

In the Matter of BRISTOL COUNTY SHERIFF’S OFFICE

and

NATIONAL CORRECTIONAL EMPLOYEES UNION

Case No. SCR-08-2270

- 12.3 *appointed official*
- 35.7 *supervisory and managerial employees*
- 35.8 *uniformed services—general*

January 7, 2009

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

John Connor, Esq. *Representing the National Correctional Employees Union*

Robert Novak, Esq. *Representing the Bristol County Sheriff’s Office*

**DECISION AND DIRECTION OF ELECTION**

Statement of the Case

On January 31, 2008, the National Correctional Employees Union (Union) filed a petition in Case No. SCR-08-2270 seeking to represent the canine officers employed by the Bristol County Sheriff’s Office (Employer or BCSO). The petitioned-for canine officers are not currently represented by any union, and the BCSO opposes the Union’s petition. The Employer contends that the canine officers should be excluded from any bargaining unit either as appointed officials within the meaning of Section 1 of MGL c. 150E (the Law) or in the exercise of the Board’s discretion to exclude certain categories of employees from collective bargaining. If the Board determines that the canine officers are employees within the meaning of the Law, the BCSO asks the Board to place the canine captain and canine lieutenant in a separate, supervisory bargaining unit.

The Union and the Employer agreed to a stipulated record and waived their right to an evidentiary hearing in this case. Both parties filed post-hearing briefs on or about August 28, 2008.

Stipulations of Fact<sup>1</sup>

1. The present make-up of the Canine Division is as follows: one captain, one lieutenant, two sergeants and six officers.
2. The Canine Captain acts as the Commander for the day shift (7-3) and the Canine Lieutenant as the commander for the second shift (3-11).
3. The general responsibilities of the Canine Captain and Canine Lieutenant are:

- a. Ensure that members of the Canine Unit and their dogs are on-call 24-hours a day to assist the Bristol County Sheriff’s Office as so ordered;
- b. Ensure that all administrative and operational policies and procedures of the Canine Unit are being followed;
- c. Coordinate all activities of the Canine Unit with the Chief/Law Enforcement;
- d. Ensure that canine handlers provide for the routine care, cleaning and maintenance of their respective canines (dogs);
- e. Ensure that all BCSO Canine Unit vehicles and equipment are properly cleaned and maintained;
- f. Establish Canine Unit training programs;
- g. Ensure that all BCSO canine handlers and dogs are competent, certified and properly used;
- h. Reports, etc. are completed in a timely manner;
- i. Report directly to the Chief/Law Enforcement regarding administrative matters that directly affect the operation of the Canine Unit.

4. The Canine Captain and Canine Lieutenant have the following supervisory responsibilities:

- a. They both sit on the interview panel (along with the Chief of Law Enforcement) and recommend new hires to the Sheriff;
- b. They both are authorized to administer verbal and written warnings to canine sergeants and officers as well as letters of counseling;
- c. They both have the authority to authorize days off, overtime, comp time and call in an officer from home;
- d. They both assign sergeants and officers to specific work tasks.

5. Due to being on the day shift, the Captain spends about 70% of his time on administrative and supervisory matters where the Lieutenant spends about 40% of his time on these matters.

6. Unlike captains in the captains and majors [bargaining] unit, the Canine Captain undergoes none of the same training as the other captains do, and their equipment and uniform needs are different.

7. Both the Canine Captain and the Canine Lieutenant are involved in the supervision and discipline of the canine sergeants and canine officers.

8. Although there is only one Canine Captain and one Canine Lieutenant at present, there is the potential for others to be promoted to canine lieutenant in the future.

9. The regulations of the BCSO Canine Unit marked as Joint Exhibit No. 1 are applicable to all canine officers.

10. A “call out” refers to requests for assistance from other law enforcement agencies. For example: a local police department may need a “drug-sniffing” dog to assist on a case, or may have a fugitive hiding in the woods.

11. BCSO Canine Unit officers shall be selected and appointed by the Sheriff on the recommendation of the Chief/Law Enforcement.

1. The Board’s jurisdiction in this matter is uncontested.

ment. Any openings in the unit are posted at the BCSO but are not limited to current employees.

12. BCSO Canine Officers are required to be Law Enforcement Deputy Sheriffs and must attend all required annual law enforcement training in compliance with the Municipal Police Training Council and the BCSO Law Enforcement Training Standards.

