

pending the outcome of litigation pending within the Rhode Island courts. On March 9, 2009, with the litigation having been concluded, the parties requested that this matter be re-activated. Both parties submitted briefs on April 15, 2009.

FACTUAL BACKGROUND

On or about July 5, 2001, the Rhode Island General Assembly reorganized the structure of the Rhode Island Sheriffs and the Rhode Island State Marshalls, by creating a single Division of Sheriffs, within the State of Rhode Island, Department of Administration. See R.I.G.L. 42-11-21. At the time of this reorganization, the Deputy Sheriffs and the Rhode Island Deputy State Marshalls were represented by different labor organizations. The Deputy Sheriffs were represented by RI Council 94, AFSCME, AFL-CIO, (Board Case No. EE-3418) and the Deputy Marshalls were represented by the International Brotherhood of Police Officers. (Board Case No. EE-3599) After the reorganization of these entities, a single bargaining representative needed to be selected. On September 5, 2001, the newly combined organization selected RI Council 94, AFSCME, AFL-CIO as its collective bargaining representative.

Presently, Colonel Gary Dias, Executive High Sheriff, leads the Division of Sheriffs. He has held that position since June 2003. Pursuant to a memorandum issued in July 2006, the second-in-command within the Division of Sheriffs is the Deputy Sheriff Major, Michael Viveiros. In addition to the Executive High Sheriff and the Deputy Sheriff Major, the Division also employs three (3) Chief Deputy Sheriffs: James Grant, Joann Macari and Daniel Silva. In addition to this administrative staffing unit, the Division also employs 159 Deputy Sheriffs, all of whom are represented by RI Council 94, AFSCME, AFL-CIO, as set forth supra.

SUMMARY OF TESTIMONY

The Union presented the testimony of all three (3) Chief Deputy Sheriffs: James Grant, Joann Macari and Daniel Silva. Mr. Grant testified at the formal hearing held on May 24, 2007. James testified that prior to the 2001 legislation, he was employed as a Deputy Marshall. After the legislative action, and prior to becoming a Chief Deputy in December 2001, RI Council 94, AFSCME, AFL-CIO represented Mr. Grant, for collective bargaining purposes. (TR. 5/24/07, p.13)

When he was appointed to the position of Chief Deputy, Mr. Grant was not provided with any job description, nor did he receive one until July 2006. From the time of his appointment in 2001, until July 2006, Mr. Grant reported to the Executive High Sheriff. In July 2006, Executive High Sheriff Dias reorganized the Department and created a "second-in-command" position, which was filled by Major Vivieros, to whom Mr. Grant and the other Chief Deputies report.

Mr. Grant testified that he is in charge of radio communications, motor vehicles, vehicle maintenance, and coordinating the daily activities of the vehicle maintenance officer with the Inmate Custody and Control Transport supervisors. (TR. 5/24/07, p.17) Mr. Grant also successfully co-authored a grant request for communications equipment in 2004. Mr. Grant testified that he does not have any authority to: hire, fire, transfer, lay-off, suspend, recall, promote, discharge employees or to recommend such actions. (TR. 5/24/07, p. 19-21) Mr. Grant does have the authority to occasionally request the vehicle maintenance officer to assist Mr. Grant in picking up a new vehicle. (TR. 5/24/07, p. 21) Mr. Grant does not have the authority to, nor has he ever adjusted an employee grievance. (TR. 5/24/07, p. 22) Mr. Grant has never investigated any personnel complaints, nor has he had any input to the Department's policy making. (TR. 5/24/07, pgs. 22-23) Mr. Grant also testified that he has never recommended discipline. (TR. 5/24/07, p. 23)

