VERMONT LABOR RELATIONS BOARD

PACE INTERNATIONAL UNION	)	
and	)	DOCKET NO. 00-62
TOWN OF PITTSFORD	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 12, 2000, PACE International Union ("Union") filed a Petition for Election of Collective Bargaining Representative to represent the highway workers and the highway department foreman, the water department superintendent, the recreation director, the town constable, the assistant clerk/treasurer, the assistant to the town manager, and the assistant to listers employed by the Town of Pittsford ("Town"). On September 29, 2000, the Town filed a response to the petition. The Town objected to the inclusion of the highway department foreman, recreation director and town constable in the proposed bargaining unit on the grounds that they are supervisory employees. The Town objected to the inclusion of the assistant to the town manager on the basis that she is a confidential employee. The Town subsequently withdrew its objection to the inclusion of the assistant to the town manager in the bargaining unit, and the Union agreed to the exclusion of the highway department foreman from the bargaining unit as a supervisory employee.

Thus, the only remaining issues before us are whether the recreation director and constable are supervisory employees. A hearing was held on November 30, 2000, in the Board hearing room in Montpelier before Labor Relations Board Members Richard Park, Acting Chairperson; John Zampieri and Edward Zuccaro. Union International

Representative Ron Pickering represented the Union. Attorney J. Scott Cameron represented the Town. The parties filed post-hearing briefs on December 13, 2000.

FINDINGS OF FACT

1. The Town of Pittsford is governed by a Selectboard elected by town voters. The Selectboard appoints a town manager. James O'Gorman has been town manager since February 1999. Among the employees reporting directly to the town manager are the recreation director and the constable (Town Exhibit 1).

2. Michael Coppinger has been recreation director since April 2000. He works on a part-time basis, and has averaged nearly 25 hours per week. His predecessor worked on a full-time basis, but the recreation director position became part-time upon Coppinger's hiring due to funding difficulties.

3. Coppinger is responsible for the daily management and operation of the recreation department. He is the only employee in the recreation department who works year-round. The recreation department offers a wide variety of programs and services for the children and adults of the community (Town Exhibits 9, 10).

4. The Town owns its own swimming pool and related facilities. The recreation department runs swimming programs during the summer, including recreational swimming and water safety instruction. Typically, the Town employs six to eight persons on a seasonal basis as lifeguards, and a gatekeeper to the pool. One of the lifeguards is designated as the head lifeguard. The recreation director directly supervises the head lifeguard.

5. Hiring seasonal employees at the pool falls into two categories: rehiring persons who were employed during the previous summer, and hiring new persons to fill

vacancies. Coppinger contacts persons who have been employed at the pool the previous year, and determines whether they would like to return. If so, and assuming they performed satisfactorily the previous year, Coppinger recommends to the town manager that the returnees be hired. The town manager, without further interview, has approved all of his recommendations. When vacancies exist, the recreation director advertises the open positions, receives and reviews the applications, interviews candidates, and makes hiring recommendations to the town manager. The town manager does not interview candidates for these positions. The town manager approved the hiring recommendations of Coppinger in all cases.

6. In the past, the head lifeguard has set the work schedules for other lifeguards. Coppinger informed O'Gorman that he had problems this past summer with more lifeguards scheduled for duty than needed. Coppinger told O'Gorman that he planned to take a more active role this year with regard to scheduling the lifeguards. Coppinger has the authority to overrule the head lifeguard with regard to the scheduling of work.

7. During O'Gorman's tenure as town manager, and Coppinger's tenure as recreation director, no disciplinary action has been taken against the lifeguards.

8. During the summer, the Town hires maintenance workers to work with the highway department and the recreation department. The maintenance workers perform duties for the recreation department such as mowing the recreation field and removing weeds. This past summer, Coppinger met with a summer maintenance worker to counsel him about showing up late for work and not performing his work properly. The problems continued, and Coppinger recommended to O'Gorman that the employee be dismissed.

O'Gorman concurred with Coppinger's recommendation, and Coppinger informed the employee that he was dismissed.

9. The recreation director has not conducted a formal performance evaluation of any recreation department employees.

10. The town manager solicits the input of the recreation director in the proposed budget for the recreation department. The proposed budget is then reviewed by the Recreation Committee and the Selectboard. During the presentation of the recreation department budget to the Selectboard, the town manager and the recreation director are both present to discuss the proposed budget. The Selectboard makes a decision on the recreation department budget, and the budget is then submitted to Town voters for approval.

11. The Town constable is appointed by the Selectboard. Mike Warfle has been constable for approximately five years. Warfle is employed part-time as constable, generally working 25-30 hours a week. Warfle also holds a full-time position as a police officer with the Rutland City Police Department. The Town also employs 3 – 5 special police officers that work on a part-time basis. The constable is the highest-ranking officer in the Town's police services unit.

