

VERMONT LABOR RELATIONS BOARD

AFSCME COUNCIL 93)	
)	
and)	DOCKET NO. 09-04
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TOWN OF COLCHESTER)	
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TOWN OF COLCHESTER)	
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and)	DOCKET NO. 09-21
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AFSCME COUNCIL 93)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 23, 2009, AFSCME Council 93 (“Union”) filed a unit clarification petition in Docket No. 09-04 seeking to add the part-time employees of the Town of Colchester Rescue Squad to an existing bargaining unit represented by the Union consisting of full-time employees of the Rescue Squad and highway and dispatch employees of the Town. On March 11, 2009, the Town of Colchester (“Employer”) responded to the Union’s petition and contended that it would be inappropriate to add the part-time employees to the bargaining unit without an election in which the part-time employees vote whether they wish to be represented by the Union.

On July 16, 2009, the Employer filed a unit clarification petition in Docket No. 09-21 seeking removal of full-time employees of the Rescue Squad from the existing bargaining unit of highway employees, dispatch employees and full-time employees of the Rescue Squad. The Employer requests the placement of the full-time Rescue Squad employees in a separate bargaining unit which also would include part-time rescue employees if they vote to be represented by the Union.

Docket Nos. 09-04 and 09-21 were consolidated for hearing on August 6, 2009, before Labor Relations Board Members Edward Zuccaro, Chairperson; Leonard Berliner and James Kiehle. Attorney Thomas Somers represented the Employer. Michael Blair, Union Staff Representative, represented the Union. The Union and the Employer filed post-hearing briefs on September 8 and 9, 2009, respectively.

FINDINGS OF FACT

1. The Labor Relations Board certified the Union as the exclusive bargaining representative of all highway crew employees, clerical employees and the Zoning Administrative Officer of the Employer on February 11, 1977. The Board amended this Order on June 30, 1978, by excluding the Zoning Administrator and Building Inspector from the bargaining unit represented by the Union. Subsequently, the bargaining unit represented by the Union was amended to add the Town dispatchers and remove clerical employees (Employer Exhibit 1).

2. As of April 29, 2008, the Town of Colchester had a rescue squad which consisted of Rescue Chief Amy Akerlind, three full-time employees working 40 hours a week and approximately 40 volunteers. There were no part-time rescue employees. By memorandum dated April 29, 2008, Akerlind informed Town Manager Al Voegelé that she would recommend that anyone hired to replace a current full-time rescue employee be hired at 36 hours a week instead of 40 (Employer Exhibit 25).

3. On May 14, 2008, the Union filed a Petition for Election of Collective Bargaining Representative, seeking to add the full-time employees of the Town Rescue Squad to the existing bargaining unit of employees of the Town Highway and Dispatch Departments represented by the Union. In response to the petition, the Employer agreed

to the conducting of a representation election among the three full-time employees of the Town Rescue Squad. The Labor Relations Board conducted an election on June 20, 2008, among these employees. The employees voted 3 – 0 to be represented by the Union. The Board issued an order on July 21, 2008, certifying the Union as exclusive bargaining representative of all full-time employees of the Town Rescue Squad, and adding these employees to the existing bargaining unit of the employees of the Highway and Dispatch Departments of the Employer represented by the Union. As of July 21, 2008, the Rescue Squad had not included any part-time employees.

4. The three full-time Rescue Squad employees all resigned between October 17, 2008, and May 30, 2009. Jason Ziter resigned effective October 17, 2008. Scott Flieger resigned effective January 23, 2009. Craig Lamoureux's resignation was effective May 30, 2009 (Employer's Exhibit 24).