On cross examination, Mr. Grant stated that he had been disgusted with the behavior of a particular employee who had failed a cocaine test on two occasions, but that he has not specifically recommended discipline to Colonel Dias. (TR. 5/24/07, pgs. 24-25) Mr. Grant also acknowledged having met with Attorney John Breguet to discuss the situation with this employee. (TR. 5/24/07, p. 28) Mr. Grant also recalls discussing the status of a lieutenant, but adamantly denied having told Mr. Breguet that a reference to discipline be taken out of that employee's service jacket. Mr. Grant stated that the Union had requested this action and that Colonel Dias had asked his opinion on whether the Colonel should grant the Union's request. (TR. 5/24/07, p. 29-30) Mr. Grant also emphatically denied ever having ordered any employee to serve overtime. He

stated that when problems arise with making sure there are enough deputies in a car (two (2) are required) on occasion, both he and Colonel Dias have stepped in and filled a vacancy. (TR. 5/24/07, p. 35)

Ms. Macari also testified at the May 2007 hearing. She was appointed to her position in December 2001 and prior to that had been employed as a Deputy Sheriff. Joann also testified that from December 2001 through July 2006, she did not have a formal written job description. (TR. 5/24/07, p. 41) Ms. Macari testified that she is responsible for monitoring statewide attendance records, overseeing the injured-on-duty records and long-term leave process, coordinating hospital detail/duty officer lists, formulate and maintain a statewide vacation list, and perform special projects as required. (TR. 5/24/07, p. 42) In her capacity as the monitor for statewide vacation, Ms. Macari gathers data from various offices around the state, but she does not have the authority to grant or deny requests for vacation. (TR. 5/24/07, p. 43) Ms. Macari testified that she does not know what might be done with the data that is collected. (TR. 5/24/07, p. 44) As for the injured-on-duty (IOD) personnel, Ms. Macari monitors whether the paperwork is up to date, but has no authority to grant or deny IOD leave. (TR. 5/24/07, p. 46) Ms. Macari also testified that sheriffs are required to monitor criminal defendants when they are transported to, or are being treated in, a hospital. (TR. 5/24/07, p. 47) Joann indicated that during regular working hours, the officer in charge of the complement would assign Deputies to hospital detail and after hours, the duty officer makes the assignment. (TR. 5/24/07, p. 47) As for the vacation information, Ms. Macari's office once again serves as the repository for information that is gathered from across the state. (TR. 5/24/07, p. 48) In February 2007, at Colonel Dias' request, Ms. Macari went to the Washington County Courthouse to oversee the complement to see what issues and problems there were. She testified that there were some problems with the writ service and the inappropriate scheduling or use of vacation time. She prepared a memo of her findings for Colonel Dias. In that memo, she recommended that a Deputy

Sheriff be transferred out of Washington County. (TR. 5/24/07, p. 53)¹ Ms. Macari testified extensively on her lack of ability to hire, fire, transfer, lay-off, suspend, recall, promote, discharge employees or to recommend such actions. (TR. 5/24/07, pgs. 53-60)

On cross-examination, Ms. Macari acknowledged that on occasion, Colonel Dias has forwarded draft policies to her for her input. (TR. 5/24/07, p. 60) Ms. Macari indicated that while working on the Washington County assignment, she recommended that the writ service be terminated for a while and that Colonel Dias accepted her recommendation. (TR. 5/24/07, p. 62) Ms. Macari indicated that she then suspended a person from the "writ service squad." (TR. 5/24/07, p. 63-64) Ms. Macari also testified that on occasion, she will be called into District Court to oversee operations. In the event that a Captain is not available, Ms. Macari has the authority to make scheduling and personnel assignment decisions, not only within the District Court, but also the other Courts housed within the Garrahy Building. (TR. 5/24/07, p. 66)

On re-direct examination, Ms. Macari testified that her review of the Washington County issues was the only time that she has performed any such work for Colonel Dias. In addition, she clarified that she did not formulate or change the procedures for the writ service; she made a recommendation concerning an individual employee who was performing that service. (TR. 5/24/07, p. 69) In addition, Ms. Macari testified that she has no role in formulating policy for the use of either sick time or vacation time. (TR. 5/24/07, p. 70) Ms. Macari further testified that she did make a recommendation to Colonel Dias to change the time of day by which an employee must report in if he or she is going to be out sick and that the recommendation was implemented statewide. (TR. 5/24/07, p. 90)

