

**STATE OF OHIO  
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Fraternal Order of Police, Ohio Labor Council, Inc.,

Employee Organization,

and

Ohio Attorney General,

Employer.

**Case No. 99-REP-03-0060**

**DIRECTIVE DISMISSING REQUEST FOR RECOGNITION  
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:  
March 2, 2000.

On March 15, 1999, the Fraternal Order of Police, Ohio Labor Council, Inc. ("Employee Organization") filed a Request for Recognition seeking to represent certain employees of the Ohio Attorney General ("Employer"). On June 3, 1999, the State Employment Relations Board ("Board") directed this matter to hearing to determine an appropriate bargaining unit and for all other relevant issues. On August 26-30, 1999, a hearing was held. on the issue of whether the employees in question are "public employees" under Ohio Revised Code Section 4117.01. On October 29, 1999, the Administrative Law Judge's Recommended Determination was issued. No exceptions were timely filed. On January 13, 2000, the parties' representatives presented oral arguments to the Board.

After reviewing the record, including the transcript and the post-hearing briefs, the Board finds, for the reasons set forth in the attached Opinion, incorporated by reference, that the Special Agent Supervisor 1 positions in the Bureau of Criminal Identification and Investigation and the Special Agent Supervisor 1 and 2 positions in the Medicaid Fraud Unit are supervisors, pursuant to O.R.C. § 4117.01 (F), and are not public employees under O.R.C. § 4117.01(C) and that the Criminal Justice Administrator position is not included in the bargaining-unit description for the proposed unit. As a result, the Request for Recognition is hereby dismissed.

It is so directed.

POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,  
concur.

  
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SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Court of Common Pleas within fifteen (15) days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party by certified mail, return receipt requested, on this 3<sup>rd</sup> day of March,  
2000.

  
\_\_\_\_\_  
SALLY L. BARAILLOUX, EXECUTIVE SECRETARY

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Case No. 99-REP-03-0060

**OPINION**

POHLER, Chairman:

On March 15, 1999, the Fraternal Order of Police, Ohio Labor Council, Inc. filed with the State Employment Relations Board ("SERB" or "Board") a Request for Recognition seeking to represent "All full-time Special Agent Supervisors in the Attorney General's Office." On June 3, 1999, this matter was directed to hearing to determine whether the employees in the proposed unit are "public employees" as defined by Ohio Revised Code ("O.R.C.") § 4117.01 (C) and for all other relevant issues, including whether the description of the proposed unit included the Criminal Investigations Administrator. A hearing was conducted and, on October 29, 1999, the Administrative Law Judge's Recommended Determination was issued. On December 9, 1999, SERB directed the parties' representatives to appear for an oral argument. The oral argument was held on January 13, 2000.

For the reasons below, we find that the Special Agent Supervisor 1 positions in the Bureau of Criminal Identification and Investigation ("BCI") and the Special Agent Supervisor 1 and 2 positions in the Medicaid Fraud Unit are supervisors, pursuant to O.R.C. § 4117.01 (F), and are not public employees under O.R.C. § 4117.01 (C). We also

find that the Criminal Justice Administrator position is not included in the bargaining-unit description for the proposed unit. As a result, the Request for Recognition must be dismissed.

### **I. FINDINGS OF FACT**

1. The Ohio Attorney General is a “public employer” as defined in O.R.C. § 4117.01(B). (S.)
2. The Fraternal Order of Police, Ohio Labor Council, Inc. is an “employee organization” as defined in O.R.C. § 4117.01 (D). (S.)
3. BCI is a division within the Ohio Attorney General’s Office; it is directed by Superintendent Ted Almay. The Medicaid Fraud Unit is also within the Ohio Attorney General’s Office; it is directed by John Guthrie. (S.)
4. The Fraternal Order of Police, Ohio Labor Council, Inc. currently represents Bargaining Unit 46, which includes the following classifications of employees of the Ohio Attorney General: BCI Special Agent, Medicaid Special Agent, Special Agent 4, Medicaid Fraud Intake Officer, Radio Dispatcher, Law Enforcement Training Officer, Certification Officer, Peace Officer Training Compliance Officer, Trainer, and Environmental Background Investigator. (S.)

