

VERMONT LABOR RELATIONS BOARD

SOUTH BURLINGTON CAREER)	
FIREFIGHTERS ASSOCIATION)	
)	
and)	DOCKET NO. 91-43
)	
CITY OF SOUTH BURLINGTON)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 17, 1991, the South Burlington Career Firefighters Association ("Association") filed a petition for Election of Collective Bargaining Representative, requesting an election among firefighters and fire captains employed by the City of South Burlington ("Employer"). On August 12, 1991, the Employer filed a response to the petition, contending that the three fire captains are not eligible for inclusion in the proposed bargaining unit because they are supervisors.

A hearing on the issue of whether the captains are supervisors was held on October 17, 1991, before Board members Charles H. McHugh, Chairman, Louis A. Toepfer, and Carroll P. Comstock. Attorney Gilbert Myers represented the Association. Attorney Steven Stitzel represented the Employer. The Association filed a Request for Findings on October 29, 1991. The Employer filed Proposed Findings of Fact and Conclusions of Law on October 30, 1991.

The Board issued Findings of Fact, Opinion and Order on December 23, 1991. Therein, the Board concluded that the three fire captains were not supervisors.

On January 8, 1992, the Employer filed a Motion to Reopen Hearing, and to Alter Findings of Fact, Opinion and Order. The

Board granted the Motion to Reopen filed by the Employer for the purpose of taking additional evidence and hearing additional arguments.

The hearing to take additional evidence was held on January 29, 1992, before Board members Charles H. McHugh, Chairman, Louis A. Toepfer, and Carroll P. Comstock. Attorney Gilbert Myers represented the Association. Attorney Steven Stitzel represented the Employer. The Employer filed a brief on February 5, 1992. The Association filed no brief.

As a result of the additional evidence presented at the January 29, 1992, hearing, the Board has decided to vacate its Findings of Fact, Opinion and Order issued on December 23, 1991, and to issue these Findings of Fact, Opinion and Order in place of that decision.

FINDINGS OF FACT

1. The South Burlington Fire Department has ten full time paid employees: a chief, three fire captains, and six senior firefighters. In addition, there are 32 volunteer firefighters, including an assistant chief and two lieutenants.

2. The volunteer firefighters respond to emergency situations only and also attend training sessions. They do not work regular shifts.

3. The Department's main fire station is located on Dorset Street. There is also a substation on Holmes Road. The equipment, or apparatus, at the main station includes three pumper trucks, a tower truck, a tanker truck, and a one ton pickup truck. The apparatus at the substation includes a pumper truck and a one ton pickup truck.

4. Fire Chief James Goddette began work for the Employer in 1970 as a fire fighter and has been Chief since 1976. Goddette's office is at the Dorset Street station. The fire chief is the head of the Fire Department and works under the administrative direction of the city manager. He supervises all full time and volunteer officers. He works a regular schedule of customary business hours, approximately 8:00 a.m. to 5:00 p.m., Monday through Friday (City Exhibit 1).

5. The Department is staffed 24 hours per day by a captain and two senior firefighters. Each group of three employees work in 21 day cycles and work 24 hours on duty, followed by 48 hours off duty. Each employee potentially can work approximately 122 shifts per year, although the number of shifts actually worked is less due to annual leave and sick leave. Generally, the captain and one senior fire fighter is at the main station and the other senior firefighter is at the substation. A senior fire fighter assumes responsibility if the assigned captain is unavailable due to vacation or sick leave.

6. Employees' vacation time is computed by years of service with the Employer. This can range from two weeks to five weeks per year. All three current captains earn five weeks per year vacation time. Each captain would not work approximately 10 shifts in a given year. Therefore, there is not a captain on duty approximately 8% of the time.

7. The South Burlington Fire Department has had a work schedule existing for many years which details routine cleaning and maintenance duties which are to be performed each day of the

week. Such duties include station cleaning chores as well as complete apparatus checks. Both captains and senior firefighters perform these routine duties, but the captains are responsible for seeing that the work schedule is carried out (Association Exhibit 13).

8. The Department responds to medical and fire emergencies in the City of South Burlington. It also may respond to emergencies in other communities through "mutual aid" requests made by those communities.

