

State of Maryland  
State Labor Relations Board

In the matter of:	)	
State Law Enforcement Officers	)	
Labor Alliance,	)	
	)	
Petitioner,	)	
	)	SLRB ULP Case No. UC 2016-02
v.	)	
	)	
Maryland State Comptroller,	)	
	)	
Respondent.	)	

**Decision and Order**

On June 13, 2018, Administrative Law Judge Emily Daneker issued the attached decision. No exceptions to the decision were filed.

The State Labor Relations Board (“SLRB”) has considered the decision and the record and has decided to adopt the judge’s Proposed Decision.<sup>1</sup>

**Order**

The Proposed Decision of the Administrative Law Judge is adopted.

Issue Date: June 7, 2019

Annapolis, Maryland

**For The State Labor Relations Board:**



Richard A. Steyer, Chair

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<sup>1</sup> The Proposed Decision is consistent with the analysis of the definition of what constitutes a “confidential employee” as set forth in this Board’s decision in State Law Enforcement Officers Labor Alliance v. Maryland State Police, SLRB UC 2016-03.



Mark A. Gardner, Vice-Chair



LeRoy A. Wilkison, Member



Doris S. Mason, Member



Nancy J. Courson, Member

#### **APPEAL RIGHTS**

Any party aggrieved by this action of the SLRB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act—Contested Cases), and Maryland Rules CIR CT Rule 7-201 *et seq.* (Judicial Review of Administrative Agency Decisions).

STATE LAW ENFORCEMENT	*	BEFORE EMILY DANEKER,
OFFICERS LABOR ALLIANCE,	*	AN ADMINISTRATIVE LAW JUDGE
PETITIONER,	*	OF THE MARYLAND
v.	*	OFFICE OF ADMINISTRATIVE HEARINGS
MARYLAND STATE	*	OAH CASE NO.: SLRB-X-02-18-03703
COMPTROLLER,	*	
RESPONDENT	*	

\* \* \* \* \*

**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
PROPOSED ORDER  
RIGHT TO FILE EXCEPTIONS

**STATEMENT OF THE CASE**

The State Law Enforcement Officers Labor Alliance (SLEOLA) was created in approximately 1997 and is the collective bargaining unit that represents State law enforcement officers. The Office of the Comptroller (Comptroller) maintains a Field Enforcement Division (FED) that is charged with enforcing the revenue laws of Maryland relating to alcohol beverages, tobacco products, motor fuels, sales and use tax, and slot machines. In 2013, collective bargaining rights were permitted for certain employees of the Comptroller and by way of a December 17, 2013 election, FED Agents became part of the SLEOLA bargaining unit. Comptroller Field Enforcement Agent Supervisors (Agent Supervisors) were excluded from SLEOLA based on their classification.

On or about June 2, 2016, SLEOLA filed a Petition for Clarification/Contest of a Unit Designation (Petition) with the Maryland State Labor Relations Board (SLRB) asserting that the position of Agent Supervisor was improperly classified as a supervisory position and, thus, improperly excluded from collective bargaining rights and requesting that Agent Supervisors be included within the collective bargaining unit.<sup>1</sup> On June 29, 2016, the Office of the Comptroller (Comptroller) filed a response to the Petition, requesting the Petition be dismissed and asserting that the position was properly excluded under an exemption for supervisory and/or confidential employees.

On December 19, 2016, the Executive Director of the SLRB determined that the SLRB has jurisdiction over this matter under sections 3-102 and 3-205(c) of the State Personnel and Pensions article (SPP Article) of the Annotated Code of Maryland and “request[ed] that the SLRB consider the petition and response filed, and determine whether it would like to dismiss the matter or hold a hearing (or delegate to the Office of Administrative Hearings [(OAH)]).” *See* COMAR 14.32.01.03A. On January 29, 2018, pursuant to COMAR 14.32.01.03C(3) and the Contested Case Hearing Agreement/Contract between the OAH and the SLRB, the SLRB delegated this matter to the OAH for a hearing and to render proposed findings of fact and proposed conclusions of law.

On May 8, 2018, I held the hearing at the OAH in Hunt Valley, Maryland. Brian L. Oliner, Assistant Attorney General, represented the Comptroller. Abigail V. Carter, Esquire, and April Pullium, Esquire, represented SLEOLA.

The procedure in this case is governed by the contested case provisions of the Administrative Procedures Act, the General Practice and Hearing Procedures of the SLRB, and

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<sup>1</sup> *See* Code of Maryland Regulations (COMAR) 14.32.03.05A(1)(b).

the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 to 10-226 (2014 & Supp. 2017); COMAR 14.32.01 and .02; COMAR 28.02.01.