5. None of the resigned full-time Rescue Squad employees were replaced by full-time employees. Chris Paradee was hired effective October 6, 2008, for a work schedule of 24 hours per week. Shortly thereafter, he moved to a 36 hours per week schedule. Luke Tallman was hired effective February 28, 2009, to work 36 hours per week. Josh Dishaw and Jamie Piche both were hired effective June 29, 2009, to work 36 hours per week. As of the date of the hearing in this matter, Paradee was the only permanent employee among the Rescue Squad employees. Tallman, Dishaw and Piche were probationary employees serving a six month probationary period as of the date of the hearing. Tallman was scheduled to complete his probationary period by August 28, 2009. In sum, the Employer ultimately hired four part-time employees at 36 hours per week to succeed the three full-time employees. The Employer hired a complement of

employees working a higher total number of weekly hours than previously due to the difficulty filling open shifts as a result primarily of a decrease in volunteer availability to cover shifts (Employer Exhibits 14, 27, 29, 30).

6. The Town Personnel Policy Manual provides that an employee must regularly be scheduled to work 40 hours per week to be considered a full-time employee. Employees regularly scheduled to work fewer than 40 hours per week are considered regular part-time employees. Part-time employees working 31 to 39 hours per week make a 25 percent contribution to health insurance. This is a higher contribution toward health insurance premiums than made by full-time employees of the Town. Part-time employees are entitled to vacation and sick leave on a prorated basis. The hiring of part-time employees rather than full-time employees results in savings to the Town because of reduced benefit costs and reduced expenses for overtime (Employer Exhibits 3, 5, 17, 18, 19, 26, 27, 29).

7. The four Rescue Squad employees working 36 hours per week all occupy the position of Emergency Medical Technician. They respond to calls for aid, and provide medical care to the sick and injured. They also perform routine cleaning of ambulances, conduct daily vehicle checks, perform basic cleaning and maintenance of the Rescue Squad facility, and assist with community education. They all report to the Rescue Chief (Employer Exhibits 6, 34).

8. In addition to the above-described Emergency Medical Technician duties, the four part-time Rescue Squad employees each have distinct responsibilities which they are assigned. One of them is the Crew Chief, serving as a working supervisor who oversees the crew on emergency medical calls. One serves as the Emergency Vehicle

Operator, and is responsible for the transport of rescue squad members and patients. One of the employees is the Engineer, responsible for overseeing the care and maintenance of squad vehicles, equipment and uniforms. One is the Outreach Coordinator who is responsible for all outreach programs and public relations for the Rescue Squad. One of the employees is the Privacy Officer responsible for all Health Insurance Portability and Accountability Act (HIPAA) issues (Employer Exhibits 35 – 39).

9. When the duties of the part-time Rescue Squad employees are considered in their entirety compared to those performed by the full-time rescue employees whom they succeeded, the duties of the part-time employees are essentially the same as performed by the full-time employees (Union Exhibits 4 – 6; Employer Exhibits 6, 34 – 39).

10. The changing of Rescue Squad employees from 40 hours per week to 36 hours made it easier for scheduling. They are each assigned to work 12 hour shifts. The increase from three to four employees also provided more flexibility in assigning volunteers to perform rescue duties.

11. There have been occasions when the current Rescue Squad employees have worked more than 36 hours per week. Recently, this has happened more frequently to adequately cover shifts.

12. The Union and the Employer entered into a collective bargaining agreement effective July 1, 2006 to June 30, 2009. They negotiated an Addendum to the collective bargaining agreement which resulted in the 2006-2009 agreement remaining in place until June 30, 2010, except for specific changes identified in the Addendum. The collective bargaining agreement covers part-time employees represented by the Union.

The rescue squad employees are not covered by the Addendum and have never been covered by a collective bargaining agreement. The wages, hours and conditions of employment of the rescue squad employees have been determined by the Town personnel manual (Employer Exhibits 5, 19).

13. All Town government buildings are situated in a nine and one-half acre complex. The Rescue building is located approximately 165 feet from the Highway Department facility. The Dispatch Department is housed in the same facility as the Police Department which is approximately 405 feet from the Highway Department facility and a similar distance from the Rescue building (Employer Exhibit 20).

