VERMONT LABOR RELATIONS BOARD

AFSCME LOCAL 1201, FAIR HAVEN TOWN EMPLOYEES CHAPTER	)	
	)	
and	)	DOCKET NO. 00 - 21
	)	
TOWN OF FAIR HAVEN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 11, 2000, AFSCME Local 1201, Fair Haven Town Employees Chapter ("Union") filed a unit clarification petition seeking to add the position of public works foreman to an existing bargaining unit represented by the Union consisting of certain employees of the Town of Fair Haven ("Employer"). On May 5, 2000, the Employer responded to the Union's petition and contended it would not be appropriate to include this position in the bargaining unit because the position is supervisory.

On July 20, 2000, a hearing was held in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; Carroll Comstock and John Zampieri. Attorneys Alison Forbes and John Zawistowski represented the Union and the Employer, respectively. The parties filed post-hearing briefs on August 14, 2000.

FINDINGS OF FACT

1. On November 5, 1992, the Vermont Labor Relations Board certified the Union as the exclusive bargaining representative of all employees in the office, police department, cemetery, water department, sewer department, highway department and transfer station; excluding the superintendent of the department of public works,

superintendent of water and sewer, chief of police and town manager employed by the Employer (Union Exhibit 2).

2. There is no water and sewer superintendent. The employees who work in the water department and the sewer department are in the bargaining unit and report directly to the town manager.

3. Dick Reed was superintendent of the department of public works for many years. Reed announced his retirement in the spring of 1998 and offered to remain until the fall in order to train his replacement. The Employer advertised for Reed's replacement.

4. Several people applied for the position, including John Eaton, who had worked as a laborer in the department for several years. During this time period, the town manager also was intending to resign. The select board considered one of the applicants for the superintendent position to be a likely replacement for the town manager. The select board offered Reed's position to him with the understanding that he ultimately would become the town manager. The select board also decided to offer Eaton a position as foreman of the department of public works. Eaton accepted the job offer. At some point in the hiring process, the other individual declined to take the superintendent position. The Employer did not hire a superintendent and has no plans to hire a superintendent.

5. The department of public works is responsible for maintaining the town's public works, including the maintenance of the transfer station. There generally are five or six laborers in the department. Eaton meets at the town garage with the department employees every morning and they discuss what needs to be done that day. Eaton tells

which employees which jobs to perform, although employees often have duties they traditionally or routinely perform, such as working on the loader or working certain days at the transfer station. Eaton also assigns anything special that needs to be done each day, such as working on the recreation field or cleaning out storm drains or catch basins.

6. The current town manager generally meets with Eaton and department employees at the garage and discusses many topics, including projects, with them. Town citizens call the town manager and express concerns about certain public works projects – such as a section of the road near their house; the town manager relays these concerns to Eaton during these early morning meetings. Citizens also call the town manager or Eaton when they become aware of emergency situations - such as a burst water main. The town manager also brings these emergencies to Eaton's attention or often these calls come directly to Eaton. In each case, Eaton determines what needs to be done and assigns employees to the situation. During these early morning meetings, all the employees are able to freely discuss their jobs and their concerns.

7. Eaton often works alongside department employees. He drives the truck that Reed formerly was assigned. He checks on the progress of work throughout the day through site visits, talking to the employees at lunchtime to see how work is progressing. Occasionally, he has to reassign an employee to different tasks. Employees who finish tasks come back to the garage and Eaton tells them what project to work on next.

8. Eaton signs employees' time sheets. Employees tell Eaton if they want to take time off. If Eaton is not working or not available, a designated employee in the department approves time off. To date, Eaton has not denied an employee time off and

has worked with employees to ensure that the department is sufficiently staffed during employees' vacations.

9. Eaton has a desk in the corner of the town garage where he performs paperwork, such as the public works budget. Large public works projects are sub-contracted. The select board makes all contractor hiring decisions on these major works, but Eaton contacts the successful contractors and coordinates the projects. He also checks on their progress to ensure that the project is progressing correctly. Occasionally he may ask one of the other department employees to check on the contractors' work.

10. Eaton has never performed performance evaluations, nor has he had occasion to discipline an employee. A grievance was filed at some point after Eaton became foreman. The Union chapter chair brought the grievance to Eaton to sign as the first step in the grievance procedure. Eaton signed the grievance but was not involved in its resolution.

11. The Employer has hired two employees since Eaton became foreman. In both cases, Eaton was asked by the town manager if the prospective employees were good workers. Eaton gave them good recommendations and the town manager hired them. Eaton did not interview either employee.