### ISSUES

1. Whether Agent Supervisors are supervisory and/or confidential employees, pursuant to section 3-102(b)(11) of the SPP Article, COMAR 14.32.03.05C, and Executive Order 01.01.1996.13;<sup>2</sup> and, therefore,

2. Whether Agent Supervisors must be excluded from the bargaining unit represented by SLEOLA.

### SUMMARY OF THE EVIDENCE

#### Exhibits

Along with its January 29, 2018 delegation letter, the SLRB forwarded the record established before it. I incorporated those materials into the record as follows:

- Executive Director's Determination of Jurisdiction, dated December 19, 2016
- Comptroller's Response to the Petition, dated June 29, 2016, with attachments
- Petition, dated June 2, 2016, with attachments

The Comptroller offered the following exhibits, which were admitted into the evidentiary record:

- Comp. Ex. 1 - Performance Planning & Evaluation Program (PEP) Guidelines & Instructions, revised October 14, 2010
- Comp. Ex. 2 - FED Procedures Manual excerpts, effective date September 8, 2008
- Comp. Ex. 3 - Position Description for FED Agent II, undated
- Comp. Ex. 4 - Position Description for Agent Supervisor, undated

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<sup>2</sup> Set forth at COMAR 01.01.1996.13.

Comp. Ex. 5 - Position Description for Agent In Charge/Assistant State Comptroller III, undated

Comp. Ex. 7<sup>3</sup> - FED Organizational Chart, undated

SLEOLA offered the following exhibits, which were admitted into the evidentiary record:<sup>4</sup>

SLEOLA Ex. 4 - Performance evaluation for William Collier, dated June 27, 2017

SLEOLA Ex. 5 - Performance evaluation for unidentified Agent, dated December 14, 2017

### Testimony

The Comptroller presented testimony from the following FED employees: William George, Agent In Charge; Ronald Gallant, Deputy Director; and, Jeffrey Kelly, Director.

SLEOLA presented testimony from Jimmy Dulay, President of SLEOLA,<sup>5</sup> and William Collier, Agent Supervisor.

### **PROPOSED FINDINGS OF FACT**

I find the following facts by a preponderance of the evidence:

1. Within the FED, the position of Agent Supervisor is a first-line supervisory position, meaning it is the first level of supervision over the Agents in a particular unit who perform the day-to-day inspections and investigations.<sup>6</sup>
2. Agent Supervisors are sworn law enforcement officers and must be available to work in the field as-needed for enforcement assignments. However, Agent Supervisors regularly report to the Comptroller's offices in Annapolis, where each has an assigned cubicle, rather than to the field.

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<sup>3</sup> The Comptroller's exhibits were premarked, and it did not offer or use its exhibit six at the hearing.

<sup>4</sup> SLEOLA premarked its exhibits; only exhibits four and five were used at the hearing.

<sup>5</sup> Mr. Dulay participated in the hearing in his capacity as President of SLEOLA, but he is also a First Sergeant with the Maryland State Police.

<sup>6</sup> The chain of command for the FED includes, from the top down: the Director of the FED, the Deputy Director of the FED, the Agent In Charge of the Enforcement Bureau, the Agent Supervisors, and the Agents.

3. On a regular basis, an Agent Supervisor receives assignments from the Agent In Charge and distributes those assignments to his assigned Agents; reviews the work-product of assigned Agents; knows the daily work activities of assigned Agents; approves leave requests; builds morale among Agents; plans and staffs, or assists with planning and staffing special and complex operations; coordinates operations with other Agent Supervisors and other agencies; ensures productivity goals for the number of inspections are being met; coordinates the submission of documents and appearance of Agents for court proceedings; identifies problems that require resolution or additional training; and recommends items for procurement.

4. An Agent Supervisor is not able to layoff or recall an Agent and does not have authority to recommend such action.

5. An Agent Supervisor cannot transfer an Agent, though an Agent Supervisor can recommend the transfer of an Agent.

6. An Agent Supervisor cannot suspend an Agent's employment. An Agent Supervisor can, in limited circumstances, suspend an Agent's police powers, which requires review within 24-hours by the appointing authority and involves no loss of pay or benefits to the Agent.

7. An Agent Supervisor cannot discharge an Agent.

8. An Agent Supervisor prepares performance evaluations (PEP) for assigned Agents; the PEP is subsequently subject to multiple levels of review and approval before the Agent Supervisor presents it to the Agent. If an Agent's review is in the "unsatisfactory" category, the Agent is put on a performance improvement plan (PIP); the Agent Supervisor identifies the areas in which improvement is needed and thereafter evaluates whether the PIP was fulfilled by the Agent. If the Agent does not comply with the PIP, the Agent is terminated as a matter of course.

9. An Agent Supervisor conducts factual misconduct investigations that could result in a decision, higher up the chain of command, to suspend or discharge an Agent. An Agent Supervisor does not have authority to undertake such an investigation without approval or assignment from either the Agent In Charge or the Deputy Director of the FED. Upon completion of the investigation, the Agent Supervisor makes a report of his factual findings. The Agent Supervisor does not recommend discipline, but could be asked for his opinion on the imposition of such discipline.