***Special Agent Supervisor 1s at BCI*** (including narcotics, major crimes, environmental enforcement and financial investigation, and advanced technology unit)

5. BCI has twelve Special Agent Supervisor 1s (“SAS1s”), all of whom work under a Deputy Director, the Deputy Superintendent of Investigation, and the BCI Superintendent. The Investigations Section comprises Narcotics Investigations, which has five SAS1s, and a subdivision titled Marijuana Eradication that has a Special Agent 4, who is a member of the bargaining unit; Environmental

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<sup>1</sup>All references to the transcript of the hearing are indicated parenthetically by “T.,” followed by the page number(s). All references to the Joint Exhibits are indicated parenthetically by “Jt. Exh.,” followed by the exhibit number. All references to the Stipulations of Fact are indicated parenthetically by “S.” All references to the Employer’s exhibits are indicated parenthetically by “E. Exh.,” followed by the exhibit number. All references to the Employee Organization exhibits are indicated parenthetically by “E.O. Exh.,” followed by the exhibit number. References to the transcript and/or exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for that related finding of fact.

Enforcement,. which has one SAS1; and Major Crimes, which has six SASIs, a Special Investigations Unit (computer and financial crime section) and a Crime Scene Unit. (Jt. Exh. 4.)

6. Each SAS1 is assigned to one of six district offices but is not required to live in the district. The special agents (four to eight per each SAS1) who report to each SAS1 usually are required to live within the district. (T. 22-24, 64, 134, 205, 278, 352, 410, 491, 536, 633; Jt. Exh. 4.)
7. The district offices process assistance requests from local law enforcement agencies. Requests for assistance may come to the Deputy Director or Deputy Superintendent, a special agent, an SAS1, or the SASI's secretary. Assistance requests generally are granted or redirected to a more appropriate agency. (T. 27, 66, 156-159, 220, 353-354, 546-547, 568, 636.)
8. The SASIs assign cases to the special agents based on various criteria, such as past cases worked by an agent, the agent's proximity to the assignment, volume of case work, complexity of the case assignment, investigative experience, ties with local law enforcement, the agent's history with a police department, training, and the unique characteristics of the agent, such as age, appearance, mannerisms, sex, and race. (T. 73-78, 260-261, 294, 357, 427-429, 518-519, 571, 593, 638.)
9. The SAS1s approve special agents' leave requests. Leave requests can be denied by the SASIs. Denials are rare because special agents know not to ask for leave during mandatory training periods or when operational needs make the exercise of leave prohibitive. The SASIs informally work through any leave request problems with the special agents so that leave can be taken as requested. After receiving the SASI's approval, the leave requests are sent up the chain of command for sign-off. Leave requests could be denied by anyone up the chain of command, but those denials have never occurred because the leave requested has been taken by the time the request is completely processed. (T. 36-37, 87, 89-91, 142, 177-178, 187-189, 224-228, 288-290, 359, 419-420, 423-424, 498-500, 519, 543-544, 557.)
10. The SASIs approve the accrual of overtime and compensatory time. The SASIs sometimes tell special agents to do work the next day or week as opposed to through the accrual of overtime. The SAS1s use different methods for determining when to approve overtime. They are not required to use any particular method. Several SASIs use the "ten hours per agent per week rule": If the anticipated overtime exceeds ten hours per agent per week, the SAS1 consults with his supervisor; if the anticipated overtime is less than ten hours per agent per week, the SAS1 does not consult with his supervisor. Other SASIs will consult with their supervisors on a case-by-case basis where a large amount of overtime is requested. (T. 140, 230-231, 263-265, 290, 361, 430, 437-439, 515-516.)