The Union's third witness, Daniel Silva, testified at the hearing on September 25, 2007. He stated that he was hired into state service as a Chief Deputy Sheriff in December 2001. At that time, he was not provided with a job description. In July 2006, he received the memo which stated his job duties as

¹ Ms. Macari was unable to state whether any action was ever taken on her recommendation because the individual Deputy went out on administrative leave. (TR. 5/24/07, p. 53)

follows: "investigate personnel complaints, assist with statewide purchasing, maintain records relating to unclaimed property, maintain an accurate accounting of inmate appearance information and perform special projects as required." (TR. 9/25/07, p. 100) During the course of his employment, Chief Deputy Silva has investigated numerous personnel complaints by engaging in a fact-finding process and then reporting the results to Colonel Dias. The complaints come from a variety of sources including members of the public and other employees. (TR. 9/25/07, p. 108) Mr. Silva's reports to Colonel Dias are ordinarily in a written format, but sometimes, he may simply discuss his findings with the Colonel.

Mr. Silva testified that he has no authority to hire, fire, transfer, suspend, lay-off, recall, promote or discharge an employee. Mr. Silva has had the occasion, when working as the officer in charge at Garrahy, to assign work to personnel, in accordance with seniority provisions. (TR. 9/25/07, p. 103)

At the third hearing on November 15, 2007, the Employer presented the testimony of Colonel Gary Dias, the Executive High Sheriff. Colonel Dias testified that he is not the "appointing authority" for his Division, but that he provides oversight in the day to day operations of the Division. In the Colonel's absence, Major Viveiros serves as the officer in charge of the Division. (TR. 11/15/07 p. 119).

The Colonel testified that after discussions with the Director of Administration and the Assistant Personnel Directors, they decided to re-align the work of the Chief Deputy Sheriffs to be far more administrative in nature than previously. (TR. 11/15/07, p. 120) Colonel Dias confirmed that the Chief Deputy Sheriffs all had specific areas of responsibility and that they can contact either Major Viveiros or the Colonel with any issues. Colonel Dias also testified that he authorized Chief Deputy Macari to suspend a deputy from the Washington County writ squad. (TR. 11/15/07, p. 127)

Colonel Dias also confirmed that he has directed Chief Deputy Sheriff Silva to not include recommendations in his written investigative reports to Colonel Dias, who prefers to make the recommendation himself to the Director of Administration. (TR. 11/15/07, p. 130) Finally, Colonel Dias confirmed that Major

Vivieros is being treated as a member of Council 94 and enjoys all the benefits afforded to members of that Union.²

DISCUSSION

At the commencement of this case, it appeared that the Employer was objecting to the inclusion of the Deputy Chief Sheriffs on the grounds that they were supervisory employees. However, as the case progressed, the objection shifted to claims that the employees were excludable as either confidential, managerial, or administrative officials.

The Employer objects to the within petition for representation and argues that the three (3) Chief Deputy Sheriffs are either “managerial” employees, “administrative officials” or “confidential” employees, thus rendering them unable to participate in collective bargaining. The Employer argues that an employee, within the context of labor relations matters, is either one of “us” or one of “them”; that is, either aligned with management or aligned with labor; and that even if the Deputy Chief Sheriffs are placed into a different bargaining unit than the Deputy Sheriffs, that the Chiefs will lose the managerial allegiance and confidential trust of the Employer.