12. Warfle establishes a monthly work schedule for himself and the special officers, and provides copies of the schedule to the town manager and the Selectboard. The Town does not have around the clock police coverage. Warfle generally works a 5 – 6 hour shift several days a week. The special police officers work in the evenings, on weekends, and during special events. At times, Warfle has to change the schedule on

short notice. He makes the necessary changes to ensure adequate police coverage without having to obtain the permission of the town manager.

13. Typically, there is only one officer on patrol at any one time. Warfle generally works at the same time as the special police officers only if there are special events or a critical incident occurs. Whenever the special police officers require direction, or are involved in a situation for which they are not adequately prepared by their experience or training, they first attempt to contact Warfle by pager, radio or telephone. If they are unable to reach Warfle, they contact the State Police. The special police officers do not contact the town manager for direction concerning the performance of their police duties. When a critical incident occurs, such as a crime or a serious accident, Warfle may go to the scene to provide additional manpower or to provide guidance due to his experience. Warfle may take over the scene if the special police officer is unable to handle it.

14. Three special police officers have been hired by the Town since Warfle has been constable. In two cases, Warfle recommended the hiring of a candidate for the position, the town manager concurred with the recommendation, and the person recommended by Warfle was hired. In the third case, Warfle was part of a group decision to hire a particular person. Recently, Warfle advised the town manager of the need to hire an additional special officer. The town manager authorized Warfle to recruit for the position. Warfle interviewed a candidate for the position, and recommended that he be hired. Following Warfle's recommendation, the town manager interviewed the candidate. A background check is being conducted on the candidate and no final decision has been made whether to hire the candidate.

15. In August of this year, O'Gorman spoke to Warfle about Warfle completing performance evaluations for the special police officers. Warfle expressed the view that the performance evaluation form in the Town personnel handbook was not an appropriate evaluation instrument for police officers. Warfle recommended that the Town use a performance evaluation form similar to that currently in use in the Rutland Police Department. Warfle and O'Gorman plan to meet in the near future to review the form used in Rutland to determine whether it can be adapted for use in the Town. Once an evaluation form is approved, the town manager wants Warfle to conduct performance evaluations of the special police officers.

16. During Warfle's tenure as constable, no disciplinary action has been taken against special police officers. Warfle has investigated citizen complaints made against officers. In these cases, he has attempted to mediate a solution. He has counseled officers on how to better handle situations in the future.

17. The Town does not have a police operations manual in effect. Warfle had discussions with O'Gorman recently about the need for a police manual in the Town. Warfle recommended that the Town develop a manual, governing circumstances that arise for police officers, to protect the Town and officers from liability. O'Gorman indicated that he was open to this recommendation.

18. The town manager solicits Warble's input on the proposed budget for the police services unit. Warble has made suggestions for purchases and staffing levels.

OPINION

At issue is whether the recreation director and constable of the Town of Pittsford are supervisors and, thus, ineligible to belong to a bargaining unit pursuant to 21 V.S.A. Sections 1502 and 1722.

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

> "an individual having 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".

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, 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. Id. at 351. Nor do rare or infrequent supervisory acts change the status of an employee to a supervisor. Id.

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 (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.

Recreation Director

The Town contends the recreation director is a supervisor because he has supervisory authority with respect to hiring, assigning and directing, and disciplining seasonal employees. The Union argues that the recreation director does not meet the statutory definition of supervisor.

This is the second time since the Municipal Employees Relations Act ("MERA") was amended in 1989 that the Board has been called upon to determine supervisory status when the employees being supervised are seasonal employees. Prior to 1989, the definition of "municipal employee" excluded individuals employed on a seasonal basis, as well as individuals employed on a part-time or probationary basis, and such employees were ineligible to be included in a bargaining unit. MERA was amended in 1989 to only exclude individuals employed on a probationary status. 21 V.S.A. Section 1722(12)(c). In 1997, the Board determined that the recreation director of the town of Shelburne was a supervisory employee based on her hiring responsibilities concerning seasonal employees. Local 1343, AFSCME, AFL-CIO and Town of Shelburne, 20 VLRB 15.

We reach the same conclusion here. Much evidence presented at the hearing related to the recreation director's responsibilities with respect to hiring employees. 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 this standard, we conclude that the recreation director has the authority to effectively recommend the hiring of summer seasonal employees. The recreation director recommends which persons to hire as lifeguards and gatekeeper at the Town swimming pool. The town manager, without interviews, has followed the recommendations in all instances. The recreation director's independent judgment in hiring situations is most evident when vacancies exist due to employees from the previous year not returning. The recreation director advertises the open positions, receives and reviews the applications, interviews candidates, and makes hiring recommendations to the town manager. The town manager does not interview candidates for these positions. The town manager has approved the hiring recommendations of the recreation director in all instances. This evidence is sufficient to demonstrate supervisory authority by the recreation director within the meaning of the statute.