11. The SASIs prepare performance evaluations (mid-probation, final probation, and annual) for special agents and secretaries. Performance evaluations are used to determine whether probationary employees are to be retained. As the rater, the SAS1 gives ratings of "meets," "below," and "above" in eight categories. If a probationary employee is rated "below" by the SAS1, the employee is automatically not retained. If a probationary employee is rated "meets" or "above" by the SAS1, the employee is automatically retained. The SAS1s' recommendations are followed in this area. Performance evaluations go up the chain of command for sign-off by the Deputy Director, Deputy Superintendent, and Superintendent after being signed by the SAS1. Evaluations may be returned with comments agreeing or disagreeing with the SAS1. The SAS1 is not required to change evaluations in accordance with the supervisor's views. (T. 134, 145-151, 155-156, 189-190, 198-201, 210-212, 215-216, 269, 245-247, 279-283, 327, 365, 385-386, 395, 417, 455-457, 477-478, 507, 543, 555, 573-576, 583, 640-644, 650-652; E. Exhs. 1 and 3.)
12. The SAS1s develop action plans and discuss goal setting with their special agents. The SAS1 and the special agent meet and develop the plan together, or the special agent prepares the action plan and then meets with the SAS1. (T. 152-154, 218-219, 284-285, 365, 394, 453, 588.)
13. Under the Bureau directives that became effective in 1998, "supervisors" are authorized, in cases of minor infractions, to counsel employees, issue oral reprimands with notice to the Deputy Director, and issue written reprimands with consultation with the Deputy Director and notice to the Deputy Superintendent and BCI Personnel Department. The SAS1s issue verbal and written reprimands. The SASIs believe that some level of communication with a supervisor before issuing an oral or written reprimand is appropriate, but not required. (T. 121, 366-369, 493, 639; Jt. Exh. 3.)
14. The SASIs counsel employees about various performance issues, such as the amount of work an SAS1 expects an agent to produce, following proper procedures, and the agents' written work product. Counselings include a discussion of steps to take to correct the problem. Frequently, counselings result in improved work performance and alleviate the need for the SASIs to issue verbal or written reprimands. (T. 160-161, 247, 296, 370, 493-494, 509, 537-538.)
15. The SAS1s serve on interview panels for special agents. A panel usually includes a Deputy Director, a Human Resources representative, and an SAS1. Each panel member rates the applicant on rater sheets that are returned to the Personnel Department, where the scores are averaged. The SAS1s may comment that they like several of the applicants, or their opinions may be demonstrated by the numerical score or wording used to comment on the rater sheet. The forms are

then submitted to the Chief of Staff and the Superintendent. (T. 105-I 06, 11 O-I 13, 162, 242-244, 286-287, 381-384, 400-401, 412-415, 473, 492, 537, 634-635.)

16. The SASIs in Narcotics approve confidential funds used by the special agents in performing their duties. Confidential funds reports are signed by the special agent, the SAS1, and the Division Chief. (T. 251-252, 379-381, 550-551.)
17. The SAS1s review paperwork for special agents in their departments, including car reports, subject data sheets, and case reports. The SASIs review the substantive content of special agents' case reports and discuss them with the agents. On occasion, the SASIs ask special agents for more detail or clarification of case reports, ask agents to rewrite reports, and discuss with agents the direction being taken on a case and the questions asked during witness interviews. When agents request input, the SASIs also offer suggestions on how to approach a particular case. (T. 138-139, 295-296, 357-358, 432-433, 451-452, 545, 611.)

### ***Special Agent Supervisor 1s in the Medicaid Fraud Unit***

18. The Medicaid Fraud Unit investigates and prosecutes allegations of medicaid fraud and patient abuse and neglect in long-term care facilities. The Medicaid Fraud Unit is governed by its own rules contained in the Medicaid Fraud handbook; it does not follow BCI directives. The Medicaid Fraud Unit has two SASIs, who work under one Special Agent Supervisor 2 ("SAS2") and the Section Chief. One SAS1 oversees six patient-abuse-team special agent investigators. The other SAS1 oversees eight fraud-team special agent investigators. (T. 306-308, 31 O-31 1,599; Jt. Exhs. 4 and 7.)
19. The Medicaid Fraud Unit has a toll-free complaint line. The Medicaid Fraud Unit also receives and reviews referrals from other agencies, law enforcement, and the general public. A case intake officer (a bargaining-unit position) sorts through the assistance requests and prepares the paperwork for a bimonthly case meeting at which the SAS2, Section Chief, Assistant Section Chief, and Section Attorney assign cases to a particular team and transfer the cases to the appropriate SAS1. The SAS1 decides which agent will be assigned a particular case based upon the type and complexity of the cases being worked by the agent. (T. 313-315, 601-602, 604.)
20. The SAS1s prepare performance evaluations (mid-probation, final probation, and annual) for special agents and secretaries. Performance evaluations are used to determine whether probationary employees are to be retained. As the rater, the SAS1 gives ratings of "meets," "below," and "average" in eight categories. If a probationary employee is rated "below" by the SAS1, the employee is automatically not retained. If a probationary employee is rated "meets" or "above" by the SAS1,

the employee. is automatically retained. The SAS1s' recommendations have been followed in this area. Since the SASIs have mostly experienced agents reporting to them, the SASIs use annual performance evaluations to convey goals and objectives, and the SAS1's expectations, to the agents. (T. 316-317, 608-610.)

