

VERMONT LABOR RELATIONS BOARD

INTERNATIONAL UNION OF)	
OPERATING ENGINEERS, LOCAL)	DOCKET NO. 05-31
98, AFL-CIO)	
)	
and)	
)	
TOWN OF ROCKINGHAM)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 30, 2005, the International Union of Operating Engineers, Local 98, AFL-CIO ("Union"), filed a Petition for Election of Collective Bargaining Representative. The Union is seeking to represent the accounting, secretarial, bookkeeping, clerical and custodial employees of the Town of Rockingham ("Employer"). The Employer filed a response to the petition on September 14, 2005. The Employer contends that the Administrative Assistant to the Town Manager should be excluded from the bargaining unit as a confidential employee, and that the Assistant Town Clerk should be excluded from the unit due to being under the direct supervision and control of the Town Clerk. The Union objects to the exclusion of these two employees from the bargaining unit.

The Labor Relations Board conducted a hearing on these issues on November 17, 2005, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; John Zampieri and Joan Wilson. Eugene Melville, Union Business Representative, represented the Union. Attorney Stephen Ankuda represented the Employer. The Employer and the Union filed post-hearing briefs on December 8 and 9, 2005, respectively.

FINDINGS OF FACT

1. The Town of Rockingham is located in Windham County. Shane O'Keefe has been the Municipal Manager of the Town of Rockingham and the Village of Bellows Falls for almost three years. There are approximately 45-50 full-time employees of the combined Town and Village, as well as part-time employees.

2. The Administrative Assistant to the Municipal Manager provides administrative and secretarial support to the Manager. The current Administrative Assistant has worked in that position for nearly three years. The Administrative Assistant works at a desk just outside the Manager's office. O'Keefe keeps the door to his office closed if he is having a confidential meeting there. Otherwise, he generally keeps the door open (Employer Exhibit A).

3. Employee personnel files are kept in a locked cabinet in the Municipal Manager's office. Only the Municipal Manager, the Administrative Assistant and the Accounting Bookkeeper have keys to the cabinet. The Accounting Bookkeeper is one of the employees in the proposed unit.

4. The Municipal Manager, the Administrative Assistant and the Selectboard Chairperson are the only persons that have keys to the Municipal Manager's office. O'Keefe does not always keep his office locked. O'Keefe has a binder on his desk with materials relating to collective bargaining negotiations. The binder contains confidential notes taken by O'Keefe.

5. The Administrative Assistant regularly receives telephone messages for O'Keefe. She also receives fax transmissions for him. If O'Keefe knows that he is to receive a confidential fax transmission, he waits for it at the fax machine or has the

Administrative Assistant wait for it. She opens the mail that comes into the office addressed to O'Keefe. If mail addressed to O'Keefe is marked confidential, the Administrative Assistant usually does not open it.

6. The Administrative Assistant is the only person other than O'Keefe with knowledge of his computer password. She also is the only other person with access to O'Keefe's e-mail. O'Keefe asks the Administrative Assistant at times to access his e-mail.

7. O'Keefe regularly bounces issues off the Administrative Assistant. He discusses confidential matters with the Administrative Assistant, including disciplinary actions and information the Administrative Assistant may have on persons O'Keefe is considering hiring. O'Keefe trusts the Administrative Assistant not to pass confidential information on to others.

8. The Employer's Director of Finance and Administration was terminated recently. Prior to leaving employment, the Director of Finance and Administration played a key role for the Employer in collective bargaining negotiations with the unions representing employees due to the Director's expertise in that area. O'Keefe discussed the termination of the Director of Finance and Administration's employment with the Administrative Assistant before the Director knew of the termination. Prior to the Director of Finance and Administration's termination, the Administrative Assistant told O'Keefe of some issues that the staff had in dealing with him. At the time of the hearing in this matter, the Employer was seeking to hire a new Director of Finance and Administration.

9. O'Keefe puts together agendas for Selectboard meetings. The Administrative Assistant distributes materials for meetings to the Selectboard members. She also transcribes the minutes of Selectboard meetings. The Administrative Assistant does not sit in on executive sessions of the Selectboard.

10. The Administrative Assistant routinely proofreads correspondence generated by O'Keefe. This proofreading includes confidential materials.

11. The Administrative Assistant takes notes during meetings that O'Keefe has with department heads. Confidential personnel, budgetary and collective bargaining matters are discussed at these meetings.

12. O'Keefe expects that the Employer is headed towards a difficult budgetary period. The Employer is engaging in a mandatory property re-evaluation that is resulting in an increasing tax burden on residents and a shift of value of a hydroelectric generating facility that constitutes a substantial portion of the value of the Employer's grand list. O'Keefe expects that there will be an adverse impact on revenues that will lead to budgetary cuts and layoffs of employees. In making budgetary and personnel administration decisions, O'Keefe will be assisted by the Administrative Assistant and will need to rely on her maintaining confidentiality during this period.

