

VERMONT LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD)	
OF ELECTRICAL WORKERS,)	
LOCAL 300)	
)	DOCKET NO. 08-26
and)	
)	
TOWN OF ROXBURY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The International Brotherhood of Electrical Workers, Local 300 (“Union”), filed a Petition for Election of Collective Bargaining Representative on July 15, 2008, to represent the highway department road crew of the Town of Roxbury. The Town of Roxbury (“Town”) filed a response to the petition on July 31, 2008, contending that the Labor Relations Board did not have jurisdiction over this matter because the Town was not an “employer” as defined in the Vermont Municipal Employee Relations Act (“MERA”). MERA states that a “town . . . which employs five or more employees as defined in this section” is a “municipal employer” under the Act. 21 V.S.A. Section 1722(13).

The Labor Relations Board conducted a hearing on December 11, 2008, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; Leonard Berliner and James Kiehle. Union Representative Matthew Lash represented the Union. Attorney J. Scott Cameron represented the Town. The Union and the Town indicated at the outset of the hearing that they had reached agreement on the following matters concerning individuals employed by the Town: 1) the road foreman is excluded from the definition of “employee” under MERA as a supervisory employee; 2) the other

two full-time members of the road crew are municipal employees as defined by MERA, 3) the assistant town clerk is a municipal employee as defined by MERA; and 4) the town clerk/select board assistant is excluded from the definition of employee under MERA.

The parties indicated at the hearing that the remaining issues in dispute were whether town librarian Susan D'Amico and back-up road crew member Clarence Baker are employees as defined by the Act. The Union also raised for the first time at the hearing whether Reggie Tucker is an employee as defined by the Act. The parties presented evidence on these issues at the hearing. The Town and the Union filed post-hearing briefs on January 2 and 5, 2009, respectively.

FINDINGS OF FACT

1. Annual reports for the Town of Roxbury are prepared by the Town's auditors. The Annual Report presented at the Town Annual Meeting on March 4, 2008, listed the following as "Town Employees":

Road Crew	Loren Bent, Foreman Roger Thomas Norman Durrell Clarence Baker, backup driver
Select board Assistant:	Tammy Legacy
Town Librarian:	Susan D'Amico
(Town Exhibit 1, p.6; Union Exhibit 4)	

2. Bent continues to serve as foreman of the road crew. Thomas and Durrell continue to serve as full-time members of the crew. They are covered by the Town Personnel Policy "which applies to full-time and part-time employees of the Town." A part-time employee is defined under the policy as "an employee who works fewer than 20 hours per week on a regular and continuing basis". Employees covered by the policy are

covered by group life, retirement, health, vision, dental and short term/long-term disability insurance programs. The policy also provides for holiday, vacation, personal, sick, bereavement, military, jury and parental and family leave. The full-time employees of the road crew also participate in the retirement plan for Town employees – i.e., Vermont Municipal Employees Retirement System (“VMERS”) (Town Exhibits 2, 3, 4).

3. Clarence Baker has performed snow plowing services for the Town for at least the last six winters. Baker has worked an average of 119 hours per year for the Town since 2003. He has worked this winter for the Town and the Town plans no changes on how he will be used this winter. Specifically, he worked the following number of hours from 2003 through March of 2008:

<u>Year</u>	<u>Hours Worked</u>
2003	107.5
2004	47.5
2005	178
2006	28
2007	203.5
2008	150

(Town Exhibit 6)

4. Baker receives a W-2 Wage and Tax Statement from the Town annually to file with his income tax returns (Union Exhibit 1).

5. Baker is employed by the Town on an “on-call” basis. He carries a pager rented by the Town during the winter months to respond to calls to provide snow plowing services for the Town. When Baker is called into work, he generally is assigned to drive

the town pickup truck to plow roads and parking lots. He generally is called in to help the regular road crew members handle larger snowstorms. Baker is covered under the Town's workers compensation policy when he performs work for the Town.

6. The full-time employees of the Town road crew have a commercial driver license. Baker does not hold such a license and he does not drive the larger Town trucks.

7. Baker receives no employee benefits. He is not a member of VMERS. The Town provides uniforms to the full-time members of the road crew. The Town does not provide a uniform to Baker (Town Exhibit 5).

8. Reggie Tucker was formerly employed by the Town as the foreman of the road crew. He retired a few years ago. This past winter, Tucker worked approximately one week for the Town to run a grader to move snow. He has not worked for the Town since that time and the Town has not offered him employment. As of the hearing in this matter, the Town had no plans to use him this winter.