13. The following are requirements that all canine officers must agree to:

- a. A willingness to remain with the BCSO Canine Unit for the work life of an assigned canine (dog);
- b. A willingness (together with family members) to care for and house the canine at the officer's residence with a secure outdoor area that conforms to BCSO guidelines;
- c. A willingness to work with, to care for and to train with their assigned dog;
- d. A satisfactory work performance;
- e. A willingness to accept orders as given and carry them out;
- f. A willingness to accept assignments that promote the most useful coverage of the Canine Unit and the Sheriff's Office;
- g. The ability to successfully complete BCSO firearms qualification training and successfully meet all other requirements necessary to become a sworn BCSO Law Enforcement Deputy Sheriff;
- h. The ability to achieve and maintain the applicable Handler/Dog Certification;
- i. The willingness to immediately withdraw from the Canine Unit without prejudice if requested to do so by the Sheriff or his designee.

14. A Canine Officer is a BCSO staff member who is a Bristol County Deputy Sheriff, has met the established training requirements set forth by the Sheriff, and has been provided a trained and qualified dog for correction/security, law enforcement and crime prevention purposes.

15. The Primary Responsibilities of the BCSO Canine Unit shall be:

- a. Secure and protect the BCSO correction facilities, as well as other BCSO properties;
- b. Respond to correction facility disturbances and emergencies (such as perimeter alarms, suspicious persons and/or vehicles, escapes) as directed;
- c. Locate suspects, victims, missing persons, escapees, missing articles or evidence, as requested by the BCSO or other public safety agencies;
- d. Provide support and security to local, county, state and/or federal law enforcement agencies, when so authorized;
- e. Conduct random vehicle searches;
- f. Conduct random searches at BCSO community work release sites;
- g. Conduct searches for concealed narcotics and/or other contraband within the BCSO Correction Facilities and Regional Lockups;
- h. Protect the general public and/or the BCSO staff members from death or serious injury;

- i. Provide support to BCSO Correction Facilities or divisions attempting to effect an arrest or serve a warrant;
- j. Promote the public safety through seminars and demonstrations.

The Primary Responsibilities of a BCSO Canine Officer shall be to:

- a. Ensure that their assigned canine, vehicle, and equipment are ready to work before each tour of duty.
- b. Ensure that they are prepared to work, as assigned by the Canine Unit Commander (Captain/Lieutenant) in a manner that will promote the most useful coverage of the Canine Unit for the Bristol County Sheriff's Office.
- c. Ensure that their assigned canine, vehicle and equipment are on-call 24-hours a day to assist the BCSO as so ordered;
- d. Ensure for the routine care, cleaning and maintenance of their assigned dog;
- e. Ensure that they have reported to work in full BCSO canine uniform, with working equipment and firearm;
- f. Ensure that they and their canine have been properly trained and have completed assigned in-service training activities as so ordered;
- g. Ensure that all reports and documentation regarding their tour of duty is properly completed and submitted to the Canine Unit Commander (Captain/Lieutenant) in a timely manner.

16. Should a BCSO canine officer become detached or re-assigned to another BCSO division, unit or facility, the officer shall no longer be a member of the Canine Unit.

17. A BCSO canine officer, as a Bristol County Deputy Sheriff, shall gain their authority to make arrests from Massachusetts General Laws Chapter 37, §3 and Chapter 37, §13. All arrests initiated by BCSO canine officers shall be consistent with BCSO policy, procedures and training guidelines.

18. The canine officers do not share a community of interest with any other BCSO employees, because the canine officers perform different duties, have different work schedules, work in unique locations, receive different training, have a distinct supervisory hierarchy, and possess law enforcement powers, including powers of arrest.

19. Canine officers are not confidential or managerial employees within the meaning of Section 1 of MGL c. 150E.

20. At the BCSO, the canine deputies, with and without their dogs, perform law enforcement security functions outside of the facilities and on occasion, for other law enforcement departments.

21. The canine officers do not supervise inmates as corrections officers [do].

22. The BCSO employs canine officers in the Law Enforcement Division under the direction of the Chief of Staff. The Law Enforcement Division is a separate division that is not encompassed within the BCSO's security operations.

## Opinion

Where issues raised by a representation petition are resolved by the parties' stipulation, the Board will adopt the stipulation, if it does not conflict with the Law or established Board policy. *Town of Hopedale*, 20 MLC 1059, 1063 (1993). Here, the BSCO and the Union have stipulated that: 1) the canine officers at issue in this petition are not confidential or managerial employees; and, 2) they do not share a community of interest with any other BCSO employee. Because these stipulations do not appear to conflict with the Law or with established Board policy, we adopt them.