Although the Union is not seeking to represent the employees being supervised by the recreation director, it is evident that the fundamental concept behind the supervisory exclusion is the individual's authority to act as an arm of management in supervising their employees. If an employer expects an individual to carry out significant supervisory functions over employees in a major component of the employer's operation, then we believe that individual meets the statutory definition of supervisor regardless of whether those employees are in the bargaining unit. Shelburne, 20 VLRB at 22. Chittenden South Education Association, Vermont-NEA and Shelburne Board of School Directors, 12 VLRB 242,249 (1989).

We conclude that the hiring of seasonal employees each year is not a rare or infrequent event and is a significant supervisory function in the Employer's operation.

Although the employees hired by the recreation director work only during the summer months, resulting in the recreation director not actually supervising employees during the major part of the year, it is significant that the recreation director's hiring responsibilities extend beyond the summer months in evaluating employees for re-hire, determining which employees to hire for the succeeding year, seeking and interviewing candidates for hire, and determining which employees will be hired. Under these circumstances, we conclude that it is appropriate to exclude the recreation director from the bargaining unit as a supervisor based on his hiring responsibilities. Shelburne, 20 VLRB at 23.

Although not necessary to our determination that the recreation director is a supervisory employee, it also is apparent that the recreation director has authority to effectively recommend the dismissal of employees. This is demonstrated by the situation this past summer, when the recreation director recommended to the town manager that a summer maintenance worker be dismissed, and the recommendation was followed.

Town Constable

The Town contends that the constable exercises supervisory authority over the special police officers with regard to hiring, assigning and responsibly directing, evaluating, and disciplining them. The Union argues that the constable does not meet the statutory definition of supervisor.

As we concluded with the recreation director, we believe that the constable meets the statutory definition of supervisor with respect to his authority to effectively recommend the hiring of employees. Three special police officers have been hired by the Town since the present constable, Mike Warfle, has been constable. In two cases, Warfle recommended the hiring of a candidate for the position, the town manager concurred with

the recommendation, and the person recommended by Warfle was hired. In the third case, Warfle was part of a group decision to hire a particular person. This evidence is sufficient to demonstrate supervisory authority by the constable within the meaning of the statute.

We also conclude the constable assigns and responsibly directs special police officers, and he exercises independent judgment in carrying out these responsibilities. Although he does not typically work at the same time as the special police officers, Warfle establishes and revises work schedules for himself and the special officers without the intervention of the town manager. He exercises independent judgment in performing these assigning responsibilities. He also exercises independent judgment in directing the officers. This is demonstrated by the evidence that, whenever the special police officers require direction, or are involved in a situation for which they are not adequately prepared by their experience or training, they first attempt to contact Warfle by pager, radio or telephone. If they are unable to reach Warfle, they contact the State Police. The special police officers do not contact the town manager for direction concerning the performance of their police duties. When a critical incident occurs, such as a crime or a serious accident, Warfle may go to the scene to provide additional manpower or to provide guidance due to his experience. Warfle may take over the scene if the special police officer is unable to handle it. This indicates that Warfle is the chief person in the Town responsible for the providing of police services and, that in performing this function, he necessarily exercises independent judgment in directing subordinate police officers.

The constable's supervisory authority is also demonstrated by ongoing developments with respect to Town police operations. When recently informed by the

town manager that he was to evaluate special police officers, he has taken it upon himself, with the approval of the town manager, to recommend an evaluation form specific to police officers. Further, he has made a recommendation to the town manager that the Town develop a police operations manual, and the town manager has indicated he is open to such a recommendation. The constable's initiatives in these areas indicate his primary responsibility to manage the operations of the Town's police services and responsibly direct the work of the special police officers.

In sum, the constable exercises supervisory authority over the special police officers with regard to effectively recommending their hiring, and assigning and directing them. For the reasons expressed in our discussion of the recreation director, the fact that the special police officers are part-time employees, and the Union is not seeking to represent them, does not change our conclusion. Finally, we note that, in reaching our conclusions with respect to the recreation director and the constable, we have not based our conclusions on any additional evidence of increased supervisory responsibilities these employees may assume in the future.

ORDER

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

1. The recreation director of the Town of Pittsford is a supervisory employee and is ineligible to be included in a bargaining unit represented by PACE International Union;

2. The constable of the Town of Pittsford is a supervisory employee and is ineligible to be included in a bargaining unit represented by PACE International Union; and

3. The Vermont Labor Relations Board will conduct a representation election among the water department superintendent, the assistant clerk/treasurer, the

assistant to the town manager, the assistant to listers, and the highway workers (excluding the highway department foreman) employed by the Town of Pittsford to determine whether the employees wish to be represented by PACE International Union.

Dated this 22 day of December, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Acting Chairperson

/s/ John J. Zampieri

John J. Zampieri

/s/ Edward R. Zuccaro

Edward R. Zuccaro