9. The Department has established Standard Operating Procedures. The Standard Operating Procedures are general guidelines that fire fighters are expected to follow. The Standard Operating Procedures include detailed procedures for sending out apparatus in response to emergencies and detailed instructions on what is called "command" procedure. The Standard Operating Procedures include the following provisions:

4.01 The effective functioning of fire department units and personnel at operating incidents requires clear, decisive action on the part of the officer-in-charge. The following procedures outlines the Standard Operating Procedures to be employed in establishing Command and operating a Command Post. It also identifies the responsibility for the command function and its associated duties and places this responsibility on one individual."

...

4.04 Responsibilities assigned to Command include:

Remove endangered occupants and arrange for treatment of the injured....

Stop the fire where he finds it.

Conserve property, after fire control is achieved.

Provide for the safety and survival of his personnel.

Size-up and assignment of apparatus (City Exhibit 4).

10. When there is a fire emergency, the captain at the main station is the officer-in-charge and takes command. If

there is not a captain on duty (due to use of vacation or sick leave), a senior fire fighter takes command. If the fire is in the substation district, the senior fire fighter at the substation is the officer in charge until the captain arrives.

11. The officer-in-charge of a fire follows the Standard Operating Procedures, but each fire is unique and the officer-in-charge must exercise judgment and discretion in bringing the fire under control.

12. At a structural fire, the officer-in-charge "sizes up" the situation and directs personnel and use of apparatus accordingly. He supervises all personnel at the scene, including any volunteer firefighters and mutual aid personnel from other departments if they are at the scene. The officer-in-charge decides if mutual aid is needed and whether additional equipment should be called to the scene. If necessary, the officer-in-charge also decides evacuation procedures, arranges for treatment of injured persons, decides ventilation procedures and relieves personnel who appear cold or fatigued. If there is a loss of life or if arson is suspected, the officer-in-charge is responsible for contacting the Vermont State Police. The officer-in-charge is also responsible for the property until it is returned to its owner. The fire fighters at the scene must follow the directions of the officer-in-charge and not "free lance".

13. The fire chief has the authority to assume command of any incident occurring in the city. However, if the chief responds to the scene of a fire, it is his practice to not assume command

of the fire. The officer-in-charge continues to perform that function. Also, the assistant fire chief, who is part of the volunteer staff of the Fire Department, has authority to assume command of an incident. However, the assistant chief has not exercised this authority.

14. The Department has responded to the following number of emergency calls over the last three year period:

	10/88 - 10/89	10/89 - 10/90	10/90 - 10/91
total	714	837	919
medical	431	471	592
mutual aid	22	20	18
fires	117	141	156
false/unnec.	144	205	153

(City Exhibit 5).

15. From October, 1988 - October, 1991, the Department responded to three serious structural fires.

16. In addition to serious structural fires, South Burlington fire fighters and captains respond to car fires, dumpster fires, minor structural fires and grass fires. Typically, the captain on duty responds to such fires, along with the fire fighters. The captain may perform the same duties as the fire fighters in these instances until enough fire fighters respond to the scene. Then, the captain limits himself to directing the fire fighting activities. The captain determines when equipment and fire fighters are able to leave the scene of the fire.

17. Fire fighters have responded to car fires in many different types of locations, including on highways and in shopping center parking lots. Anywhere from two to six fire fighters respond to such fires. The on-duty captain goes to the

scene of the fire, and directs fire fighters on how to proceed. The captain will tell the driver of the responding fire truck where to set up the truck. The captain decides what equipment is needed. The captain has to assess safety issues with respect to persons or, in a parking lot fire, other vehicles. He then directs fire fighters accordingly to ensure safety.

18. In addition to actual car fires, the Fire Department may be called by an ambulance crew responding to a car accident if there is a potential hazard to patient and crew. For example, there may be a potential for a gasoline explosion from the car. In such cases, a truck is dispatched to the scene and the captain is responsible for directing fire fighters to ensure that the hazard is eliminated.