“Managerial” employees are employees who “formulate and effectuate management policies by expressing and making operative the decisions of their employers.” Fraternal Order of Police, Westerly Lodge 10 v. Town of Westerly, 659 A.2d 1104,1107 (1995); State v. Local 2883 AFSCME, 463 A.2d 186, 190 (1983) citing and quoting in part NLRB v. Bell Aerospace Co., 416 U.S. 267, 278 (1974). Managerial employees must exercise discretion within or even independently of established employer policy and must be aligned with management. N.L.R.B. v Yeshiva University, 444 U.S. 672 (1980). An employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that control or implement employer policy. Id. “Employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some

² The Board notes that how the Major came to be a member of Council 94 is unclear, but that the Board did not previously make a finding that the position belonged in a bargaining unit.

divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." Id at 690.

In this case, the Board does not find that the evidence can support a finding that any of the three (3) Chief Deputy Sheriffs "formulate and effectuate management policies by expressing and making operative the decisions of their employers." The most that can be said about policy making within this Division is that it comes from Colonel Dias who occasionally seeks some input or feedback on proposed policies. In fact, it was clear from the testimony, that none of the Chief Deputy Sheriffs has the authority to act independently of the Colonel to take "discretionary actions that control or implement employer policy." In fact, the one instance cited when Deputy Chief Macari may have had the opportunity to engage in such action, the evidence established that she was in very regular verbal contact with Colonel Dias about the problems. He authorized when action could be taken. This was clearly not a situation where Macari was dispatched to find out what the problems were and fix them. Other than this one special project, it does not seem that Macari is responsible for much, other than gathering data, which may or may not be used. In Chief Deputy Sheriff Silva's case, he is not even permitted to make formal recommendation as to actions which might be appropriate upon his conclusion of an investigation into employee misconduct. Colonel Dias reserves that right solely unto himself, to recommend to his supervisor, the Director of Administration. The Employer argues that the fact that Silva is performing investigations of employees means that he is "aligned with management" which is entitled to his undivided loyalty. The Employer further argues that once management makes a decision or takes any action regarding the results of Chief Silva's recommendations, the Unions will "naturally and rightly be involved in the resolution of the matter or any inevitable challenge to any adverse [employment] action."

The Employer's own argument evidences the fact that Chief Deputy Sheriff Silva has no role in determining disciplinary or employment actions. Furthermore, the rank and file sheriffs are in Council 94, *not* the petitioning

Union, IBPO. Even if Chief Deputy Silva had the authority to make a recommendation to the “appointing authority” concerning discipline or even discharge, he has no role in actually implementing the same. So, where is the inherent conflict with his duties to conduct investigations of employee complaints and his engaging in collective bargaining for the terms and conditions of his own employment? Clearly, these three (3) Chief Deputy Chief Sheriffs are on a pretty tight leash when it comes to their functions. Colonel Dias is the officer in charge, who has a second in command to whom these three also report. As noted previously, while the record is not clear as to how the “second in command” came to be in a Union, his membership, therein, appears not to be creating any difficulties. How is it possible that the three (3) Chief Deputy Sheriffs are more tightly “aligned” with management than their immediate supervisor, Major Viveiros? Clearly, the Chief Deputy Sheriffs do not begin to approach the level of managerial employees and they will not be excluded from collective bargaining on this basis.

Confidential employees:

In Barrington School Committee v. Rhode Island State Labor Relations Board, 694 A.2d 1185 (R.I. 1992) the Rhode Island Supreme Court considered the question of which employees qualify as “confidential” and held:

“Two categories of employees are recognized as confidential under the test and are therefore excluded from collective bargaining. The first category comprises those confidential employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. ... The second category consists of employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. (Barrington at p. 1136, quoting NLRB v. Hendricks County Rural Electric Membership Corp, 454 U.S. 170 at 189)

The definition of “confidential” for collective bargaining purposes, as set forth in Barrington, is purposefully and narrowly constricted to two (2) types of employees, because “a more expansive application of the exclusionary rule would deprive a great number of employees, in an unwarranted fashion, of the statutory right to collectively bargain”. Barrington at 1136, referencing, Note, “The Labor-Nexus” Limitation on the Exclusion of Confidential Employees -

NLRB v. Hendricks County Rural Electric Membership Corp., 16 Ga. L. Rev. 745, 754 (1982).