14. The Town Highway Department employees maintain highways, vehicles, grounds and buildings, the stormwater system and the wastewater system in the Town. The Rescue Squad employees' interactions with Highway Department employees generally are limited to occasions where rescue vehicles are being maintained or repaired. Rescue employees regularly interact with Dispatch Department employees who dispatch rescue employees based on calls for aid that are received.

OPINION

We need to decide whether to grant either of the competing unit clarification petitions filed by the Union and Employer. The Union seeks to add the part-time employees of the Town of Colchester Rescue Squad to an existing bargaining unit represented by the Union consisting of full-time employees of the Rescue Squad and highway and dispatch employees of the Town. The Employer opposes the Union's attempt to add the part-time employees to the bargaining unit without an election in

which the part-time employees vote whether they wish to be represented by the Union. Instead, in its unit clarification petition, the Employer seeks removal of full-time employees of the Rescue Squad from the existing bargaining unit. The Employer requests the placement of the full-time Rescue Squad employees in a separate bargaining unit which also would include part-time rescue employees if they voted to be represented by the Union.

A petition for clarification of an existing bargaining unit or units may be filed by a collective bargaining representative or an employer where no question concerning the majority status of the exclusive bargaining representative is pending at the time the unit clarification petition is filed. Such a petition may be filed where: 1) there is a dispute over the unit inclusion or exclusion of employee(s), 2) there has been an accretion to or reorganization of the work force, or 3) the collective bargaining representative or employer seeks a reorganization of the existing structure of a bargaining unit or units. Sections 34.1, Vermont Labor Relations Board *Rules of Practice*. If the Board decides that the employees in dispute should be added to the bargaining unit as a result of a unit clarification petition, the Board issues an order adding the employees to the unit without an election.

The Union contends that an accretion occurred here warranting the addition of the part-time Rescue Squad employees to the bargaining unit without an election. Accretion is the process whereby new employees, whose work and interests are aligned with those of employees in an existing bargaining unit, are added to that unit. If the duties of the new employees are identical or substantially similar to those of employees in an existing bargaining unit, it is appropriate to find an accretion. Barre Town School Chapter,

AFSCME Local 1369 and Barre Town School District, 13 VLRB 364, 368 (1990).
Woodstock Union High School Teachers Organization, Educational Support Personnel Unit and Woodstock Union High School District, 22 VLRB 186, 196 (1999). UE Local 267 and University of Vermont, 24 VLRB 260 (2001). A determination shall be made whether the new employees share a community of interests with employees in the existing unit. Barre Town, 13 VLRB at 369. Woodstock, 22 VLRB at 196. UE Local 267 and University of Vermont, 24 VLRB at 270. In accretion cases, the Board must consider the facts in light of conflicting policies of maintaining stability in bargaining relations and assuring that employees have the right to choose their own bargaining representative. Id.

We concur with the Union that the part-time Rescue Squad employees should be added to the unit without an election as a result of an accretion. The Board certified the Union as exclusive bargaining representative of all full-time employees of the Town Rescue Squad in July 2008, and added these employees to the existing bargaining unit of Highway and Dispatch Departments employees of the Employer represented by the Union. In the ensuing year, all three full-time Rescue Squad employees resigned and were succeeded by four part-time rescue employees scheduled to work 36 hours per week.

Given that the duties of the new rescue employees are identical or substantially similar to those of the full-time employees in the existing bargaining unit, it is appropriate to find an accretion. The fact that the part-time employees are scheduled to work a mere four hours per week less than the full-time employees highlights the similarity of their positions. Even this slight difference is narrowed given the evidence

that there have been occasions when the current Rescue Squad employees have worked more than 36 hours per week. Recently, this has happened more frequently to adequately cover shifts.