## Collective Bargaining Rights of Canine Officers

The primary issue in this case is whether the petitioned-for canine officers are employees within the meaning of Section 1 of the Law. The Employer argues that these employees are excluded from collective bargaining because, as deputy sheriffs appointed by the Sheriff, they are "appointed officials" within the meaning of Section 1. More specifically, the Employer contends that Section 1 excludes appointed officials who serve at the pleasure of an elected official. Conversely, the Union argues that, because the canine officers are not managerial employees, they cannot be excluded from collective bargaining as appointed officials under existing case precedent. In the alternative, the Employer urges the Board to exercise its discretion to exclude these employees from collective bargaining due to the operational conflicts that the Employer suggests would inevitably arise if the canine officers were permitted to bargain collectively.

Section 1 of Law defines an employee or public employee as:

Any person in the executive or judicial branch of a government unit employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer, and other managerial employees or confidential employees...

The question of whether appointed officials should be excluded from collective bargaining is not a novel issue before the Board. In *Town of Dartmouth*, 1 MLC 1257 (1975), the Board observed that, since most non-elective municipal positions are filled by appointment, Section 1 of the Law must have intended to exclude only some appointed positions from collective bargaining. The Board also noted that the language of Section 1 demonstrated that "appointed officials" are a subcategory of managerial employees. *Town of Dartmouth*, 1 MLC at 1259. The Board reaffirmed this interpretation of Section 1 in *City of Chicopee*, 19 MLC 1765, 1767-1768 (1993), *aff'd. sub nom.*, *City of Chicopee v. Labor Relations Commission*, 38 Mass. App. Ct. 1106 (1995), expressly declining to create a new category of excluded employees. *City of Chicopee*, 19 MLC at 1768, n.4. The Board has consistently fol-

lowed this interpretation of the Law in subsequent cases; e.g., *Town of Tisbury*, 30 MLC 77, 82 (2003); *Commonwealth of Massachusetts*; 30 MLC 67, 69 (2003); *Town of Millbury*, 33 MLC 47, 52 (2006).

We decline to revisit this area of settled law. Neither the historical underpinnings of the Sheriff's office, nor the current powers and duties of deputy sheriffs persuade us that the petitioned-for canine officers, who hold appointed deputy sheriff positions, should be excluded from collective bargaining. The Employer details the deputy sheriffs' historical and current status as peace officers and role in law enforcement, but offers no reason why these responsibilities would impede their ability to bargain collectively, particularly where Sections 1 and 3 of the Law explicitly reference collective bargaining for certain state and municipal police officers.<sup>2</sup> The Employer distinguishes between appointed officials who enjoy statutory protection against arbitrary removal and appointed officials who serve at the discretion of an elected official, and argues that Section 1 excludes appointed officials who have no statutory good cause protection. However, the Employer offers no case law or legislative history to inform this novel distinction. The Board has previously determined not to create an additional category of excluded appointed officials, *see City of Chicopee, supra*, and we decline to do so here.

Further, the cases that the Employer cites do not support the Employer's position. *Sheriff of Middlesex County v. International Brotherhood of Correctional Officers, Local R1-193*, 62 Mass. App. Ct. 830 (2005) upheld a sheriff's exclusive authority, pursuant to G.L. c. 37, s.3, to appoint individuals to deputy sheriff positions, but the Appeals Court did not hold that the sheriff's statutory powers of appointment excluded the employee at issue from the Law's ambit. Indeed, *Sheriff of Middlesex County* noted that the sheriff could have agreed, presumably with the employee's exclusive representative, to follow specific appointment procedures. *Id.* at 834. *Compare, City of Somerville*, 451 Mass. 493 (2008). Similarly, *Massachusetts Coalition of Police, Local 165 v. Town of Northborough*, 416 Mass. 252 (1993) affirms an employer's non-delegable right to appoint police officers pursuant to G.L. c. 41, §97A, but did not conclude that a position filled through a statutory power of appointment must be excluded from collective bargaining.