13. The Assistant Town Clerk of the Employer is hired by the Town Clerk pursuant to 24 V.S.A. Section 1170, which provides that "a town clerk shall forthwith appoint one or more assistant clerks, for whose official acts he shall be responsible, who shall hold office during his term of office, or until such appointment is revoked by him." The Assistant Clerk is an employee of the Employer, and is paid by the Employer. The

Municipal Manager does not take an active role in the managing of the Town Clerk's office.

14. The Assistant Town Clerk performs administrative work in connection with the keeping of official municipal records, the issuing of licenses and official documents, the conducting of municipal elections, and providing information to the general public and other municipal departments (Employer Exhibit B).

15. The Town Clerk is considered a department head for purposes of the municipal budget. The Town Clerk submits budget recommendations for the Town Clerk's office to the Municipal Manager. The Municipal Manager then makes recommendations to the Selectboard. The Selectboard makes final budget decisions (Union Exhibit D).

16. The Town Clerk makes recommendations for any merit increases to be received by the Assistant Town Clerk. The Municipal Manager then determines whether to approve the recommended wage increase. This past year, O'Keefe denied a recommendation by the Town Clerk to give the Assistant Town Clerk a merit increase (Union Exhibit D).

17. Recently, a citizen made a complaint about the Assistant Town Clerk. The Town Clerk spoke to O'Keefe about the matter. O'Keefe gave advice to the Town Clerk on how to respond to the citizen making the complaint (Employer Exhibits E, F).

OPINION

The first issue is whether the Administrative Assistant to the Town Manager should be excluded from the proposed bargaining unit as a confidential employee. The

Employer contends that the Administrative Assistant is a confidential employee. The Union disagrees.

A “confidential employee” is defined in 21 V.S.A. Section 1722(6) as “an employee whose responsibility or knowledge or access to information relating to collective bargaining, personnel administration or budgetary matters would make membership in or representation by an employee organization incompatible with . . . official duties”. A finding that a person assists or acts in a confidential capacity in relation to persons who formulate, determine and effectuate management policies in the field of labor relations is a necessary element under the labor nexus rule if an employee is to be classified as a confidential employee. In re Local 1201, AFSCME and Rutland Department of Public Works, 143 Vt. 512 (1983). The essential issue is whether the challenged employees have such a close relation to the employer’s management of labor relations that the employer would be prejudiced by their inclusion in a bargaining unit with other employees. Harwood Union High School District and Harwood Education Association, 172 Vt. 167 (2001). Employers are entitled to rely upon employees who are not subject to divided loyalties, and employees should not be in a position where they must choose between their obligations to a union and to their employer. Vermont State Hospital Personnel Designation Disputes, 5 VLRB 60, 68 (1982).

Employees who do not have access to confidential information as part of their regular duties do not meet these tests. Employees whose duties require only occasional access to confidential material and which could be reassigned, or employees who occasionally substitute for confidential employees, do not meet the definition of "confidential" employee. American Federation of Teachers, Local 333 and Washington

Central Supervisory Union, 1 VLRB 288 (1978). Castleton Education Association and Castleton Board of School Directors, 1 VLRB 374 (1978). Vermont Education Association and Rutland City School Department, 2 VLRB 108 (1979). Vermont Education Association and Windsor Town School District, 2 VLRB 295 (1979). Further, an employer must demonstrate not only access to confidential information, but that such access would adversely impact on the employer's conduct of its labor relations policies if employees are included in a bargaining unit. Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60, 78 (1989).

In several cases, the Board has examined whether a secretary employed by a municipality is a confidential employee. In applying the standards delineated above, in some cases the Board has concluded that secretaries' access to confidential information as part of their regular duties warranted a confidential designation. United Steelworkers of America, AFL-CIO and Town of Barre, 27 VLRB 229 (2004). Village of Essex Junction and Local 1343, AFSCME, 12 VLRB 211 (1989). City of Burlington and Local 1343, AFSCME, 9 VLRB 116 (1986). In other cases, the Board has found confidential duties to be absent, or only rarely performed, and has concluded the secretaries were not confidential. AFSCME Council 93, Local 1201 and Rutland Housing Authority, 18 VLRB 1 (1995). IBEW Local 300 and Morristown Police Department, 15 VLRB 66 (1992).

We conclude that the Administrative Assistant acts in a confidential capacity to the Municipal Manager, who formulates, determines and effectuates the Employer's labor relations policies. The Municipal Manager bounces issues off the Administrative

Assistant and confides in her with respect to confidential personnel administration matters. The Administrative Assistant takes notes at meetings that the Municipal Manager has with department heads where confidential personnel, budgetary and collective bargaining matters are discussed. She routinely proofreads correspondence generated by the Municipal Manager that includes confidential materials.