19. Fire fighters have responded to fires occurring in dumpsters. Dumpsters are large containers placed outside many apartment buildings and business establishments to store trash. In responding to a dumpster fire, the captain has to be concerned about the safety of the area around the dumpster, particularly if the dumpster is placed close to a building, and direct fire fighting operations accordingly. Typically, one truck is sufficient to control such fires, and the fire is controlled by use of a hand line from the truck.

20. Fire fighters have responded to grass fires. Depending on where the fire is located, the responding captain may have to be concerned about the fire spreading to structures. The captain has to assess wind conditions, how fast the fire will spread and what property may be endangered. The captain directs fire

fighters on what equipment to use and how to attack the fire to best extinguish it. In some cases, the captain orders that additional equipment be brought to the scene.

21. In responding to reports of chimney fires, the captain first has to assess whether the fire actually is a chimney fire. If there is a chimney fire, the captain has to determine the equipment to use and directs fire fighters in their activities so that the property will be best protected.

22. South Burlington has 22 hotels or motels, which have a total of 1500 rooms. The Fire Department has responded to reports of hotel and motel fires. The Burlington International Airport is in South Burlington. There has been one serious incident there to which the Fire Department responded, a reported gas leak. The responding captain ordered the airport terminal evacuated until the gas company was able to inspect the building. At a recent fire in a locker room at the South Burlington High School, the captain directed the relocation of fire fighting equipment and directed the fire fighters in their activities fighting the fire.

23. Each captain also serves as either a training officer, a fire prevention officer, or a supply officer. The training officer plans and implements a training schedule for all members of the department. The fire prevention officer is responsible for planning, organizing, and implementing a school/community program of public awareness and education for fire prevention. The supply officer is responsible for the Department's assignment of equipment and the collection and maintenance of personnel documents (City Exhibit 4)

24. The Employer's Personnel Rules and Regulations provide procedures for evaluating an employee. The captains have no authority to evaluate employees' performance (Association Exhibit 1).

25. The Personnel Rules and Regulations provide for a grievance procedure. Captains have no supervisory involvement in the grievance procedure (Association Exhibit 1).

26. Captains have the authority to send an employee home for misconduct or being unfit for duty, but there is no evidence that this has happened.

27. Captains do not have the authority to hire, transfer, lay off, recall, promote, discharge, reward or discipline, or to effectively recommend such action.

28. All full-time and and volunteer officers are required to complete training courses. In order to be considered for an appointment as a captain, a senior fire fighter must take specific courses. Four years experience as a fire fighter is also a requirement to be considered for progression from a senior fire fighter to a captain.

OPINION

The issue before us is whether the three captains of the South Burlington Fire Department are supervisors, and thus, ineligible to belong to a bargaining unit pursuant to 21 VSA §1502(13) and §1722(12).

Supervisor is defined in 21 VSA §1502(13) as:

An individual having the authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them or to adjust their grievances, 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 judgment.

In order to be considered a supervisor, an employee must pass two tests: 1) the possession of any one of the listed powers in the statutory definition; and 2) the exercise of such powers "not of a merely routine or clerical nature but requiring the use of independent judgment." Firefighters of Brattleboro, Local 2628 v. Brattleboro Fire Department, Town of Brattleboro, 138 Vt. 347 (1980). The statutory test is whether or not an individual can effectively exercise the authority granted him or her; theoretical or paper power will not make one a supervisor. AFSCME, Local 490 v. Town of Bennington, 153 Vt. 318, 320 (1989), citing Brattleboro.

It is clear and undisputed that captains have no authority to hire, transfer, lay off, recall, promote, discharge or reward employees, or to adjust their grievances, or to effectively recommend such action. Also, it is clear that captains possess no authority to discipline other employees, or to effectively recommend such action. Although there was evidence that a captain

could send an employee home for violation of a rule or regulation, this has not happened. Moreover, such limited authority, standing by itself, does not make an employee a supervisor. Brattleboro, 138 Vt. at 351.

The Employer contends that the captains are supervisors because they have the authority to responsibly assign and direct employees of the Fire Department under circumstances requiring the use of independent judgment when they are officers-in-charge in responding to fire emergencies.