Thus, the word “confidential” within the scope of labor relations has a very specific legal meaning which departs significantly from the routine dictionary definition of confidential (treated with confidence, private, and secret). In all employment situations, there are countless types of information that are considered “private” or “secret”, depending upon the relationship of the party seeking the information to the person who has control of the information. For instance, most employee personnel information is private or secret (ie “confidential”) to the individual employee and designated members of a department of human resources. This does not mean that clerks or secretaries in human relations or personnel departments are ineligible for collective bargaining. Further, employees with access to investigative pre-employment reports and reports of disciplinary actions including written reprimands do not meet the definition of “confidential” for collective bargaining purposes. (See EE 3636 Bristol County Water Authority and Teamsters, Local 251)

In this case, two (2) of the three (3) Chief Deputy Sheriffs have engaged in review of actions of other personnel. Chief Deputy Macari’s role, in this regard, has been limited to her time in Washington County, which was closely monitored by Colonel Dias, as previously discussed. Chief Deputy Grant has never engaged in any review of other personnel. Chief Deputy Silva regularly engages in fact finding and then reports those facts to Colonel Dias, who then makes his own recommendations to the Director of Administration. Since Silva is not allowed to make a recommendation, how can he be considered to be acting in a “confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations?” It is clear from Colonel Dias’ testimony, that it was established that even he did not have the authority to unilaterally make all types of personnel decisions, because he is not the appointing authority. Thus, it is not clear that the Colonel himself has any authority to “formulate, determine and effectuate management policies in the field of labor relations.” Therefore, the Board finds that these Chief Deputy Sheriffs do

not even come close to meeting the first prong of the labor-nexus test and are not considered confidential, thereunder.

As for the second prong, there was only one (1) Chief Deputy Sheriff that who has had any access to potentially confidential information concerning anticipated changes which may result from collective bargaining negotiations. However, the information which he had simply had to do with the “costing out” of proposals with RI Council 94, AFSCME, AFL-CIO on a prior contract. This Board does not believe that occasionally engaging in the mathematical exercise of “costing out” a proposal comes anywhere close to “regularly having access to confidential information concerning anticipated changes which may result from collective bargaining negotiations” and therefore, none of the Chief Deputy Sheriffs are excludable under the second prong of the labor-nexus test.

FINDINGS OF FACT

- 1) The Respondent is an “Employer” within the meaning of the Rhode Island State Labor Relations Act.
- 2) The Petitioner Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection and as such is a “Labor Organization” within the meaning of the Rhode Island State Labor Relations Act.
- 3) On or about July 5, 2001, the Rhode Island General Assembly reorganized the structure of the Rhode Island Sheriffs and the Rhode Island State Marshalls, by creating a single Division of Sheriffs, within the State of Rhode Island, Department of Administration.
- 4) There are approximately 159 Deputy Sheriffs in the Division, all of whom are represented for collective bargaining purposes by RI Council 94, AFSCME, AFL-CIO.
- 5) The Division is led by Colonel Gary Dias, who reports to a Deputy Director of Personnel, within the Department of Administration. Below Colonel Dias in the Division’s organizational chart is Major Viveiros who serves as “second-in-command” and takes Colonel Dias’ place when he is out of work.