21. The SAS1s serve on interview panels for special agents. A panel usually includes a Deputy Director, a Human Resources representative, and an SAS1. Each panel member rates the applicant on rater sheets that are returned to the Personnel Department, where the scores are averaged. The SAS1s may comment that they like several of the applicants, or their opinions may be demonstrated by the numerical score or wording used to comment on the rater sheet. The forms are then submitted to the Chief of Staff and the Superintendent. (T. 320-322, 603, 608-610, 613.)
22. The SASIs in the Medicaid Fraud Unit go to the SAS2 with disciplinary matters. (T. 608-610.)
23. The SASIs in the Medicaid Fraud Unit counsel employees about various performance issues, such as the amount of work an SAS1 expects an agent to produce. Counselings include a discussion to correct the problem. The counselings result in improved work performance and alleviate the need for further action by the SASIs. (T. 334, 610).
24. The SASIs in the Medicaid Fraud Unit approve leave requests for their agents in the absence of the SAS2. The SASIs approve the accrual of overtime and compensatory time in the absence of the SAS2. (T. 312, 318-319, 605606.)

### ***Special Agent Supervisor 2 in the Medicaid Fraud Unit***

25. The Medicaid Fraud Unit has one SAS2 who oversees two SASIs and a team of nine special agent investigators. (T. 306-308, 310-311, 599; Jt. Exhs. 4 and 7.)
26. The SAS2 approves leave requests for the special agents who report directly to him. (T. 312, 318-319, 605606.)
27. The SAS2 approves overtime and compensatory time requests for the special agents. (T. 312, 318-319, 605-606.)
28. The SAS2 participates in the hiring process for special agent investigators by screening applications and conducting interviews. Participants individually prepare rater sheets on which they rank candidates after the interview. They usually decide as a group who will be recommended. The SAS2 then writes a recommendation memo. (T. 320-322, 603, 608-610, 613.)



29. The SAS2 prepares probationary evaluations for the SAS1s and for the special agent investigators who report directly to the SAS2. The SAS2 has recommended that fourteen probationary employees be retained; all of these recommendations have been followed. The SAS2 also recommended that one probationary special agent's employment be terminated for theft; the agent's employment was terminated. In other situations, the SAS2 recommended suspensions after consulting with the supervisor; the SAS2's recommendations were followed. The SAS2 also recommended a suspension when Human Resources was recommending termination; the SAS2's recommendation was followed. The SAS2 has issued approximately 8 to 10 verbal or written reprimands. The SAS2 has chosen to consult with the Section Chief before issuing the discipline, except in two instances which the SAS2 determined required immediate action. (T. 316-318, 325-328, 331-333.)
30. The SAS2 in the Medicaid Fraud Unit counsels employees about various performance issues. No further acts have been necessary to correct any problems. The SAS2 has consulted with the Section Chief before some of the counselings; no testimony was presented that the SAS2 is required to consult before acting. (T. 334).

### ***Criminal Investigation Administrator***

31. Terrence Neely, whose title is Criminal Investigation Administrator, works under the Deputy Superintendent of Investigations and the BCI Superintendent. Mr. Neely does not evaluate SAS1s or any of the special agents. (T. 615, 617; Jt. Exh. 4.)
32. The proposed bargaining unit in the Request for Recognition is described as "All full-time Special Agent Supervisors in the Attorney General's Office." Excluded from the proposed unit are "All other employees of the Attorney General."

## **II. DISCUSSION**

The primary question in this matter is whether the SAS1s at BCI and the SAS1s and SAS2 in the Medicaid Fraud Unit are supervisors, pursuant to O.R.C. § 4117.01(F). O.R.C. § 4117.01 (F) defines "supervisor" and provides in relevant part as follows:

"Supervisor" means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively

recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment[.]