It is clear that, outside of fire emergencies, captains do not assign and direct other employees within the meaning of the statutory definition. Assigning and directing duties performed at the fire station by the captains with respect to cleaning and maintenance operations are of a routine nature and do not require the use of independent judgment.

However, it is evident that captains have the authority to direct and assign employees when they are the officers-in-charge at serious structural fires, and that this authority requires the use of independent judgment. At the time of a serious structural fire, the authority of the captain is considerable. The very nature of the command procedure requires that one individual take clear, decisive action. Although there are detailed standard operating procedures that guide the officer-in-charge, the officer-in-charge must "size up" the situation and assess and reassess employee and apparatus placement and activities to carry out the responsibility of command. We conclude this assigning and directing of employees is not routine and does require the

use of independent judgment. This authority, standing by itself, would not make the captains supervisors. The Vermont Supreme Court held in Brattleboro that rare or infrequent supervisory acts do not change the status of an employee to a supervisor. 138 Vt. at 351. Certainly, the performance of supervisory acts three times in three years constitute rare or infrequent supervisory acts.

However, the Employer has presented additional un rebutted evidence indicating that captains assign and direct employees at more frequent minor fires, such as minor structural fires, car fires, dumpster fires and grass fires. Thus, the issue is whether these assigning and directing responsibilities, taken together with the captain's responsibilities at major structural fires, are sufficient to make the captains "supervisors" within the meaning of the statutory definition of that term.

In reviewing past Board decisions, it is apparent that the general rule applied is that deputy chiefs, captains or lieutenants who direct fire fighters at the scene of fires are supervisors. NAGE, National Association of Firefighters, 1 VLRB 464 (1978). Burlington Fire Officers' Association and City of Burlington, 9 VLRB 64 (1986).

The Board has recognized that there are exceptions or qualifications to this general rule. The Board has concluded that lieutenants or captains who performed some directing duties at fire scenes were not supervisors under the following circumstances:

- Captain or Lieutenant directed fire fighting work only in the absence of a superior officer. Firefighters

of Brattleboro, Local 2628, 1 VLRB 248 (1978);
Affirmed, 138 Vt. 347, 415 A.2d 243 (1980). Springfield
Firefighters Local #2750, IAW AFL-CIO, CLC and Town of
Springfield, 3 VLRB 237 (1980).

- Lieutenant directed only one firefighter at minor or routine fires. Springfield, supra.

- Fire fighting members of the Department generally knew what duties they were supposed to perform at a fire, and non-supervisory fire fighters also served as persons in charge at a fire. Local 1343, AFSCME, AFL-CIO and City of St. Albans Fire Department, 10 VLRB 99 (1987).

In applying these precedents to the circumstances of this case, it is evident that none of the exceptions or qualifications to the general rule apply. The captain does not direct fire fighters only in the absence of a superior officer. The captain is the officer-in-charge at a fire, and the evidence indicates that no superior officer is assigned to, or in fact performs, such duties at a fire. Also, the evidence indicates that captains are assigning and directing more than one fire fighter at the scene of major and minor fires. Further, it is evident that captains exercise independent judgment in this regard at minor fires, as well as major fires, by assigning and directing employees with respect to equipment placement and use, and extinguishing fires, to ensure the safety of persons and the protection of property. Finally, while non-supervisory fire fighters also may serve as persons in charge at a fire in the

absence of a captain, this happens only rarely since the evidence indicates that a captain is on duty 92% of the time.

In sum, we conclude that the Employer has demonstrated by a preponderance of the evidence that captains assign and responsibly direct employees under circumstances which are not of a merely routine or clerical nature, but require the use of independent judgment, and thus are supervisors.

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The captains employed by the City of South Burlington Fire Department are supervisory employees and, thus, are ineligible to be included in a bargaining unit represented by the South Burlington Career Firefighters Association; and
2. The Vermont Labor Relations Board shall conduct a representation election wherein the senior firefighters employed by the City of South Burlington Fire Department may determine whether they wish to be represented by the South Burlington Career Firefighters Association, or no union.

Dated this 23rd day of March, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Charles H. McHugh
Charles H. McHugh, Chairman

Louis A. Toepfer
Louis A. Toepfer

Carroll P. Comstock
Carroll P. Comstock