We recognize that the appointment powers that the Sheriff holds pursuant to G.L. c. 37, §3 will impact collective bargaining over appointments to deputy sheriff positions. However, the Employer cites no statutory impediment to bargaining over wages, hours or other working conditions and no persuasive reason why statutory hiring procedures should preclude bargaining over other mandatory subjects of bargaining.<sup>3</sup> In *City of Somerville*, 451 Mass. 493 (2008), the Supreme Judicial Court held that the city's mayor had the exclusive authority pursuant to G.L. c.115, §10 to appoint an individual to the position of director of veteran's services, and that

2. Section 1 of the Law indicates that a professional employee shall include a detective, member of a detective bureau or police officer who is primarily engaged in investigative work in any city or town police department which employs more than four hundred people. Section 3 of the Law describes the appropriate bargaining unit for uniformed members of the state police.

3. We express no opinion on the Employer's argument that the Sheriff's power to appoint deputy sheriffs includes the non-delegable power to remove them. Even if that were true, it would not preclude bargaining over the myriad of other subjects of bargaining.

an arbitrator could not usurp that authority. However, the Court noted that the position at issue was within a bargaining unit and did not exclude the position from collective bargaining. Consequently, we see no incongruity between a deputy sheriff's method of appointment and right to bargain collectively.

Finally, we note that the Board has previously placed deputy sheriff positions in a collective bargaining unit. In *Plymouth County Sheriff's Department*, 30 MLC 85 (2003), the Board accreted a front gate checkpoint officer position into a bargaining unit comprised of correctional officers, noting that the employees who held the checkpoint positions were deputy sheriffs appointed pursuant to G.L. c.37, §3. Although the employer in *Plymouth County* did not raise the arguments that the BCSO raises here, upon examination, we find no statutory basis for excluding deputy sheriffs from the ambit of collective bargaining. Accordingly, we hold that the petitioned-for canine officers, who are deputy sheriffs appointed pursuant to G.L. c. 37 §3, are employees within the meaning of the Law.

We next consider the Employer's argument that the Board should exercise its discretion to deny collective bargaining rights to these employees because: 1) the employees' exercise of bargaining rights will conflict with the BCSO's operations; and 2) these employees would not enjoy the full panoply of traditional union rights and benefits, like the ability to contest terminations or challenge unlawful discrimination before the Board. The Employer suggests that the petitioned-for employees would be unlikely to rely on any negotiated discipline/termination procedures where the Employer could terminate the employees at will at any time for any reason, and it would be unfair to give employees rights that they would be afraid to exercise.

The record contains no evidence of an operational conflict that would defeat the collective bargaining rights of the canine officers, and we decline to determine the value of collective bargaining for the employees at issue. Employee free choice is a hallmark of the Law. Thus, the petitioned-for canine officers should be free to choose whether or not to avail themselves of the benefits and responsibilities of collective bargaining.

#### Separate Supervisory Unit

We next consider whether the supervisory responsibilities of the canine captain and canine lieutenant preclude their inclusion in a bargaining unit with their subordinates. The Board generally establishes separate bargaining units for supervisory employees and the employees whom they supervise. This well-established policy is rooted in the belief that individuals who possess significant supervisory authority owe their allegiance to their employer, particularly in the areas of discipline and productivity. *City of Westfield*, 7 MLC 1245, 1250 (1980).

Individuals are considered supervisory employees if they have either: 1) independent authority to make personnel decisions like hiring, transfers, promotion, discipline and discharge; 2) effective ability to recommend such personnel decisions; or 3) independent authority to assign and direct the work of their subordinates. The presence of all three criteria is not required, and any one criterion is

sufficient for the Board to find that an employee exercises supervisory authority. *Town of Holden*, 25 MLC 175, 176 (1999). The Board also considers factors like the authority to adjust grievances, *Eastham School Committee*, 22 MLC 1190, 1197 (1995), the authority to take charge in emergency situations, *Town of North Attleboro*, 5 MLC 1145, 1146 (1978), the authority to assign off-duty officers to work overtime, *Town of Holden*, 25 MLC 176, and the responsibility to command a department in the absence of higher ranking supervisory authority. *Id.*

Here, the parties have stipulated that the canine captain and lieutenant are involved in the discipline of the canine sergeants and canine officers and are authorized to administer verbal and written warnings to these subordinate employees. The canine captain and lieutenant assign canine sergeants and canine officers to specific work tasks and can authorize days off, overtime, and compensatory time off. The superior officers can also require an off-duty sergeant or officer to report for duty. These supervisory duties are sufficient to place the canine captain and canine lieutenant in a separate bargaining unit from the canine sergeants and canine officers whom they supervise.