We reject the position of the Employer that Rescue Squad employees should be placed in a separate bargaining unit from the Highway Department and Dispatch Department employees. This position is based on the Employer's assertion that there is no community of interests shared among the Rescue Squad employees and the highway and dispatch employees.

In unit clarification cases where employees' exclusion from bargaining units as supervisory employees resulted from an agreement between a union and an employer rather than a Board decision, the Board has determined that the burden was on the union to demonstrate that circumstances had changed with respect to the supervisory duties of the employees since the parties' agreement and convince the Board by a preponderance of the evidence that the employees were no longer supervisory employees. International Brotherhood of Electrical Workers Local 300 and City of Burlington Electric Department, 26 VLRB 103, 110-111 (2003). South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995). Similarly here, where the Employer and Union agreed just over a year ago that it was appropriate to include Rescue Squad employees in the same bargaining unit as highway and dispatch employees, the burden is on the Employer to demonstrate that there has been a sufficient change of circumstances to convince the Board by a preponderance of the evidence that it is no longer appropriate to include the employees in the same bargaining unit.

The criteria appropriate unit decisions primarily turn on are community of interests and overfragmentation of units. The following factors are relevant in determining whether a community of interests exists among employees: differences and similarities in method of compensation, hours of work, employment benefits, supervision, qualifications, training, job functions and job sites; and whether employees have frequent contact with each other and have an integration of work functions. AFSCME and Town of Middlebury, 6 VLRB 227, 231 (1983).

The community of interests criterion must be considered together with whether overfragmentation of units will result to a degree which is likely to produce an adverse effect on the effective representation of other employees or upon the effective operation of the employer. It is Board policy that public rights generally are protected by broader units. Petition of Vermont State Employees' Association (Re: Agency of Transportation Highway and Maintenance Employees), 24 VLRB 37 (2001). Teamsters Local 597 and Champlain Valley Union High School Board of Directors, 7 VLRB 1 (1984). Champlain Valley Union High School Staff Association, VEA/NEA Local 325 and Champlain Valley Union High School Board of Directors, 3 VLRB 426 (1980).

The Employer has not presented evidence demonstrating that there have been changes in employee contact, integration of work functions, or any of the other relevant community of interest factors since the Employer agreed just over a year ago that it was appropriate to include Rescue Squad employees in the same bargaining unit as highway and dispatch employees. The Employer also has not demonstrated that the removal of a small group of rescue employees from a larger bargaining unit will not result in overfragmentation of units. In sum, the Employer has not demonstrated that there has

been a sufficient change of circumstances to convince the Board by a preponderance of the evidence that it is no longer appropriate to include the rescue employees in the same bargaining unit as the highway and dispatch employees.

The Employer also asserts that the Board has no jurisdiction over two of the part-time rescue employees because they are still in their probationary period, and that it is premature to grant the Union's unit clarification petition where one-half of the involved employees are still in probationary status. It is true that our jurisdiction over probationary employees is impacted by the provisions of the Municipal Employee Relations Act. The Act excludes "individuals . . . employed on a probationary basis" from the definition of "municipal employee" covered by the Act.

However, this does not preclude us from granting the Union's petition to add part-time rescue employees to the existing bargaining unit. The granting of the petition will result in the Union being certified as the exclusive bargaining representative of the permanent part-time rescue employees with the understanding that they will not become the representative of the probationary part-time rescue employees until such employees successfully complete their probationary period. This is no different than the result in cases where the Board certifies unions as exclusive bargaining representative of a group of employees after a union representation election or voluntary union recognition by a municipal employer. The unions in such instances are certified as the representative of the permanent employees in the bargaining unit with the understanding that they will not become the representative of any probationary employees in covered positions until they successfully complete their probationary period.