10. An Agent Supervisor cannot hire or promote Agents, but sits on the interview panels that make recommendations as to who to hire or promote. The interview panels employ standardized questions and generate a numerical ranking of the candidates based on each candidate's responses to those questions. Agents may also participate in these interview panels.

11. An Agent Supervisor may be asked to provide input to the Agent In Charge if an Agent is being considered for promotion.

12. The Agent Supervisors are participating in the revision of the FED Procedures Manual. Draft procedural changes may also be shared with Agents for input.

## DISCUSSION

### Applicable Law

Collective bargaining means, at base, good faith negotiations involving an authorized representative on behalf of employees and an employer with the goal of reaching agreement about the terms and conditions of employment. *See* Md. Code Ann., State Pers. & Pens. § 3-101(c) (Supp. 2017); COMAR 01.01.1996.13E. Generally, employees of the State's Executive Branch, including employees of the Comptroller, have the right to join an employee organization and bargain collectively through representatives of their choosing. *See* COMAR 01.01.1996.13; *see also* Md. Code Ann., State Pers. & Pens. § 3-102(a) (Supp. 2017). The Maryland Collective



Bargaining Act (Act) sets out those rights. Md. Code Ann., State Pers. & Pens. §§ 3-101 to 3-602 (2015 and Supp. 2017).<sup>7</sup>

There are, however, certain exceptions to the right to participate in a collective bargaining unit. Among the employees excluded from participation are employees of the Comptroller who are categorized as supervisory or confidential employees. Md. Code Ann., State Pers. & Pens. § 3-102(b)(11); COMAR 01.01.1996.13E(2), (3). A supervisory employee is an employee who has:

authority in the interest of the Executive Branch to hire, transfer, suspend, lay off, recall, promote, discharge other employees, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgement.

COMAR 01.01.1996.13E(6); *see also* Md. Code Ann., State Pers. & Pens. §§ 3-102(b)(11) and 3-206 (providing that the term shall have the meaning specified in regulations adopted by the SLRB on behalf of the Secretary of Budget and Management); COMAR 14.32.03.05C (adopting definition in COMAR 01.01.1996.13). A confidential employee is an employee:

- (a) Who has access to confidential or discretionary information regarding the formulation of policy or procedures;
- (b) Whose functional responsibilities or knowledge concerning employee relations makes the employee's membership in an employee organization incompatible with the employee's duties; or
- (c) Who is the personal secretary of the chief administrative or executive officer of an agency.

COMAR 01.01.1996.13E(3); *see also* Md. Code Ann., State Pers. & Pens. §§ 3-102(b)(11) and 3-206; COMAR 14.32.03.05C.

The burden of proof is on the Comptroller, as the party asserting that the position of Agent Supervisor is within the supervisory and/or confidential employee exceptions to collective bargaining rights. *Cf. N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-12

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<sup>7</sup> Unless otherwise noted, all references to the State Personnel and Pensions article of the Annotated Code are to the 2015 volume, as complemented by the 2017 supplement.

(2001) (“The burden of proving the applicability of the supervisory exception . . . should thus fall on the party asserting it. In addition, it is easier to prove an employee’s authority to exercise [one of the] listed supervisory functions than to disprove an employee’s authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting supervisory status.”); *John Crane, Inc. v. Scribner*, 369 Md. 369, 395 (2002) (stating, in a personal injury case, “it is the usual rule that a party who seeks exemption from a statute has the burden of justifying the exemption”). The standard of proof is a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so,” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). For the reasons set forth below, I find that the Comptroller has not met its burden.

### **Analysis**

#### **A. An Agent Supervisor is not a Supervisory Employee within the meaning of COMAR 01.01.1996.13E.**

As Director Kelly, Mr. Dulay and Agent Supervisor Collier (A.S. Collier) all testified, an Agent Supervisor is a first-line supervisory position over the Agents who perform the day-to-day field work.<sup>8</sup> The testimony the parties elicited from Agent In Charge George (A.I.C. George) demonstrates that many of the duties of an Agent Supervisor are administrative or ministerial. The evidence was that an Agent Supervisor’s daily duties include overseeing “a tremendous amount of paperwork”; compiling documents for case files; overseeing “the constant flow of documentation coming from the District Court” and distributing those documents to the appropriate staff; distributing assignments from the Agent In Charge to the Agents; communicating with the Agent In Charge on a daily basis concerning any staffing and resource needs; communicating and coordinating with other Agent Supervisors; coordinating with other

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<sup>8</sup> There was no evidence that an Agent Supervisor had any level of authority with respect to any other employees.

divisions of the Comptroller and other agencies concerning investigations; and, following up on assignments to ensure the investigation was completed and properly documented in the databases used by the FED. (*See also* Comp. Ex. 4.) To be sure, the evidence presented by the parties also established that an Agent Supervisor’s duties further include assisting in planning and developing complex investigatory operations, identifying issues that may require additional training for Agents, and motivating Agents, (*id.*)—all of which require the exercise of independent judgment by the Agent Supervisor. Nonetheless, that an Agent Supervisor has many ministerial duties is not dispositive of the issue before me, nor is the fact that an Agent Supervisor exercises independent judgment in planning enforcement operations conducted by the FED or training its Agents.