#### Conclusion and Direction of Election

For the foregoing reasons, we conclude that: 1) the canine officers employed by the Bristol County Sheriff's Office are employees within the meaning of the Law; and, 2) the canine captain and canine lieutenant are supervisory employees who should be placed in a separate bargaining unit from the canine sergeants and canine officers whom they supervise.

Further, based on the record, we find that a question of representation has arisen among the canine officers employed by the Bristol County Sheriff's Office, and that the following units constitute appropriate bargaining units within the meaning of Section 3 of the Law:

##### *Unit A:*

All full-time and regular part-time canine officers and canine sergeants employed by the Bristol County Sheriff's Office excluding all lieutenants, captains, members of Unit B and all confidential, managerial, casual and other employees.

##### *Unit B:*

All full-time and regular part-time canine lieutenants and canine captains employed by the Bristol County Sheriff's Office excluding all canine officers, canine sergeants, members of Unit A and all confidential, managerial, casual and other employees.

IT IS HEREBY DIRECTED that an election by secret ballot shall be conducted to determine whether a majority of employees in each of the above-described separate bargaining units desire to be represented by the National Correctional Employees Union or by no employee organization. The eligible voters shall include all those persons within the above-described bargaining unit whose names appear on the Bristol County Sheriff's Office's payroll for the payroll period for the week ending the Saturday preceding the date of this decision and who have not since quit or been discharged for cause.

To ensure that all eligible voters shall have the opportunity to be informed of the issues and their statutory right to vote, all parties to this election shall have access to a list of voters in each unit and their addresses that may be used to communicate with them. The list of eligible voters must be provided either electronically (*e.g.* Microsoft Access or Excel) or in the form of mailing labels.

Accordingly, IT IS HEREBY FURTHER DIRECTED that two (2) copies of election eligibility lists containing the names and addresses of all eligible voters must be filed by the Bristol County Sheriff’s Office with the Executive Secretary of the Division, Charles F. Hurley Building, 19 Staniford Street, 1<sup>st</sup> Floor, Boston, MA 02114 no later than fourteen (14) days from the date of this decision.

The Executive Secretary shall make the lists available to all parties to the election. Failure to submit the lists in a timely manner may result in substantial prejudice to the rights of employees and the parties; therefore, no extension of time for filing the lists will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election, should proper and timely objections be filed.

SO ORDERED.

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In the Matter of CITY OF HOLYOKE  
and  
INTERNATIONAL BROTHERHOOD OF POLICE  
OFFICERS, LOCAL 388

Case No. MUP-05-4503

63 *Discrimination*  
63.21 *filing a grievance*

January 9, 2009

Marjorie F. Wittner, Chair  
Elizabeth Neumeier, Board Member

Melissa M. Shea, Esq. *Representing the City of Holyoke*  
Michael P. Clancy, Esq. *Representing the International  
Brotherhood of Police Officers,  
Local 388*

**DECISION<sup>1</sup>**

Statement of the Case

The International Brotherhood of Police Officers, Local 388 (Union) filed a charge with the former Labor Relations Commission (Commission) on August 12, 2005, alleging that the City of Holyoke (City) had violated Sections 10(a)(1), (a)(2), (a)(3), and (a)(4) of Massachusetts General Laws, Chapter 150E (the Law).

Following an investigation, the Commission issued a complaint of prohibited practice on February 2, 2007. The complaint alleged that the City had violated Sections 10(a)(3) and, derivatively, 10(a)(1) of the Law by transferring Gary Gresh (Gresh) from the Detective Bureau to the Field Operations Bureau (FOB) in the Holyoke Police Department. The Commission dismissed the allegations that the City violated Sections 10(a)(2) and 10(a)(4) of the Law.<sup>2</sup> The City filed an answer to the complaint on February 15, 2007.

On May 31, 2007 and July 19, 2007, Susan Atwater, Esq., a duly-designated hearing officer of the Board, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses and to introduce evidence. The Union and the City filed post-hearing briefs on or about September 21, 2007.

On April 29, 2008, the Hearing Officer issued Recommended Findings of Fact. The parties filed no challenges. After reviewing the record, we adopt the Hearing Officer’s Recommended Findings of Fact and summarize the relevant portions below.

1. Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission’s regulations, this case was designated as one in which the former Labor Relations Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) “shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission.” The Commonwealth Employment

Relations Board (Board) is the Division agency charged with deciding adjudicatory matters. References to the Board include the former Labor Relations Commission.

2. The Union did not request reconsideration of the allegations that the Commission dismissed.