9. The Roxbury Town Library is a municipal library established pursuant to 22 V.S.A. Section 141. The library is governed by a five member Board of Trustees pursuant to 22 V.S.A. Section 143(a) which provides that the "trustees . . shall have full power to manage the public library, make bylaws, elect officers, establish a library policy and receive, control and manage property which comes into the hands of the municipality." The trustees are elected by Town voters at the Town's annual meeting. The library trustees exercise fiscal and operational control over the library (Town Exhibit 13).

10. The library trustees draft a proposed budget for the library and submit it to voters at the Town annual meeting. The voters vote on the library budget separate from the vote on the general budget for the Town.

11. The Roxbury Town Library has one paid employee, librarian Susan D'Amico. D'Amico is paid to work 10 hours a week and she also volunteers to work additional hours. The library trustees interviewed and hired D'Amico approximately six years ago. D'Amico reports directly to the library trustees. The trustees have the sole authority to hire, fire and direct the activities of the librarian (Town Exhibit 9).

12. The trustees determine the wages to be paid D'Amico. The trustees have provided D'Amico with paid vacation leave and professional leave.

13. The library trustees have not considered D'Amico to be covered by the Town Personnel Policy although the policy does not explicitly exclude the librarian from its coverage. D'Amico does not receive benefits under the health or dental plan covering Town employees. D'Amico is not a member of VMERS (Town Exhibit 2).

14. The library trustees and the Town Select Board reached an agreement providing that the town clerk would administer payroll and benefits for the librarian. The library trustees advance funds to the Town from the library budget. The town clerk processes D'Amico's paychecks, taking care of such items as withholding for state and federal taxes and FICA (Town Exhibits 9, 10; Union Exhibit 3).

15. D'Amico receives a W-2 Wage and Tax Statement from the Town annually to file with her income tax returns (Union Exhibit 2).

16. The Town of Roxbury is a member of the Vermont League of Cities and Towns ("VLCT"). As a VLCT member, the Town can participate in a variety of group

insurance programs, including workers' compensation and general liability. The Town Select Board and the library trustees agreed that the librarian would be included under the Town's workers compensation coverage, and that the library would be insured under the Town's general liability coverage with VLCT. The library trustees reimburse the Town for the library's share of the cost of workers' compensation and general liability coverage (Town Exhibits 11, 12).

17. Several volunteers work at the library. D'Amico selects, trains and supervises the volunteers, and schedules their work. If it was necessary to terminate the services of a volunteer, D'Amico would make that decision.

18. The building which houses the library was gifted to the trustees for use as a library in the 1930's. Approximately one year ago, the trustees decided to renovate the building to make it accessible to the disabled. During the planning stage of the renovation, it was discovered that the foundation of the building had problems. The expense to repair the foundation was greater than the trustees believed that they could raise. The trustees deeded the building to the Town. The Town passed a bond at last year's annual meeting to borrow money "for structural renovations and insulation of the existing library building." The library trustees raised additional monies to complete the necessary renovation work, including making the building accessible to the disabled (Town Exhibit 1, p.3).

19. The Town Library building and library books are included in the Town annual report under the heading "Inventory of Town Property". All books and other property of the library either were donated to the library or purchased with funds appropriated for the library by vote of the Town citizens (Union Exhibit 4).

OPINION

The issue before us is whether the Town of Roxbury is a “municipal employer” within the meaning of the Municipal Employee Relations Act. The Act defines “municipal employer” in pertinent part as a “town . . . which employs five or more employees as defined in this section”. 21 V.S.A. Section 1722(13). The Town contends that it has only three employees as defined in the Act, and thus the Labor Relations Board is without jurisdiction to proceed on the petition for election of collective bargaining representative filed in this matter by the Union. The Union asserts to the contrary that the Board has jurisdiction because the Town employs five or six employees as defined by the Act.

Section 1722(12) of the Act defines “municipal employee” as follows:

“Municipal employee” means any employee of a municipal employer, including a professional employee as defined in section 1502(11) of Title 21, except:

- (A) elected officials, board and commission members and executive officers;
- (B) individuals employed as supervisors as defined by section 1502 of this title;
- (C) individuals who have been employed on a probationary status;
- (D) confidential employees as defined in this section;
- (E) certified employees of school districts, except as otherwise provided in section 1735 of this title.

We first consider whether Clarence Baker, the on-call driver for the Town road crew, meets the definition of “municipal employee” pursuant to Section 1722(12). Our decision in this matter is informed by a review of the legislative history of the Act. Prior to July 1, 1990, Section 1722(12)(C) of the Act excluded many more categories of individuals from the definition of “municipal employee” than “individuals who have been employed on a probationary status”. It excluded:

individuals who have been employed on a probationary, provisional or other nonpermanent status, or on a temporary, seasonal, on-call or part-time basis. “Part-time” means 20 hours per week or less. “Seasonal” means fewer than 100 working days in any calendar year.