Rather, as noted above, to qualify as a supervisory employee an Agent Supervisor must have authority to either take or effectively to recommend the specified employment and disciplinary actions laid out in COMAR 01.01.1996.13E. As relevant here, the word “authority” means the “power a person has through an official position; governmental power or jurisdiction.” Black’s Law Dictionary 158 (10th ed. 2014); Henry Campbell Black, *A Law Dictionary* 107 (2<sup>nd</sup> ed. 1910) (defining authority, as used in governmental law, as “Legal power; a right to command or to act . . . .”); *see also Stoddard v. State*, 395 Md. 653, 668-69 (2006) (explaining that “[w]hen interpreting a statute, the ‘ordinary, popular understanding of the English language dictates interpretation of its terminology’”; and turning to Black’s Law Dictionary for same).<sup>9</sup> By requiring the specified authorities be exercised by use of independent judgment, the regulation requires the employee to:

“act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” Judgment is not independent . . . if it is “dictated or controlled by detailed instructions, whether set

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<sup>9</sup> *Miller v. Comptroller*, 398 Md. 272, 282 (2007) (“the interpretation of an agency rule is governed by the same principles that govern the interpretation of a Statute.”).

forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.”

*Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 91 (4th Cir. 2015) (National Labor Relations Act (NLRA) case) (quoting *In re Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 692-93 (2006)).

Thus, the regulatory definition of supervisory employee serves to “distinguish ‘true supervisors vested with genuine management prerogatives, [from] employees . . . who are protected by the Act even though they perform minor supervisory duties.’” *Pac Tell Group, Inc.*, 817 F.3d at 91 (4th Cir. 2015) (discussing the NLRA’s definition of “supervisor”). Each of authorities specified in COMAR 01.01.1996.13E(6) is considered below. In sum, the evidence establishes that an Agent Supervisor is not a supervisory employee within the meaning of the regulation.

**1. An Agent Supervisor does not have authority to lay off or recall Agents, or to recommend such action.**

A.I.C. George expressly testified that an Agent Supervisor has no authority to lay off or recall Agents. In his testimony, A.S. Collier confirmed that an Agent Supervisor does not have authority to lay off or recall Agents. No other evidence contradicted this testimony. There was no evidence that an Agent Supervisor has authority to recommend laying off or recalling Agents. Thus, an Agent Supervisor does not meet these parts of the definition of a supervisory employee; the Comptroller conceded as much during its closing argument.

**2. An Agent Supervisor does not have authority to suspend an employee or to recommend suspension.**

A.I.C. George testified that an Agent Supervisor does not have authority to suspend an Agent. However, as Director Kelly, Deputy Director Gallant, and A.S. Collier all noted, in emergency circumstances (such as a shooting or a psychological impairment) an Agent Supervisor has the ability to suspend an Agent’s police powers. There is no resultant loss of pay or benefits for the Agent and the suspension of police powers would be effective for only twenty-

four hours to allow immediate review and action by the appointing authority (the Deputy Director or Director) of the FED. As Director Kelly and Deputy Director Gallant explained, such emergency suspensions are controlled by the Law Enforcement Officers' Bill of Rights (LEOBR). *See* Md. Code Ann., Pub. Safety §§ 3-101(e)(12), 3-112 (2011 & Supp. 2017). There was little testimony addressing the workings of an emergency suspension of police powers and the witnesses seemed unsure of the contours of that authority and whether it was an authority that could also be exercised by Agents. Accordingly, I turned to the provisions of LEOBR, as referenced by the witnesses.

Under the plain language of LEOBR, suspending a law enforcement officer's police powers in an emergency situation is a power that can be granted to any outranking law enforcement officer. *See* Md. Code Ann., Pub. Safety § 3-112(a). By contrast, the actions defining a supervisory employee, per COMAR 01.01.1996.13E(6), are akin to the type of actions reserved for appointing authorities and management under COMAR 17.04.01.04A(1)—appointing, promoting, transferring, reassigning, disciplining, and terminating an employee.<sup>10</sup> An emergency suspension of police powers is not reserved to the appointing authority and management; this type of emergency suspension is not on par with the disciplinary authority to “suspend . . . other employees,” within the meaning of COMAR 01.01.1996.13E(6). *Cf.* Md. Code Ann., State Pers. & Pens. § 11-104(3) (providing that suspension of an employee *without* pay is a disciplinary action).