An individual will be excluded from a bargaining unit if the record contains substantial evidence that the employee has the authority to perform one or more of the functions listed in O.R.C. § 4117.01(F), actually exercises that authority, and uses independent judgment in doing so. *In re Mahoning County Dept of Human Services*, SERB 92-006 (6-5-92) (“*Mahoning*”) at 3-19. Those individuals found to be supervisors under O.R.C. § 4117.01 (F) are not considered “public employees” pursuant to O.R.C. § 4117.01(C)(10); consequently, a public employer cannot be compelled to bargain collectively with them. *Id.* Supervisory issues are a question of fact in each case, and such status must therefore be determined on a case-by-case basis. *In re Lucas County Recorder’s Office*, SERB 85061 (11-27-85). The burden of establishing an exclusion from a bargaining unit under O.R.C. § 4117.01 (C) rests upon the party seeking it. *In re SERB v Fulton County Engineer*, SERB 96-008 (6-24-96); *In re Franklin Local School Dist Bd of Ed*, SERB 84-008 (11-8-84), *rev’d on other grounds* (CP, Franklin, 4-30-87).

In construing the statutory definition of a supervisor, recognition must be given to the basic reality in the public sector that final decisions regarding areas such as hiring, discipline, and salaries are reserved to persons far removed from the employee’s immediate supervision. *See, e.g., Sweetwater Union High School District*, 1 PERC ¶ 10 (CA EERB, 1976). The ability to effectively recommend these changes in employment status, as described in O.R.C. § 4117.01 (F), is accorded great weight in the public sector. O.R.C. § 4117.01 (F) directs us to find that an employee is a supervisor if the employee has the authority to effectively recommend the promotion, discharge, or hiring of other employees.

An “effective recommendation” has been defined as one “which, under normal policy and circumstances, is made at the chief executive level or below and is adopted by higher authority without independent review or de novo consideration as a matter of course.”

*Davenport v. Public. Employment Relations Board*, 264 N.W.2d 307, 319, 98 L.R.R.M. 2582, 2590-2591 (IA S.Ct., 1978). SERB cited this definition with approval in *In re University of Cincinnati*, SERB 89-028 (1 O-I 2-89) at 3-I 93.

The individual must use independent judgment in the interest of the employer when carrying out the responsibilities set out in O.R.C. § 4117.01 (F). The individual must not be using judgment of a routine or clerical nature. Independent judgment is the opportunity to make a clear choice between two or more significant alternative courses of action without plenary review or approval. *California Dept. of Forestry and Fire Prevention*, 21 PERC ¶ 28144 (CA PERB 1997). SERB has held that a management employee who assigns tasks equally and as needed to balance the workload among employees who work independently on a routine schedule of familiar tasks exercises no independent judgment “beyond choosing between narrowly defined parameters.” *In re University of Cincinnati*, *supra* at 3-192. SERB also has held that independent judgment can constitute evaluating an employee’s workload as well prioritizing it on a weekly basis. *In re Medina County Health Dept*, SERB 95-006 (4-21-95) at 3-43. Since the case law mandates that supervisory issues be determined on a case-by-case basis, the type of work being performed must be examined, too.

In its posthearing brief, the Employer contends that the positions in the proposed unit effectively recommend employees for hire, effectively recommend discharge, effectively recommend discipline, or responsibly direct special agents, clerical staff, and some exempt positions in their commands.

The SAS1s in BCI and the SAS1s and SAS2 in the Medicaid Fraud Unit participate on interview panels as raters along with a Deputy Director from the section and a representative from Human Resources. All three panelists rate the candidates. The rater sheets are returned to the Personnel Department, where scores are tallied, averaged, and

sent up the chain of command. Under this procedure, no hiring decision or true effective recommendation for hire is made by an SAS1. Equally weighted participation on interview panels does not demonstrate effective recommendation of the outcome. *California Dept. of Forestry and Fire Prevention, supra; State System of Higher Education*, 28 PPER ¶ 28046 (PA PLRB 1997). When individuals act collectively and make a joint recommendation, no individual employee is responsible for the hiring recommendation, and no individual appears responsible for the hiring recommendation. *Atlantic County Dept. of Social Services*, 15 NJPER ¶ 20243 (NJ PERC 1989). Panels of this type do not meet the requirements for an effective recommendation. We cannot say, however, that hiring panels could never be set up to allow for effective recommendations. Thus, these positions do not hire or effectively recommend hiring decisions.