- 6) There are three (3) Chief Deputy Sheriffs: James Grant, Joann Macari and Daniel Silva, all of whom are assigned a specific area of administrative functions.
- 7) Chief Deputy Grant's responsibilities include radio communications, motor vehicles, vehicle maintenance, and coordinating the daily activities of the vehicle maintenance officer with the Inmate Custody and Control Transport supervisors. Mr. Grant has no authority to hire, fire, transfer, lay-off, suspend, recall, promote, discharge employees or to recommend such actions. Mr. Grant does not have the authority to, nor has he ever adjusted an employee grievance. Mr. Grant has never investigated any personnel complaints, nor has he had any input to the Department's policy making. Mr. Grant also has never recommended discipline, although he has acknowledged discussing his disgust concerning a co-worker's drug use, with Colonel Dias.
- 8) Chief Deputy Macari's responsibilities include monitoring statewide attendance records, overseeing the injured-on-duty records and long-term leave process, coordinating hospital detail/duty officer lists, formulate and maintain a statewide vacation list and perform special projects as required. Ms. Macari gathers data from various offices around the state, but she does not have the authority to grant or deny requests for vacation. Ms. Macari has also completed a special project which consisted of visiting and reviewing personnel in Washington County and making recommendations to the Colonel. Ms. Macari has no authority to hire, fire, transfer, lay-off, suspend, recall, promote, discharge employees or to recommend such actions. Ms. Macari has occasionally reviewed draft policies at the request of Colonel Dias and did recommend a policy change concerning "call-in" time, which was adopted. Ms. Macari has the authority to make scheduling and personnel assignment decisions, not only within the District Court, but also the other courts housed within the Garrahy building, when a Captain is not available.
- 9) Chief Deputy Sheriff Daniel Silva is responsible to: "investigate personnel complaints, assist with statewide purchasing, maintain records relating to unclaimed property, maintain an accurate accounting of inmate appearance

information and perform special projects as required.” Chief Deputy Silva has investigated numerous personnel complaints by engaging in a fact-finding process and then reporting the results to Colonel Dias. The complaints come from a variety of sources including members of the public and other employees. Mr. Silva’s reports to Colonel Dias are ordinarily in a written format, but sometimes, he may simply discuss his findings with the Colonel. Colonel Dias does not permit Mr. Silva to issue recommendations concerning the results of his fact-finding. Mr. Silva has no authority to hire, fire, transfer, suspend, lay-off, recall, promote or discharge an employee. Mr. Silva has had the occasion, when working as the officer in charge at the Garrahy Courthouse, to assign work to personnel, in accordance with existing seniority provisions.

- 10) The Chief Deputy Sheriffs seek organization under a different Union than that of the Deputy Sheriffs.

CONCLUSIONS OF LAW

- 1) The position of Deputy Chief Sheriff is neither confidential nor managerial as those terms are defined by the Board’s Rules and Regulations or by case law and as such, the position of Deputy Chief Sheriff is eligible to participate in collective bargaining.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the Rhode Island State Labor Relations Board by the Rhode Island Labor Relations Act, it is hereby:

DIRECTED that an election by secret ballot shall be conducted within sixty (60) days hereafter, under the supervision of the Board or its agents, at a time, place and during hours to be fixed by the Board, among the Chief Deputy Sheriffs employed by the State of Rhode Island, Department of Administration, Division of Sheriffs who were employed on January 11, 2007 to determine whether they wish to be represented, for the purposes of collective bargaining, as provided for in the Act, by International Brothers of Police Officers, or by no labor organization.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

RHODE ISLAND STATE LABOR
RELATIONS BOARD

-AND-

STATE OF RI – DEPARTMENT OF
ADMINISTRATION, DIVISION OF
SHERIFFS

CASE NO: EE-3694

NOTICE OF RIGHT TO APPEAL AGENCY DECISION
PURSUANT TO R.I.G.L. 42-35-12

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of Case No. EE-3694 dated **September 24, 2009**, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **September 24, 2009**.

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-29.

Dated: September 24, 2009

By: Robyn H. Golden
Robyn H. Golden, Administrator

RHODE ISLAND STATE LABOR RELATIONS BOARD

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ENTERED AS AN ORDER OF THE
RHODE ISLAND STATE LABOR RELATIONS BOARD

Dated: SEPTEMBER 24, 2009

By: Robyn H. Golden
ROBYN H. GOLDEN, ACTING ADMINISTRATOR