That the emergency suspension of police power is not the type of suspension of other employees contemplated by COMAR 01.01.1996.13E, is also illustrated by A.I.C. George's testimony. As noted above, he testified unequivocally on cross-examination that an Agent Supervisor does not have authority to suspend an Agent's employment. Although on re-direct

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<sup>10</sup> *See also Pac Tell Group, Inc.*, 817 F.3d at 91 (definition of supervisory employee, as used in the NLRA, is designed to distinguish between those with genuine management privileges and those with “minor supervisory duties”).

examination, he recognized that an Agent Supervisor can make an emergency suspension of an Agent's police powers, his varying responses serve to illustrate the distinction between suspending an employee, within the meaning of COMAR 01.01.1996.13E, and suspending an Agent's police powers. Similarly, the testimony from Deputy Director Gallant and Director Kelly was expressly limited to emergency suspensions of police power, exercised only in "egregious" situations, and, as such, supports drawing a distinction from the general power to suspend an employee.

Finally, the Comptroller presented testimony from Deputy Director Gallant that an Agent Supervisor may initiate an investigation into an Agent's conduct and the results of that investigation may lead to discipline against the Agent, which could include suspension or discharge. Although the evidence established that the recommendation and decision to suspend or discharge an employee would both be made at a higher level than an Agent Supervisor, Deputy Director Gallant testified that it was "possible" that in connection with the investigation, an Agent Supervisor could provide an opinion as to the disciplinary action to be taken; he clarified, however, that the Agent Supervisor had no duty to do so.

In partial contrast to the testimony from Deputy Director Gallant, A.I.C. George testified for the Comptroller that an Agent Supervisor did not have authority to independently initiate a disciplinary investigation, but might be assigned to do so. A.I.C. George further testified that the Agent Supervisor would simply be investigating the facts, which would then be reported to A.I.C. George. A.I.C. George further testified that he or the Deputy Director would review that factual information, may make an additional investigation of their own, and would then make a decision whether to impose discipline, a decision which would ultimately be sent to the Director for action. A.I.C. George was clear that the report from the Agent Supervisor would not include any disciplinary recommendation.

A.S. Collier's testimony was that an Agent Supervisor investigating a personnel matter will collect facts to determine if the alleged misconduct is substantiated and make a factual report, but does not make a recommendation as to the discipline to be imposed. If an incident is substantiated and may require more than a counseling or verbal warning under the disciplinary matrix, the Agent Supervisor's report would go up chain of command to the Agent In Charge; the decision as to any action to be taken would not be made by the Agent Supervisor. A.S. Collier acknowledged, in his direct testimony, that he might be asked for his opinion on a discipline, but reiterated that the Agent Supervisor's report does not make a disciplinary recommendation. Indeed, he was unsure how those decisions were made.

On whole, the testimony from Deputy Director Gallant, A.I.C. George, and A.S. Collier established that an Agent Supervisor does not have authority (*i.e.* the power or right) to make recommendations for discipline, such as suspension or discharge. Although it is "possible" the Agent Supervisor might be asked for an opinion concerning the discipline, the evidence was that the Agent Supervisor's duties do not include providing a recommendation and any decision is made further up the chain of command, based on the recommendation of the Agent In Charge and Deputy Director. In these circumstances, the Comptroller has not established that an Agent Supervisor has authority to recommend discipline, such as suspension or discharge.

There was no testimony that an Agent Supervisor had any general power to suspend an Agent's employment. An Agent Supervisor's authority to suspend an Agent's police powers on an emergency basis does not bring the Agent Supervisor position within the definition of a supervisory employee. The Comptroller did not establish that an Agent Supervisor has authority to recommend suspension as part of a disciplinary investigation. Thus, the Comptroller did not establish the applicability of this portion of the definition of a supervisory employee.

**3. An Agent Supervisor does not have authority to discharge an Agent or recommend discharge of an Agent.**

A.I.C. George, for the Comptroller, and A.S. Collier, for SLEOLA, both specifically testified that an Agent Supervisor lacks authority to discharge an Agent. As discussed above in the context of suspensions, although an Agent Supervisor may investigate alleged misconduct that could ultimately result in an Agent being discharged, the decision to discharge an Agent is made further up the chain of command, and it is based on recommendations from the Agent In Charge and Deputy Director. The Agent Supervisor does not make a recommendation of the discipline to be imposed and although an Agent Supervisor's opinion *might* be sought, this is not part of the Agent Supervisor's duties or authority, per the testimony of Deputy Director Gallant, A.I.C. George, and A.S. Collier.

I also considered the role of an Agent Supervisor in the PEP and PIP process, as the Comptroller's evidence established that an Agent Supervisor prepares the PEPs for the Agents in his unit, an unsatisfactory PEP results in an Agent being placed on a PIP (which is completed by the Agent Supervisor and the Agent), and an Agent's failure to comport with the standards in the PIP results in termination of the Agent's employment. (*See also* Comp. Ex. 1 at 7-8.) The suggestion being that in this roundabout way an Agent Supervisor has authority to discharge or recommend discharge of an Agent.

The testimony from A.I.C. George and A.S. Collier established that an Agent Supervisor prepares the PEPs for the Agents under supervision and the Agent In Charge is then consulted about the contents of the PEP and must approve the PEP before it is passed up the chain of command to the appointing authority. The appointing authority must then review and approve the PEP before it can be considered final and presented to the Agent. A.I.C. George explained that while he may *suggest* revisions to an Agent's PEP based on his own observations, he



typically would not *direct* an Agent Supervisor to change the evaluation unless he saw something “egregiously inappropriate,” which he said has happened.