The Employer further contends that the Union's unit clarification petition should be dismissed because the Union obtained a certification order just over a year ago limited to full-time employees based on the Union's request. The Employer asserts that, because of the certification order, part-time employees were excluded from the bargaining unit and have never expressed interest in having the Union represent them. The Employer cites Local 1343, AFSCME, Burlington Area Public Employees Union, 4 VLRB 391 (1981) for the proposition that in similar circumstances where an incumbent union seeks to expand the bargaining unit to include other employees previously excluded from the unit without the benefit of a representation election, the Board has required an election before forcing an exclusive bargaining representative on these employees.

The case cited by the Employer does not provide an apt comparison to this case. In Local 1343, AFSCME, Burlington Area Public Employees Union, the Board denied a unit clarification petition filed by a union to add a group of employees to an existing bargaining unit without allowing them the opportunity to decide in an election whether they wished to be represented by the union, where the group of employees had been excluded from the bargaining unit at the time the bargaining unit was formed 15 years earlier. The Board concluded that the democratic rights of the employees to determine whether they wished to be represented by the union outweighed any negative effect of leaving them out of the unit. 4 VLRB at 398. The Board indicated that their historical exclusion from the unit had not hurt the efficiency of management's operations or the productive nature of collective bargaining between the city and the union, and that a tradition of harmonious and mutually beneficial relations between an employer and its

employees is a factor of considerable force that should not be tampered with for insubstantial reasons. Id. at 399.

Here, to the contrary, the Union did not exclude an existing group of employees from the bargaining unit at the time it successfully petitioned in 2008 to add full-time rescue employees to the existing bargaining unit. There were no part-time rescue employees at that time. There was no historical exclusion from the unit based on a conscious decision by a union as existed in the Local 1343, AFSCME, Burlington Area Public Employees Union case.

The Employer finally contends that the Union's accretion argument is without merit because it is based on adding part-time rescue employees to a bargaining unit that includes full-time rescue employees. The Employer asserts that the Union's argument in this regard is fatally flawed because there now are no full-time rescue employees in the unit, and there is no evidence there ever will be, and thus the 2008 certification of the Union as the representative of the full-time rescue employees is a legal nullity.

We do not find this contention by the Employer persuasive. The Employer agreed at the time of the 2008 certification order that it was appropriate to include rescue employees in a bargaining unit with other employees, and the rescue employees voted to be represented by the Union. If we were to allow the Employer to evade its obligation to engage in collective bargaining concerning rescue employees due to the Employer slightly reducing the work hours of rescue employees upon resignations of individuals represented by the Union, we would be acting contrary to the purpose of the Municipal Employee Relations Act to protect the "legitimate rights of both municipal employees and municipal employers in their relations with each other". 21 V.S.A. §1721. The

collective bargaining rights of employees would be unfairly subordinated to unilateral actions of employers. The Employer inappropriately would be permitted to take work that was exclusively performed by bargaining unit employees and wholly transfer it out of the bargaining unit through its unilateral actions.

In sum, we grant the unit clarification petition of the Union to add the part-time employees of the Town of Colchester Rescue Squad to the existing bargaining unit without an election as a result of an accretion. The duties performed by the part-time employees are essentially identical to those previously performed exclusively by bargaining unit employees, and the interests of the employees are aligned with those of employees in the existing bargaining unit. Given the circumstances, adding the part-time rescue employees to the bargaining unit enhances the stability of labor relations, a factor which outweighs in this case the right of the employees to determine in an election whether they wish to be represented by a union.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The unit clarification petition filed by AFSCME Council 93 in Docket No. 09-04 is granted, and the part-time employees of the Town of Colchester Rescue Squad are added to the existing bargaining unit of Highway and Dispatch Departments employees, and full-time employees of the Rescue Squad, of the Town of Colchester represented by AFSCME Council 93; and.
2. The unit clarification petition filed by the Town of Colchester in Docket No. 09-21 is denied.

Dated this 12th day of November, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro

Edward R. Zuccaro, Chairperson

/s/ Leonard J. Berliner

Leonard J. Berliner

/s/ James C. Kiehle

James C. Kiehle