**A. The Twelve Special Agent Supervisor Is at BCI Are Supervisors**

The twelve SAS1s at BCI prepare performance evaluations for special agents and secretaries in the middle and at the end of their probationary periods. If the probationary employee receives a “meets” or “above” rating from the SAS1, the probationary employee is retained. If a probationary employee receives a “below” rating from the SAS1, the probationary employee is not retained. Although the SAS1s recommending discharge are asked to provide the supporting facts, they are still effectively recommending discharge. *In re Ohio Patrolmen’s Benevolent Assn*, SERB 99-023 (9-16-99). The fact that a recommendation is submitted for final approval for budgetary and affirmative action considerations does not diminish the authority to effectively recommend where no evidence is presented that the recommendations are rejected by those in higher authority. *County of Passaic*, 20 NJPER ¶ 25066 (NJ PERC Rep. Dir., 1994); *see also Eastern Greyhound Lines v. NLRB*, 57 L.R.R.M. 2241 (6th Cir. 1964). Thus, the SAS1s effectively recommend discharge.

With regard to discipline, the SAS1s at BCI are authorized in cases involving minor infractions to issue verbal reprimands with notice to the Deputy Director, and to issue written reprimands in consultation with the Deputy Director and with notice to the Deputy Superintendent and BCI Personnel Department. According to the record, four of the twelve SASIs at BCI have actually issued reprimands. Under the Bureau directives, these positions are required to notify or consult before the reprimands are issued. The requirement to notify or consult does not nullify the authority given to the SASIs. The SASIs are not required to obtain approval before they act. It is reasonable for a public employer to have a safeguard at a higher level to ensure that discipline is imposed consistently, whether in a collective bargaining setting or not. The record shows that discipline is rarely needed at BCI. All of the SAS1s do not have to have actually imposed discipline for us to find that this group of employees has exercised that authority. Under these facts, we find that the SAS1s have the authority to discipline, that they have actually exercised that authority, and that they have exercised their independent judgment in doing so as required under *Mahoning*. Thus, the SASIs at BCI discipline employees.

To determine whether the SASIs at BCI responsibly direct public employees, we will look in this case at factors such as assigning cases, counseling employees, preparing performance evaluations with performance action plans, and granting overtime and compensatory time. The SAS1s assign cases to the special agents based on a variety of factors, including past cases worked by an agent, the agent's proximity to the assignment, volume of case work, complexity of the case assignment, investigative experience, ties with local law enforcement, the agent's history with a police department, training, and the unique characteristics of the agent, such as age, appearance, mannerisms, sex, and race.

Unlike the clerical and record-keeping functions being performed in *In re University of Cincinnati*, *supra*, the work of the special agent investigators is not routine. The investigative techniques employed by these investigators necessarily vary from case to

case and from agent.to agent. Most important, unlike the assignment of clerical duties, the assignment of an investigator could risk the life of the agent in a narcotics investigation. Considering all of these factors, we find that the SASIs exercise independent judgment in making case assignments and, by doing so, responsibly direct these employees.

Under BCI's directives, the SASIs are authorized in cases of minor infractions to counsel employees. Nearly all the SAS1 s have counseled employees. The SAS1 s have used counseling as a method for correcting problems, improving performance, and avoiding discipline. Thus, the SAS1 s use corrective counseling as a means to responsibly direct employees.

Performance evaluations, whether for a probationary period or an annual review, are one vehicle for a supervisor to "responsibly direct" or to "effectively recommend" such action. *In re City of Dayton*, SERB 98-004 (2-27-98), *aff'd* sub nom. *Dayton Firefighters Local #136, IAFF v. SERB*, 1998 SERB 4-69 (CP, Franklin 12-1 O-98). Performance action plans provide one form of responsibly directing subordinate employees. The performance action plans need not be limited to employees who demonstrate a need for direction or a route to improvement.