Although there is the potentiality that the PEP process could lead to an Agent’s discharge, as the Comptroller noted, such a discharge for a persisting “unsatisfactory” rating would be relatively automatic. A.S. Collier testified even this type of discharge still would be handled further up the chain of command than the Agent Supervisor. The discharge itself would not be an exercise of authority or a recommendation based on an independent judgment of the Agent Supervisor. While the Agent Supervisor plays a key role in the PEP evaluation process that could eventually lead to such a discharge, the evaluation of other employees is not part of the definition of a “supervisory employee.” *See Baltimore Harbor v. Ayd*, 365 Md. 366, 385 (2001) (recognizing that Maryland has “long applied the principal of statutory construction, ‘*expressio unius est exclusio alterius*’”, *i.e.* that the express inclusion of one thing is the exclusion of others).

The Comptroller did not establish that an Agent Supervisor has authority to discharge an Agent or recommend discharge of an Agent. That an Agent Supervisor may compile a factual report of misconduct that could lead to an Agent’s discharge and prepares PEP evaluations that could lead to an Agent’s discharge does not alter the analysis.

**4. An Agent Supervisor does not have authority to transfer an Agent; the Comptroller did not establish that an Agent Supervisor recommends such action by exercise of independent judgement.**

On direct examination, Deputy Director Gallant was asked if an Agent Supervisor had authority to transfer an Agent; without any hesitation or qualification, he responded “No. They do not.” In response to a follow up, leading question, “They can’t change them and put them into a different section?” Deputy Director Gallant noted the Agent Supervisor could move an

Agent to a different territory within the same supervisory unit.<sup>11</sup> On cross-examination, however, Deputy Director Gallant explained that reassigning an Agent from one geographic area of the unit to another would not involve any change in title. Moreover, the Agent In Charge must be consulted prior to the change and would evaluate the request based on the needs of the FED as a whole.

A.S. Collier testified that an Agent Supervisor could recommend a transfer, but the transfer would have to go through the Agent In Charge and be approved by the Director. This is consistent with the testimony from Deputy Director Gallant, who also recognized that the Agent In Charge would need to independently consider even the transfer of an Agent to a different territory within the same supervisory unit.

The testimony from Deputy Director Gallant and A.S. Collier establishes that an Agent Supervisor does not have authority to transfer an Agent. Although their testimony further reveals that an Agent Supervisor may recommend a transfer, there was no evidence concerning the circumstances under which an Agent Supervisor could make such a recommendation—I do not know whether such recommendations are limited and essentially a matter of an Agent's request to move into an open position being passed up the chain of command by the Agent Supervisor, or whether the Agent Supervisor is making an independent evaluation and recommendation for a transfer.<sup>12</sup> The only testimony bearing on the exercise of independent judgment in connection with a request for transfer was that the Agent In Charge, and not the Agent Supervisor, had the obligation to apply independent judgment and evaluate the needs of the agency in considering a request for transfer and then making a recommendation up the chain of command for action—if the Agent Supervisor were already tasked with making such an

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<sup>11</sup> Within each supervisory unit, each Agent has an assigned territory.

<sup>12</sup> Indeed, the only type of reassignment specifically discussed was from one geographical territory in a unit to another geographical territory in the same unit. On its face, it is not apparent that recommending this type of transfer would require an Agent Supervisor to exercise independent judgment.

evaluation, it would seem needlessly duplicative to place that obligation on the Agent In Charge as well.<sup>13</sup> Accordingly, I find that the Comptroller did not establish that an Agent Supervisor transfers an Agent or exercises independent judgment to recommend the transfer of an Agent.

**5. An Agent Supervisor does not have authority to hire Agents or to recommend such actions.**

There was no evidence that an Agent Supervisor has authority to hire Agents. The evidence bearing on an Agent Supervisor's authority to recommend the hiring of Agents consisted of testimony that an Agent Supervisor is a part of the group interview panels during the hiring process and would be involved in the panel's recommendation to the appointing authority as to who to hire. The testimony established that interviewees are asked standardized interview questions by the panel and are rated based on their responses. Director Kelly acknowledged that both Agents and Agent Supervisors are involved in the interview panels for the Agent position.

Deputy Director Gallant also testified concerning an Agent Supervisor's participation in interview panels. His testimony was that an Agent Supervisor would be part of the group involved in interviewing for new Agents and would have input into the interview panel's recommendation as to which candidate to hire. On cross-examination, he explained that there are guidelines for the interview panel to follow, including standardized questions, and that candidates are ranked on a numerical scale based on their responses to those standardized questions.