Section 1722(12)(C) was amended effective July 1, 1990, to its present content of just excluding individuals employed on a probationary status. In determining the meaning of this changed statutory language, our overriding objective must be to effectuate the intent of the Legislature. In re Grievance of Danforth, 174 Vt. 231, 238 (2002). When the Act specifies several categories of employee as excluded from the definition of employee covered by the Act, and then the Legislature specifically removes the categories of employees from the list of exclusions, we conclude that the intent of the Legislature was to amend the statute to now include within the definition of employees those categories of employees previously excluded.

Thus, “on-call” employees are included within the definition of “municipal employee”. Since Baker has been an on-call employee for the Town road crew averaging 119 hours of work for the past six years, and continues in that role to the present, we conclude that he meets the definition of “municipal employee” pursuant to Section 1722(12) of the Act.

We next address whether Susan D’Amico, the librarian of the Town Library, meets the definition of “municipal employee”. The Union contends that she meets the definition, and the Town asserts that she is not a municipal employee within the meaning of the Act. The Town maintains that she does not meet the definition because she is an employee of the library trustees and the Town Select Board has no authority or control over the operations or employees of the library.

We agree with the Town that the library trustees, rather than the Town Select Board, exercise control over the details of the librarian's employment such as hiring, firing, wages and supervision of her work. However, we disagree with the Town that this results in a conclusion that D'Amico is not a municipal employee within the meaning of the Act.

"Municipal employee" within the meaning of the Act "means any employee of a municipal employer" unless they are specifically excluded under Section 1722(12) of the Act. The Roxbury Town Library is a municipal library pursuant to 22 V.S.A. Section 101-146. A municipal library is established by a "municipality", which includes a "town". 21 V.S.A. Sections 101(a), 141. A municipality establishing a municipal library "may appropriate money as necessary for suitable facilities and for the foundation of a public library and shall appropriate money annually for its maintenance, care and increase of the library in an amount voted at its annual meeting." 21 V.S.A. Section 142. A municipality may vote at its annual meeting to elect a board of trustees. 21 V.S.A. Section 143(a). The trustees shall have "full power to manage the library". Id.

These statutory provisions describe the Roxbury Town Library. The Town of Roxbury established the library. Town citizens appropriate money for the library building and the operations of the library, including the wages paid the librarian. Town voters elect library trustees at the Town annual meeting. The trustees exercise full power to manage the library.

We conclude that the librarian is employed by a "municipal employer", the Town of Roxbury, which established and maintains the Town library. The fact that the Town Select Board does not exercise control over the operations of the library does not mean

that the Town of Roxbury itself is not the employer of the librarian. The Town of Roxbury is so constituted that it has two governing bodies – the Select Board and the Library Trustees. The Select Board is the legislative body for the Town and the governing body for the employees of the Town other than the librarian; the trustees are the governing body for the library and the librarian.

The Town alternatively asserts that the librarian meets the definition of “supervisor” within the meaning of the Act because she supervises library volunteers, and thus may be excluded from the definition of “municipal employee” on that basis. We disagree. An individual meets the definition of “supervisor” under the Act only if they exercise supervisory authority over “employees”. 21 V.S.A. Sections 1502(13), 1722(12)(B). Volunteers are not “employees”. We conclude that the librarian is a “municipal employee” pursuant to 21 V.S.A. Section 1722(12) since she is employed by a “municipal employer” and she does not fall within the list of categories excluded from the definition of “municipal employee” pursuant to Section 1722(12).

In sum, we conclude that the Town of Roxbury has five employees as defined by the Municipal Employee Relations Act. The Union raised the question at the hearing whether Reggie Tucker also is an employee of the Town within the meaning of the Act. We conclude that he is not such an employee because the evidence indicates that he is not employed at present by the Town since he has not worked since last winter and there are no plans to employ him this winter. Nonetheless, since the Town has five employees as defined by the Municipal Act, the Town is a municipal employer as defined by the Act and we will proceed to conducting a representation election in this matter among the employees the Union has petitioned to represent.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Town of Roxbury is a municipal employer within the meaning of the Vermont Municipal Employee Relations Act, and the Labor Relations Board shall proceed to conduct a representation election in which the full-time employees of the Town of Roxbury highway department, excluding the road foreman, shall vote on whether they desire to be represented by the International Brotherhood of Electrical Workers, Local 300.

Dated this 5th day of February, 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