Further, the Administrative Assistant has access to confidential communications at times between the Municipal Manager and other persons through her responsibilities of taking messages for him, opening the mail, receiving confidential faxes, and accessing his email. Her access in this regard is also reflected by her having the key to the Municipal Manager's office. When taken in their entirety, the regular duties of the Administrative Assistant providing her access to confidential information, which cannot be reasonably reassigned, suffice to exclude her from the proposed bargaining unit as a confidential employee.

It is evident that the demands on the Municipal Manager concerning personnel administration, budgetary and collective bargaining matters, as well as the Municipal Manager's trust in the Administrative Assistant, have resulted in the Administrative Assistant having confidential responsibilities that would make her representation by a union incompatible with her official duties. This is not surprising given that the Municipal Manager oversees operations of a municipality of significant size employing approximately 45-50 full-time employees, as well as part-time employees. In such an enterprise, it is not unusual that the chief executive officer has an assistant serving in a confidential capacity.

In sum, the Administrative Assistant's responsibilities relating to personnel administration, budgetary matters and collective bargaining as part of her regular duties make her a confidential employee within the meaning of 21 V.S.A. Section 1722(6). There would be an adverse impact on the Employer's conduct of its labor relations policies, such that the Employer would be unfairly prejudiced, if the Administrative Assistant is included in a bargaining unit with other employees.

The remaining issue is whether the Assistant Town Clerk should be included in the proposed bargaining unit. The Employer contends that the Assistant Town Clerk is an "executive officer", or perhaps "elected official", within the meaning of those terms in Section 1722(12)(A) of the Municipal Employee Relations Act ("MERA"), and thus does not come within the definition of "municipal employee" eligible to be included in a bargaining unit represented by a union. The Employer points out that, unlike all other members of the proposed bargaining unit, the Assistant Town Clerk is not controlled by the Municipal Manager but instead is supervised by the Town Clerk, an elected official. The Union contends that the Assistant Town Clerk does not fall within the statutory exclusions asserted by the Employer, and is eligible to be represented by the Union.

We summarily dismiss the claim that the Assistant Town Clerk is an "elected official". The Town Clerk is an elected official, but the Assistant Town Clerk clearly does not fall in this category. By statute, the Assistant Town Clerk is appointed by the Town Clerk, not elected by voters.

MERA does not provide guidance as to the meaning of the term "executive officer", as such term is not defined in the Act. Absent guidance, we seek to apply the common understanding of that term, which contemplates supervising employees and

operating at a comparable level to other executive officers of the municipality. IBEW Local 300 and Town of Stowe, 23 VLRB 264, 275 (2000).

The evidence does not indicate that the Assistant Town Clerk supervises employees. The evidence also does not support a conclusion that the Assistant Town Clerk operates at a comparable level to other executive officers of the municipality. The administrative responsibilities of the Assistant Town Clerk assisting the Town Clerk do not rise to a level of an executive officer.

Further, the unique nature of the Assistant Town Clerk's position being appointed by and working under the direction of an elected official serving a fixed term does not foreclose the right to be represented by a union for collective bargaining purposes during the term of appointment. A union is able to negotiate wages, hours and conditions of employment for the Assistant Town Clerk just as the union does for other employees. At the same time, the Town Clerk's statutory power to appoint, and revoke the appointment of, the Assistant Town Clerk does not preclude the Assistant Town Clerk's inclusion in the bargaining unit. IBEW Local 300 and Town of Stowe, *supra*.

In enacting MERA, the Vermont General Assembly has defined a "municipal employee" entitled to union representation rights as "any employee of a municipal employer" except those employed in specified categories. 21 V.S.A. Section 1722(12). If an employee is not in one of the excluded categories, the employee is eligible to be included in a bargaining unit represented by a union. The Assistant Town Clerk is not in one of the excluded categories, and thus is eligible to be included in the bargaining unit proposed by the Union.

ORDER

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

1. The Administrative Assistant to the Municipal Manager is a confidential employee and thus is ineligible to be included in a bargaining unit represented by the International Union of Operating Engineers, Local 98, AFL-CIO;
2. The Assistant Town Clerk is eligible to be included in a bargaining unit represented by the International Union of Operating Engineers, Local 98, AFL-CIO; and
3. The Vermont Labor Relations Board shall conduct a representation election among the accounting, secretarial, bookkeeping, clerical and custodial employees of the Town of Rockingham, excluding the Administrative Assistant to the Municipal Manager, to determine whether they wish to be represented for exclusive bargaining purposes by the International Union of Operating Engineers, Local 98, AFL-CIO.

Dated this 20th day of January, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Chairperson

John J. Zampieri

Joan B. Wilson