A.S. Collier acknowledged that he sat on interview panels and has even been in charge of the interview panel on occasion. He testified that Agents sit on the interview panels as well. A.S. Collier noted that the panel uses standardized interview questions and a grading system to rank the candidates based on their responses to the questions. The panel forms a list of the

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<sup>13</sup> Even assuming, *arguendo*, the Agent Supervisor uses independent judgment in recommending a transfer to the Agent In Charge, the Agent In Charge remains obligated to make a separate and independent analysis of his own, which would effectively make any transfer recommendation that then goes up the chain of command for action the recommendation of the Agent In Charge.

candidates, ranked from top to bottom based on the grading scores. The appointing authority makes the ultimate determination as to who to hire.

The evidence establishes that it is the panel, as a whole, that provides a list of the candidates, and that the list is prepared based on a numerical score assigned as a result of each candidate's response to pre-determined interview questions.<sup>14</sup> This is not equivalent to an Agent Supervisor having authority to make a hiring recommendation based on the use of independent judgment. The fact that Agents also participate in interview panels but are not excluded from the SLEOLA bargaining unit as "supervisory employees" further supports this conclusion. The Comptroller has not established that an Agent Supervisor meets this prong of the definition of a supervisory employee.

**6. An Agent Supervisor does not have authority to promote Agents or to recommend such action.**

As to promotions, A.S. Collier testified that, as an Agent Supervisor, he did not have authority to promote Agents and there was no evidence to suggest otherwise. In terms of an Agent Supervisor's authority to recommend promotion of an Agent, Deputy Director Gallant testified that when an Agent seeks promotion, it is "possible" that an Agent Supervisor would provide a recommendation to the Agent In Charge. When asked if it would be appropriate protocol for the Agent Supervisor to be consulted concerning an Agent's potential promotion, Deputy Director Gallant responded that it "could be" appropriate. Deputy Director Gallant's responses on these points were hesitant and, importantly, he acknowledged that making such a recommendation is not a part of the duties of an Agent Supervisor.

Further, Director Kelly testified that Agent Supervisors are involved in the interview panels for promotions. He also noted that he often gives Agents the opportunity to participate in

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<sup>14</sup> *Pac Tell Group, Inc.*, 817 F.3d at 91 (stating that judgment is not independent where it is "dictated or controlled by detailed instructions").

such panels so that they will understand what the FED is looking for when it promotes an Agent. The testimony from Deputy Director Gallant establishes that the interview panel process by which Agents are promoted to Agent Supervisors followed the same procedures as for hiring panels (use of standardized questions and numerical grading, with a decision by the Director).

A.S. Collier acknowledged that he may be asked for his opinion on an Agent's promotion. He also explained that the interview panel typically makes a recommendation based on a ranking of the candidates based on their scores on the standardized interview questions. He testified that, ultimately, the decision rests with the appointing authority and that he has never been involved in the process of promoting an Agent.

The fact that an Agent Supervisor *might* be asked for an opinion on the promotion of an Agent is not equivalent to an Agent Supervisor having "authority . . . effectively to recommend such action." The testimony from both Deputy Director Gallant and A.S. Collier made clear that an Agent Supervisor does not have the power or duty to make such a recommendation. This conclusion is not altered by the fact that an Agent Supervisor participates in the interview panels for promoting Agents. As discussed above in the context of hiring panels, such participation is not equivalent to an Agent Supervisor, himself, having authority to recommend a promotion through the use of independent judgment. Thus, the evidence does not establish that an Agent Supervisor meets this part of the definition of a supervisory employee.

**B. An Agent Supervisor is not a Confidential Employee within the meaning of COMAR 01.01.1996.13E.**

There are three prongs to the definition of a "confidential employee" under COMAR 01.01.1996.13E. The third prong, which applies to employees who are the personal secretary of the chief administrative or executive officer of an agency, is plainly inapplicable. During closing arguments, the Comptroller acknowledged that it was not relying on the second prong, which applies to employees whose responsibilities include employee relations, where membership in an

employee organization incompatible with those duties.<sup>15</sup> That leaves the first prong, which applies to employees who have access to confidential or discretionary information regarding the formulation of policy or procedures. The evidence does not establish that an Agent Supervisor meets this prong of the definition of a confidential employee.

The first prong of the definition of a confidential employee is specific: it covers employees who have “access to confidential or discretionary information regarding the formulation of policy or procedures.” COMAR 01.01.1996.13E(3)(a). The Comptroller presented evidence and argument concerning an Agent Supervisor’s access to personnel information, such as PEP evaluations and investigative reports. The testimony from the Comptroller’s witnesses and from A.S. Collier established that an Agent Supervisor does, indeed, have access to this type of information and that the information would be kept confidential. Nonetheless, access to an individual employee’s personnel information or internal investigations does not fall within the plain meaning of “information regarding the formulation of policy or procedures.” Accordingly, this evidence does not advance the Comptroller’s position.