The SASIs at BCI prepare performance evaluations for the special agents they oversee. The performance evaluations in this case, including the action plans, are prepared by the SASIs and are used in discussions with the employee to identify areas where the employee needs to improve and areas where the employee is performing at an acceptable level. Evaluations may be returned with comments agreeing or disagreeing with the SAS1 , but the SAS1 is not required to change evaluations in accordance with the supervisor's view. Even though the SAS1 submits the performance evaluation to other individuals in the chain of command, the record does not indicate that the evaluation is subject to an independent review. *In re Ohio Patrolmen's Benevolent Assn, supra*. All SASIs develop action plans and discuss goal setting with their special agents. Some

develop the plan together; in other situations, the special agent may prepare the action plan and then meet with the SAS1. Neither circumstance diminishes the SAS1's control over the plan. Thus, the SASIs responsibly direct the special agents through the performance action plans.

The SAS1s at BCI approve special agents' leave requests that may or may not be initialed by their supervisors. Those requests then proceed up the chain of command for sign-off. Since the leave requested has been taken by the time the request is completely processed through the chain of command, the requests have never been denied. As a result, the SAS1s exercise more than merely conditional or preliminary approval. Leave requests can be denied by the SAS1s, but such instances are rare. The SAS1s informally work through any leave request problems with the special agents so that leave can be taken as requested. Thus, the SAS1s responsibly direct employees through their approval of leave requests.

The SAS1s at BCI approve the accrual of overtime and compensatory time for the special agents they oversee. They use different methods in making this decision. For example, several SASIs use the "ten hours per agent per week rule" for approving overtime and compensatory time requests. These SASIs do not consult with their supervisor unless the anticipated overtime exceeds ten hours per agent per week. Other SASIs will consult with their supervisors on a case-by-case basis where a large amount of overtime is requested. Thus, the SASIs responsibly direct employees through their approval of overtime and compensatory time requests.

Based upon their discretion in assigning cases, counseling employees, the direction to employees given through the performance evaluations, and approving leave requests, overtime, and compensatory time, the SAS1s at BCI responsibly direct employees. Since the SASIs at BCI effectively recommend discharges and discipline and responsibly direct the employees they oversee, they are supervisors under O.R.C. § 4117.01 (F).

**B. The Two Special Agent Supervisor Is in the Medicaid Fraud Unit Are Supervisors**

Like the SASIs at BCI, the two SASIs in the Medicaid Fraud Unit prepare probationary performance evaluations for the special agents they oversee. At the end of the probationary period, they recommend whether the employee should be retained. These recommendations have been followed. Thus, the SASIs have the authority to effectively recommend discharge.

Like the SASIs at BCI, the SASIs in the Medicaid Fraud Unit prepare annual performance evaluations for the employees they oversee. The Section Chief does not review the evaluations until after the SAS1 has met with the employee. The SAS1s have never been ordered to change an evaluation. Because the SASIs have mostly experienced agents reporting to them, the SAS1s use performance evaluations to convey goals and objectives, and the SAS1's expectations, to the agents. Thus, the SASIs use performance evaluations as a means to responsibly direct employees.

Like the SASIs at BCI, the SASIs in the Medicaid Fraud Unit have counseled employees about expectations, but no further acts have been necessary to correct the problem. Thus, the SASIs use corrective counseling as a means to responsibly direct employees.

The SAS1s in the Medicaid Fraud Unit do not sit on the intake committee that meets to open and assign cases to the teams. Cases are assigned to a particular team and then are transferred to the appropriate SAS1. The SAS1 decides which agent will be assigned a particular case based upon the type and complexity of the cases being worked by the agent. The SAS2 never interferes with the case assignments. Thus, the SAS1s use case assignments as a means to responsibly direct employees.



Based upon their discretion in assigning cases, counseling employees, and the direction to employees through the performance evaluations, the SAS1s responsibly direct employees. Since the SAS1s in the Medicaid Fraud Unit effectively recommend discharge through performance evaluations and responsibly direct the employees they oversee, they are supervisors under O.R.C. § 4117.01 (F).

C. **The Special Agent Supervisor 2 in the Medicaid Fraud Unit Is a Supervisor**

The SAS2 in the Medicaid Fraud Unit has participated in the review and recommendation for retention of fifteen probationary employees. In fourteen cases, the SAS2 has recommended that the employee be retained. In one case, the SAS2 has recommended that a probationary employee be terminated for theft. In all cases, these recommendations have been followed. Thus, the SAS2 effectively recommends discharge.