OPINION

The Union, through the filing of a unit clarification petition with the Board, requests that the position of foreman of the department of public works be added to the existing bargaining unit of employees represented by the Union and employed by the Employer. Under Section 34.1 of the Board Rules of Practice, a petition for clarification of an existing bargaining unit may be filed where "there is a dispute over the unit

inclusion or exclusion of employee(s)". The Association contends that the public works foreman does not perform supervisory duties and should be included in the bargaining unit. The Employer contends that the foreman is a supervisor performing the same duties as the former superintendent of public works who was properly excluded from the bargaining unit.

Thus, we need to decide whether the position of foreman of the public works department is a supervisor and ineligible to belong to a bargaining unit pursuant to 21 V.S.A. Sections 1502(13) and 1722(12)(B). Supervisor is defined in 21 V.S.A. Section 1502(13) as follows:

> An individual having the authority in the interest of the employer to hire, transfer, suspend, lay off, 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.

An employee must pass two tests to be considered a supervisor: 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, 138 Vt. 347 (1980). The statutory test is whether an individual can effectively exercise the authority granted him or her; theoretical or paper power will not make one a supervisor. Nor do rare or infrequent supervisory acts change the status of an employee to a supervisor. Brattleboro, 138 Vt. at 351.

The existence of actual power, rather than the frequency of its use, determines supervisory status. AFSCME Local 490 and Town of Bennington, 153 Vt. 318, 320 (1989). However infrequently used, the power exercised must be genuine. Id. Also, the

Board has discretion to conclude supervisory status does not exist although some technically supervisory duties are performed, if such duties are insignificant in comparison with overall duties. Id. at 321 – 323.

It is clear that the foreman has never exercised the power to transfer, suspend, layoff, recall, promote, discharge, reward or discipline employees. The Employer contends that the foreman has the power to assign and direct employees and the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

In the area of assigning and directing employees, the key determination is whether the employee is exercising independent judgment, or is simply ensuring that standard operating procedures are followed. If an employee is relaying instructions from a supervisor or ensuring that subordinates adhere to established procedures, the employee is not a supervisor. Local 1201, AFSCME and City of Rutland, 10 VLRB 141 (1987). City of Winooski and Winooski Police Employees' Association, 9 VLRB 85 (1986). However, if an employee's duties go beyond simply ensuring established policies and procedures are followed, and require use of independent judgment in directing and assigning employees, then the employee meets the statutory definition of supervisor. South Burlington Police Officers' Association and City of South Burlington, 11 VLRB 332 (1988). c.f., South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995). Exercise of independent judgment in assigning and directing employees must occur on a more than infrequent basis or be significant in comparison with overall duties to make one a supervisor. AFSCME, Local 490 and Town

of Bennington, supra. Department of Public Safety Personnel Designation Disputes (re: State Police Sergeants), 14 VLRB 176 (1991).

In applying these standards to the facts of this case, we conclude that the duties of the foreman with respect to assigning and directing employees rise to the level of supervisory status. The foreman is not simply relaying instructions of a supervisor, nor is he merely following established operating procedures. The foreman is responsible for the daily operation of the public works department and, in carrying out his duties, the foreman exercises independent judgment in determining what work is to be performed and who is to perform it. Although some public works maintenance is routine and the foreman often works alongside department employees, his assigning and directing responsibilities require independent judgment and this is a significant duty in comparison to the rest of his duties. When discretion needs to be exercised in handling public works issues, he is the one assigning and directing employees to ensure the work is performed.

The Employer also contends that the foreman is a supervisor because he was involved in the hire of two employees and made effective recommendations, which were followed. In the area of hiring employees, it must be demonstrated that an employee actually has taken the action or effectively recommended the action, on more than a rare or infrequent basis, to warrant a supervisory designation. Local 1369, AFSCME, AFL-CIO and Kellogg-Hubbard Library, 15 VLRB 205, 213 (1992). Proctor Education Association/Vermont-NEA/NEA and Proctor School Board, 18 VLRB 174, 185 (1995). In applying these standards to the facts of this case, we conclude that the evidence with respect to hiring employees is insufficient for us to conclude that the foreman possess supervisory authority with respect to the hiring of employees.

However, it is only necessary to possess one of the listed powers in the statutory definition; Brattleboro, 138 Vt. 351 – 352; and we have already determined that the foreman possesses supervisory authority in assigning and directing employees. Thus, the foreman should be excluded from the bargaining unit.

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the foreman of public works of the Town of Fair Haven is excluded from the bargaining unit represented by AFSCME Local 1201, Fair Haven Employees Chapter, as a supervisory employee.

Dated this 7th day of September, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park, Acting Chairperson

Carroll P. Comstock

John J. Zampieri