was then forwarded to the County's Director of Human Resources, who conducted his own behavioral interviews of those candidates, along with the Warden and the Deputy Warden. As the Union points out, this is, at most, akin to the sergeants participating on a search committee or hiring panel, which the Board has long held to be insufficient to support a supervisory determination. Saucon Valley Education Ass'n v. Saucon Valley School District, 32 PPER ¶ 32167 (Final Order, 2001) (citing State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999)).

The County also relies on the sergeants' alleged authority to recommend that the County not retain certain cadets or trainees. The County specifically points to one occasion in 2021, in which Schimelfenig wrote an incident report which reflected negatively on the cadet's abilities. Despite this evidence, the record shows that Schimelfenig has only ever written one incident report regarding a cadet's performance during training and that Schimelfenig did not participate in or attend any meetings regarding whether the cadet was going to be retained or whether there were any problems with his training. Nor did Schimelfenig even make a recommendation about whether to retain the cadet. Further, the record shows that the County conducts its own independent investigation by higher-ranking officers and management personnel before deciding whether to retain cadets and/or trainees. It is well settled that recommendations are not effective within the meaning of the Act where they are subject to independent investigation by the decision maker. Luzerne County Community College, 38 PPER 70 (Proposed Order of Unit Clarification, 2007).

The County further points to the sergeants' alleged authority to conduct employe evaluations as evidence of their supervisory status. In support of this proposition, the County offered the testimony of Shanley, who claimed that, although the lieutenants conduct the evaluations of the corrections officers, the lieutenants solicit input from the sergeants and accepted his opinions when he was a sergeant, 100 percent of the time. This testimony, however, was credibly refuted by Mills and Schimelfenig. Indeed, Mills testified persuasively that he does not perform employe evaluations, nor has he ever been asked his opinion on evaluations. Similarly, Schimelfenig testified convincingly that, while he has been asked to provide opinions for the evaluations, he does not sign the forms and only sometimes meets with the lieutenant and corrections officers to review them, depending on availability. What is more, Schimelfenig testified credibly that the evaluations are not even consistently given on an annual basis and that they make up a very insignificant amount of his time, maybe five percent. This evidence is simply not indicative of supervisory status under the Act.<sup>6</sup>

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<sup>6</sup> The same result obtains to any assertion by the County that the evaluations are used for promotions to the sergeant rank. Shanley acknowledged that seniority, resume, work performance, and potential discipline are also factors utilized by the County in deciding whether to promote a corrections officer to the sergeant rank. On top of that, Shanley conceded that the warden directs a captain to interview applicants and provide him with the top



Next, the County asserts that the sergeants assign and responsibly direct other employes as part of their everyday job duties overseeing the units they tour. The credible evidence of record shows otherwise though, as the lieutenant or shift commander decides what assignments the corrections officers work for each shift, not the sergeants. Both Schimelfenig and Mills testified to this fact. Schimelfenig also testified credibly that the lieutenant does not ask for recommendations very often and that the corrections officer shift assignments sometimes remain in place for weeks or months at a time or get changed without the solicitation of his opinions. Mills testified credibly that he once made a recommendation to change a correction officer's work assignment, but it was ignored by the lieutenant. Mills further explained that he only ever made such a recommendation on one or two occasions during his time as a sergeant.

Although the record does show that sergeants direct the corrections officers in certain situations, such as during Code Blue calls, restraint chair placements, prisoner transports, and cell extractions, there is no evidence that these functions make up a substantial portion of their duties or majority of their work time as sergeants.<sup>7</sup> To the contrary, Shanley himself testified that sergeants essentially have two main job functions, overseeing/touring their assigned areas to ensure that everything is functioning properly and reviewing logs, records, reports, and documentation prepared by corrections officers in their specific zones to track everything that occurs. In essence, the sergeants oversee the units and provide guidance to the corrections officers if they encounter problems or need assistance. Indeed, Schimelfenig testified credibly that he spends most of his time, as a sergeant, touring his zone and seeing if the corrections officers need assistance, while Mills testified credibly that he spends most of his time speaking to the inmates. The sergeants do not responsibly direct the corrections officers, as they have no authority to do anything other than report any disobedience up the chain of command when they provide corrections or suggestions to the corrections officers. This is no different than the job functions of the sergeant position in 1973 when the issue was originally litigated and when the Board concluded that the sergeant position was essentially just a "superior workman or leadman who exercises control over a less skilled or less capable employe," and who did not share the power of management as a supervisor. Lackawanna County (County Jail), 3 PPER at 267.

To be sure, the sergeants do not even approve leave or call offs. Even the Administrative Sergeant simply tracks leave requests for the lieutenant, who actually approves them. And, the Administrative Sergeant only tracks vacation days. All other requests, such as personal or sick days, must go directly to the Lieutenant. Even if the sergeants did approve leave, the Board has held that approval of leave will not support an exclusion for supervisory status when those duties are not present in conjunction with other significant indicia of supervisory authority. South Coatesville Borough, 49 PPER 37 (Order Directing Submission of Eligibility List, 2017) citing Luzerne County Community College, 37 PPER 47 (Final Order, 2006). On

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three candidates based on those interviews. The warden then reviews the recommendations and provides his selection to human resources. This is simply not evidence of an effective recommendation or the authority to reward or sanction employes by the sergeants in connection with their involvement in the evaluations.

<sup>7</sup> Likewise, both Schimelfenig and Mills testified credibly that they sometimes have to physically participate in the restraint chair placements.

these facts, the County has not demonstrated the presence of any significant indicia of supervisory authority on behalf of the sergeants.

Finally, the County emphasizes an alleged incident in 2013, which resulted in a grievance by the Union. The County stresses how in 2013 the Union took the position that, while there may be times to send a sergeant or "supervisor" on a transport, the County was required by the CBA to send two corrections officers as well, instead of a sergeant and a corrections officer. However, the Union's position in 2013 and the parties' resolution of the grievance in favor of the Union is hardly dispositive or determinative in this proceeding. As set forth above, the relevant inquiry is the job duties of the sergeant position, which have not changed since the 1973 litigation. Accordingly, the County's Petition for Unit Clarification must be dismissed.

#### CONCLUSIONS

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The County is a public employer within the meaning of Section 301(1) of PERA.
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The job duties and responsibilities of the sergeant position have not changed since 1973 when the supervisory status of those positions was previously litigated and determined.
5. The Petition for Unit Clarification is barred by res judicata and is properly dismissed.
6. The sergeant positions are not supervisory level employes within the meaning of PERA and are properly included in the bargaining unit.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

#### HEREBY ORDERS AND DIRECTS

that the Petition for Unit Clarification is denied and dismissed.

#### IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this 31<sup>st</sup> day of August, 2022.

PENNSYLVANIA LABOR RELATION BOARD

/s/ John Pozniak  
John Pozniak, Hearing Examiner