If, as the Comptroller asserted, it would be problematic for an employee who is a member of the collective bargaining unit to have access to personnel information for other employees, the definition of a confidential employee should be amended to include access to personnel information. I do not have authority to insert language that is not contained in the regulation. *See Baltimore Harbor*, 365 Md. at 385 (an express enumeration serves both to include the items on that list and exclude the items not on that list); *Mid-Atlantic Power Supply Ass'n v. Public Service Comm'n*, 361 Md. 196, 204 (2000) (observing that the rules of statutory interpretation do

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<sup>15</sup> There was evidence that the agency’s Office of Human Resources requested permission for a specific Agent Supervisor to sit on the labor-management committee, as management’s representative, for AFSCME. However, the evidence indicated that this was a duty of an Agent In Charge, not an Agent Supervisor. (Comp. Ex. 5 at 2.)

not permit judicially inserting language to impose exceptions, limitations, or restrictions into an unambiguous statute).

Similarly, that an Agent Supervisor might, for chain of custody reasons, have a higher level of access to the property holding room (where contraband is stored),<sup>16</sup> does not bear on whether an Agent Supervisor has access to confidential or discretionary information “regarding the formulation of policy or procedures.” COMAR 01.01.1996.13E(3)(a). The Comptroller expressly recognized as much during closing arguments.

The Comptroller also pointed to the testimony from A.I.C. George and A.S. Collier concerning meetings between the Agent In Charge and the Agent Supervisors. A.I.C. George testified that he regularly meets with the Agent Supervisors; however, contrary to the Comptroller’s assertion, the evidence did not reflect that confidential or discretionary information regarding the formulation of policy or procedures was discussed during those meetings. The evidence established that the topics of discussion between A.I.C. George and the Agent Supervisors related to administrative issues and enforcement and investigative operations and could include: planning enforcement operations, staffing investigations, investigations into an Agent’s conduct, statistics concerning inspection goals, timeliness of reports, the use of current forms, draft PEP evaluations, areas for additional training, and supply and equipment needs. The evidence did not establish that confidential or discretionary information concerning the formulation of policies or procedures was discussed or exchanged during the meetings between the Agent In Charge and the Agent Supervisors.

Finally, the Comptroller pointed to evidence concerning the Agent Supervisors’ participation in revising the FED Procedures Manual. Director Kelly testified that the FED Procedures Manual is undergoing revision and all draft changes are circulated to everyone with

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<sup>16</sup> A.S. Collier testified that Agents are permitted access to the property holding room and the material therein, but the Agent Supervisors maintain control of the key to the room. In terms of any implication for the status of an employee as a “confidential employee,” this is a distinction without difference or relevance.

the rank of Agent Supervisor and higher for review and comment. Director Kelly was candid in acknowledging however, that the revision process would not afford Agent Supervisors access to confidential or discretionary information. Indeed, he further testified that it is an open document and while the FED does not proactively seek input from the Agents on revisions to Procedures Manual, the Agent Supervisor is free to provide it to the Agents and get their input. When asked directly if there would be higher-level communications during which the Agent Supervisors would be privy to confidential or discretionary information to which Agents were not also privy, Director Kelly hesitatingly responded that even higher-level communications regarding the Procedures Manual would “rarely” generate such information. He further qualified his response by noting that he could only think of one policy revision, the firearms policy, for which he “could envision” there being some closed-door higher-level discussions about what should be included or not included in that policy. The testimony on this point was hesitant and hypothetical and, accordingly, I did not give it substantial weight. On whole, the specific and reliable testimony from Director Kelly reflected that Agent Supervisors were not privy to confidential or discretionary information as a result of their role in the formulation of the FED Procedures Manual.

### **PROPOSED CONCLUSIONS OF LAW**


Based on the foregoing discussion, I conclude that employees holding the position of Comptroller Field Enforcement Agent Supervisor are not supervisory or confidential employees. Md. Code Ann., State Pers. & Pens. § 3-102(b)(11) (Supp. 2017); COMAR 14.32.03.05C; COMAR 01.01.1996.13E(3), (6). I further conclude, therefore, that employees holding the position of Comptroller Field Enforcement Agent Supervisor are not required to be excluded from the bargaining unit represented by the State Law Enforcement Officers Labor Alliance. Md. Code Ann., State Pers. & Pens. § 3-102(a)(1)(vi), (b)(11) (Supp. 2017).



**PROPOSED ORDER**

I **PROPOSE** the Petition for Clarification/Contest of a Unit Designation filed by the State Law Enforcement Officers Labor Alliance, asserting that Comptroller Field Enforcement Agent Supervisors were improperly excluded from the collective bargaining unit and requesting that they be included within the collective bargaining unit, be **GRANTED**.

June 13, 2018  
Date Decision Mailed

  
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Emily Daneker  
Administrative Law Judge

**RIGHT TO FILE EXCEPTIONS**

Any party may file exceptions, in writing, to this Proposed Decision with the State Labor Relations Board, in accordance with Md. Code Ann., State Gov't § 10-216 (a)(2)(2014). The Office of Administrative Hearings is not a party to any review process.

ED/emh  
#173924

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