With regard to discipline, the SAS2 in the Medicaid Fraud Unit has recommended suspensions after consulting with his supervisor; the SAS2's recommendations have been followed. The SAS2 has also recommended suspension when Human Resources recommended termination; again, the SAS2's recommendation has been followed. The SAS2 has issued 8 to 10 verbal or written reprimands. The SAS2 has consulted with the Section Chief before issuing the discipline, except in two instances. But the record does not indicate that the consultation was required or that it constituted a new, plenary review. Thus, the SAS2 has exercised the authority to discipline and has effectively recommended discipline.

The SAS2 in the Medicaid Fraud Unit has counseled employees, but no further acts have been necessary to correct problems. Although the SAS2 has consulted with the Section Chief before some of the counselings, the SAS2 has not been required to consult. Thus, the SAS2 use corrective counseling as a means to responsibly direct employees.

The SAS2 in the Medicaid Fraud Unit prepares probationary evaluations for the special agents who report directly. These evaluations include preparing performance action plans to follow for the next year. Thus, the SAS2 uses action plans as a means to responsibly direct employees.

The SAS2 in the Medicaid Fraud Unit approves special agents' leave requests. Those requests then proceed up the chain of command for sign-off. Since the leave requested has been taken by the time the request is completely processed through the chain of command, the requests have never been denied. As a result, the SAS2 exercises more than merely conditional or preliminary approval. Thus, the SAS2 in the Medicaid Fraud Unit responsibly directs employees through the approval of leave requests.

The SAS2 in the Medicaid Fraud Unit approves the accrual of overtime and compensatory time for the special agents who report directly to the SAS2. The SAS2 is not required to consult with the Section Chief before approving the request. Thus, the SAS2 responsibly directs employees through the approval of overtime and compensatory time requests.

Based upon the discretion in approving leave requests, accrual of overtime and compensatory time, and the direction to employees given through the performance action plans, the SAS2 responsibly directs employees. Since the SAS2 in the Medicaid Fraud Unit effectively recommends discharges and responsibly directs employees, the SAS2 is a supervisor under O.R.C. § 4117.01 (F).

**D. The Criminal Investigations Administrator Position Is Not in the Proposed Bargaining Unit**

The proposed bargaining unit is described in the Request for Recognition filed by the Employee Organization on March 15, 1999. Ohio Administrative Code Rule 4117-3-

01(A)(2) requires that a Request for Recognition must contain “a description of the bargaining unit which the employee organization proposes to represent, specifying inclusions and exclusions and the approximate number of employees in the unit.” The Employee Organization is specifying whom it wants in the bargaining unit. It fills out the Request for Recognition. The Employee Organization’s description does not include the Criminal Investigations Administrator position. Since this position was not included within the description of the bargaining unit, it is not part of the bargaining unit before us.

#### **IV. CONCLUSIONS OF LAW**

1. The Ohio Attorney General is a “public employer” within the meaning of O.R.C. § 4117.01 (B).
2. The Fraternal Order of Police, Ohio Labor Council, Inc., is an “employee organization” within the meaning of O.R.C. § 4117.01 (D).
3. The Special Agent Supervisor Is at BCI are supervisors within the meaning of O.R.C. § 4117.01 (F) and, therefore, are not public employees within the meaning of O.R.C. § 4117.01 (C).
4. The Special Agent Supervisor 1 s in the Medicaid Fraud Unit are supervisors within the meaning of O.R.C. § 4117.01 (F) and, therefore, are not public employees within the meaning of O.R.C. § 4117.01 (C).
5. The Special Agent Supervisor 2 in the Medicaid Fraud Unit is a supervisor within the meaning of O.R.C. § 4117.01 (F) and, therefore, is not a public employee within the meaning of O.R.C. § 4117.01 (C).
6. The Criminal Justice Administrator position is not included in the proposed bargaining unit.

#### **IV. DETERMINATION**

For the reasons above, we find that the Special Agent Supervisor 1 positions in the Bureau of Criminal Identification and Investigation and the Special Agent Supervisor 1

and 2 positions in the Medicaid Fraud Unit are supervisors, pursuant to O.R.C. § 4117.01 (F), and are not public employees under O.R.C. § 4117.01 (C). We also find that the Criminal Justice Administrator position is not included in the bargaining-unit description for the proposed unit. Consequently, the Request for Recognition is hereby dismissed.

Gillmor, Vice Chairman, and Verich, Board Member, concur.